## **NYSBA FAMILY LAW SECTION UPDATE, February 2023**

## **Matrimonial Update**

## **By Bruce J. Wagner**

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

## **Attorney & Client - Payment Dispute – Credit Card**

##  NYSBA Committee on Professional Ethics Opinion 1248 (November 23, 2022) provides that if a client disputes a fee payment made via credit card, by requesting a “chargeback,” the attorney is permitted to dispute the same “by providing information to the credit card provider about the services rendered, including the disclosure of the retainer agreement and client invoices if (a) the information is not confidential; (b) the client gives informed consent to disclose the confidential information, or (c) absent consent, the lawyer reasonably believes that the disclosure of confidential information is necessary to establish or collect the lawyer’s lawfully earned fee.” The Committee noted that the attorney’s participation in the chargeback dispute does not alter the lawyer’s obligations pursuant to the NYS Fee Dispute Resolution Program.

## **Child Support - Constructive Emancipation – Denied**

##  In Matter of Vayner v. Tselniker, 2023 Westlaw 152093 (2d Dept. Jan. 11, 2023), the father appealed from a March 2022 Family Court order, denying his objections to a February 2022 Support Magistrate order which, after a hearing, found that the subject child born in August 2001 was not emancipated between December 14, 2020 and November 27, 2021. The parties’ November 2012 judgment of divorce incorporated a stipulation, which provided that the child would be deemed emancipated at age 18 if he was employed full-time and self-supporting. The father filed a modification petition on December 14, 2020 alleging emancipation. The mother consented to the child’s emancipation as of November 27, 2021, when he moved out of her residence and into the father’s home. The Second Department affirmed, holding that although the child worked full-time and paid for his own car insurance during the period in question, the mother still paid for his food, shelter, clothing, laundry, cell phone, and income tax preparation, and the father gave the child cash and bought him automobile parts.

## **Child Support - Modification – Denied - Reallocation of Marital Property - Retirement Alleged; Counsel Fees – Enforcement – Distributive Award; Equitable Distribution - Interest on Distributive Award - Storage and Insurance Costs Pending Sale of Asset**

##  In Hofmann v. Hofmann, 2023 Westlaw 162881 (1st Dept. Jan. 12, 2023), the ex-husband (husband) appealed from an April 2022 Supreme Court order which, upon his motion for reargument, adhered to its original determinations: (1) awarding statutory 9% interest to the ex-wife (wife) upon cash distributions received by the husband from assets reallocated to the wife upon a prior appeal (175 AD3d 531 [1st Dept. 2019]); (2) directing him to pay the storage and insurance costs associated with a marital boat pending its sale; (3) awarding the wife counsel fees; and (4) denying his motion for downward modification of child support. The First Department affirmed, holding that: (1) the 9% interest award was proper, as was Supreme Court’s direction that interest accrue from the later of the entry of judgment or post-judgment issuance of the cash distributions to the husband; (2) the directive regarding storage and insurance costs is affirmed, without comment other than the Court “considered and rejected [the husband’s] remaining arguments”; (3) the counsel fee award was proper under DRL 238, “as [the husband’s] noncompliance with his obligation under the judgment to provide a timely accounting of the cash distributions prompted [the wife] to file an enforcement motion”; and (4) Supreme Court properly denied the motion for downward modification of child support based upon the reallocation of marital property upon the prior appeal, concluding: “Even with the reallocation of the assets, [the husband] still has significant earning potential, despite his claim that he had ‘retired’ prior to the commencement of this action, and considerable assets.”

## **Child Support -** **Modification - Emancipation of Older Child – Denied**

##  In Matter of Martinez v. Carpanzano, 179 NYS3d 620 (2d Dept. Jan. 11, 2023), the father appealed from a December 2020 Family Court order denying his objections to a September 2020 Support Magistrate order which, after a hearing, dismissed his October 2019 petition to modify the provisions of a 2018 divorce judgment, which directed him to pay child support of $1,000 per month, upon the ground that the older child was age 21 and emancipated. The Second Department affirmed, holding that “a party seeking a downward modification of an unallocated order of child support based upon the emancipation of one of the children has the burden of proving that the amount of unallocated child support is excessive based on the needs of the remaining children,” and that “the father failed to make the requisite showing.”

## **Child Support - Modification – Imputed Income – Self-Support Reserve – SSI; Evidence – Administrative Law Judge Determination**

##  In Matter of Woodcock v. Welt, 2023 Westlaw 402096 (3d Dept. Jan. 26, 2023), the mother appealed from a September 2021 Family Court order denying her objections to a March 2021 Support Magistrate order which, following a hearing and consideration of a May 2019 Administrative Law Judge (ALJ) determination that the father was disabled and entitled to SSI, found that he had proved a substantial change of circumstances warranting a downward modification of child support to $50 per month. The Support Magistrate found that the father “was physically impaired from working,” but “remained capable of performing some work,” at a rate of $13 per hour for 30 hours per week, or $20,280 per year. The Third Department affirmed, rejecting the mother’s argument that the ALJ determination, which was not formally offered into evidence, should not have been considered, because the mother “offered no objection to the consideration of the ALJ determination during the fact-finding hearing,” while noting that “both counsel for the mother and the Support Magistrate questioned the father regarding the ALJ determination, and he testified regarding its existence, his purported inability to work and his receipt of SSI.” The Appellate Division held that the Support Magistrate properly imputed income, based upon the father’s prior employment experience, while noting that the hourly rate should have been $14 per hour, the rate the father had earned at a friend’s business. The Court concluded that this error was harmless, “as the father’s income would still fall below the self-support reserve were he required to pay the basic child support obligation, rendering the appropriate support $50 [per] month under either calculation,” citing FCA 413(1)(d).

## **Counsel Fees – Custody – Temporary – Granted**

##  In Matter of Antoine L. v. Virginie F., 2023 Westlaw 305631 (1st Dept. Jan. 19, 2022), the father appealed from a January 2022 Family Court order, which awarded the mother $75,000 in temporary counsel fees. The First Department affirmed, holding that Family Court “providently exercised its discretion in awarding the mother interim counsel fees,” citing DRL 237(b) and that “the mother's failure to include with her counsel fee application a statement of net worth in the prescribed form (*see* 22 NYCRR 202.16[k][2]) did not mandate denial of the application as a matter of law.” The Appellate Division reasoned: “Although 22 NYCRR 202.16(k)(2) provides that a motion for counsel fees shall not be heard ‘unless the moving papers include a statement of net worth in the official form prescribed by subdivision (b) of this section,’ subdivision (b) states that statements of net worth need only be in ‘substantial compliance’ with the prescribed form (22 NYCRR 202.16[b]). The financial disclosure affidavit submitted by the mother substantially complied with the official form.” The Court concluded by noting Family Court’s finding that the financial information provided was "undisputed" and "sufficient" for the court to render a decision.

## **Custody – Visitation – Therapeutic; Hearing Delayed by COVID-19–Written Summations**

##  Matter of Damaris C. v. Juan O., 2023 Westlaw 105048 (1st Dept. Jan. 5, 2023), the father appealed from a January 2022 Family Court order, which granted the mother’s petition to the extent of directing monthly therapeutic visitation, provided that the child be encouraged but not forced to attend. The First Department affirmed, noting that the court appointed forensic expert testified that “the father and paternal grandmother had engaged in conduct that led to the child feeling alienated from the mother.” The Appellate Division held that Family Court properly determined the matter without a full evidentiary hearing, finding that the hearing was delayed during the COVID-19 pandemic, and the Court permitted written summations by the parties, “who made no request to submit further evidence or testimony and raised no objections to the procedure.”

## **Custody - Third Party – No Extraordinary Circumstances - No Violation Found; Family Offense - Disorderly Conduct – “Public” Element Not Established**

##  In Matter of Linda UU v. Dana VV, 2023 Westlaw 95177 (3d Dept. Jan. 5, 2023), the maternal grandmother appealed from a September 2021 Family Court order which, after a hearing, modified a 2019 consent order (joint legal custody, shared residential custody) to award the mother sole legal and residential custody, and, among other things, found that the mother neither committed disorderly conduct nor a violation of the custody order. The Third Department affirmed, holding that the grandmother failed to establish that the mother’s behaviors rose to the level of extraordinary circumstances sufficient to deprive her of custody, finding that the mother has endeavored to establish a stable environment for herself and the child, who has been adequately cared for. As to the family offense, the mother and grandmother had a verbal dispute outside the child’s school near the parental pick up line in which the mother used profanity, but the Appellate Division held that there “was no proof as to the number of people in the vicinity, or that any were drawn to the situation,” such that there was “insufficient proof of an intent to threaten public safety, peace or order or the reckless creation of such a risk.” The Third Department concluded that the grandmother failed to prove a violation by clear and convincing evidence “as to when or how the mother failed to provide reimbursement for transportation expenses” or failed to provide the names of her daycare providers, giving due deference to Family Court’s credibility determinations.

## **Custody – Violation – Not Found; Disclosure - Subpoena to ACS – Enforcement – Contempt**

##  In Matter of Michael Y. v. Dawn S., 2023 Westlaw 192201 (1st Dept. Jan. 17, 2023), the father appealed from: (1) a March 2021 Family Court order, which denied his motion to hold NYC ACS (ACS) in contempt for failing to comply with a judicial subpoena or to compel ACS to produce unredacted documents; and (2) a September 2021 order of the same Court, which denied his motion to hold the mother in contempt for failure to comply with the parties’ custody order. The First Department reversed the March 2021 order, on the law, and remanded to Family Court for an *in camera* review of the ACS reports and records, to determine whether disclosure would be detrimental to the safety or interests of any source of the unfounded reports or whether any source was a mandated reporter, and to thereupon determine whether ACS was in contempt or should be compelled to produce complete unredacted reports, holding that “[a]s the subject of the unfounded reports, the father is a person entitled to receive access to the otherwise sealed reports” pursuant to SSL 422(5)(a)(iv), and ACS did not challenge the subpoena or move for a protective order. The Appellate Division found that “the father made a prima facie showing of the elements necessary to hold ACS in contempt for its failure to fully comply with a lawful judicial subpoena” and he suffered prejudice, “because his modification petition alleges that the mother was causing false abuse reports to be filed with the authorities, and the unredacted repots may be admissible in such a proceeding,” citing SSL 422(5)(b)(i). The First Department affirmed the September 2021 order denying the father’s motion to hold the mother in contempt, holding that Family Court “providently determined that the father failed to prove all the elements necessary for a finding of civil contempt under Judiciary Law §753.” The Court noted that the mother testified that she advised the father of the children’s planned trip to North Carolina, and he did not object; the father did not rebut that assertion with any direct testimony, relying solely on his supporting affidavit.

## **Enforcement - Equitable Distribution – Sale of Property Following Bankruptcy**

##  In Roberts v. Roberts, 2023 Westlaw 152116 (2d Dept. Jan. 11, 2023), the ex-husband (husband), Patricia Beck (Beck) and East Jersey Commercial, LLC (EJC) appealed from a March 2020 Supreme Court judgment, rendered in the wife’s 2018 action to enforce a June 2014 New Jersey judgment of divorce, which created a support trust for the support and certain needs of the ex-wife (wife) and children. The support trust was to be funded by the “immediate sale” of a commercial building owned by EJC, in which the husband owned a 90% interest, such that the net proceeds of the sale of the husband’s interest therein would be deposited into the support trust. Shortly following the divorce, the husband filed for bankruptcy and the wife commenced an adversary proceeding against the husband and Beck, seeking a declaration that EJC’s commercial property was not the property of the bankruptcy estate but, rather, was subject to the support trust. The wife obtained a default judgment in the adversary proceeding against Beck, declaring that she had no legal or equitable ownership in EJC and entered into a settlement with the bankruptcy trustee, in which the trustee transferred the estate’s right, title and interest in the support trust to the wife. In the present action against the husband, Beck and EJC, the wife alleged that the husband had engaged in a course of conduct to prevent the sale of the commercial property and that he and Beck had continued hold themselves out as owners thereof and collected rents from the tenant. Supreme Court’s judgment, as here relevant: (1) directed the tenant to release all rents held in escrow to the wife or any other agent or entity designated by her; (2) directed that all rents due to EJC shall be paid directly to the wife; (3) directed the husband and Beck to comply with the production of documents needed to effectuate the sale and to execute the documents needed and to complete the sale; (4) adjudged that the wife is now the designated agent and lawful owner of EJC; and (5) awarded the wife counsel fees of $50,013.75 against the husband and Beck pursuant to 22 NYCRR 130-1.1. The Second Department modified, on the law, as is here relevant, by: (a) deleting the directive that the tenant release rents to the wife or her designee, and replacing the same with a provision that the tenant release all rents held in escrow for the subject property directly to the support trust established by the judgment of divorce; (b) deleting the directive that all rents due to EJC shall be paid to the wife or her designee; (c) deleting the adjudication that the wife is the lawful owner of EJC, finding as to both items (b) and (c) that neither the judgment of divorce nor the bankruptcy settlement agreement awarded the wife the husband’s interest in EJC, but, rather, the judgment of divorce directed the sale of the property and the bankruptcy settlement awarded the wife whatever interest the husband may have in the support trust and its assets; (d) deleted the award of counsel fees to the wife, holding that “Supreme Court failed to specify which conduct it found to be frivolous, and it is not clear from the order what conduct the court found to be frivolous,” and determining that the wife’s motion for counsel fees against the husband and Beck “must be denied”; and otherwise affirmed.

## **Equitable Distribution - Credit Card Debt; Equal Distribution; Separate Property Claims Denied**

##  In Glessing v. Glessing, 2023 Westlaw 380072 (2d Dept. Jan. 25, 2023), the husband appeared from a November 2019 Supreme Court judgment which, upon a September 2019 decision after trial of the wife’s 2017 action for divorce: (1) failed to award him a separate property credit of $220,000 toward the purchase of the marital residence; (2) directed him to pay half of the cash in a home safe to the wife; (3) directed him to pay $23,692.64 from a Chase bank account to the wife; (4) directed the distribution of the net proceeds of certain bonds to be divided equally between the parties; and (5) directed him to pay the wife half of the parties' marital credit card debt. The parties were married in 1992. The First Department affirmed, holding: (1) Supreme Court providently denied his request for a credit of $220,000 for separate funds which he contended he used toward the purchase of the marital home, noting the existence of commingled funds in a joint account which the husband failed to prove “was created only as a matter of convenience; (2) and (3) since the husband failed to overcome the presumption that the money in the home safe and the funds in the Chase bank account were marital property, the court properly determined that those items were marital property subject to equitable distribution; (4) the bonds were purchased in both parties' names during the course of the marriage, and although the funds came from his disability pension, they were again the product of a commingling and Supreme Court “providently exercised its discretion in ordering the net proceeds of the bonds to be divided equally between the parties”; and (5) Supreme Court properly directed the husband to remit to the wife half of the marital credit card debt of $5,859.65.

## **Family Offense - Aggravating Circumstances; Assault 3d; Forcible Touching; Harassment 1st and 2d; Menacing 2d and 3d; Sexual Abuse 3d**

##  In Matter of Marta M. v. Gopal M., 2023 Westlaw 362984 (1st Dept. Jan. 24, 2023), the father appealed from an April 2022 Family Court order which, after a hearing, found that he committed various family offenses, granted a 5-year stay away order of protection to the mother and a 2-year order of protection to the parties’ children. The First Department affirmed, holding: (1) as to harassment 1st and 2d, the father “repeatedly threatened the mother’s and children’s lives, and on one occasion coupled a threat with his throwing metal objects at the mother and younger child” and “[h]is intent to alarm the mother can be inferred from the circumstances”; (2) regarding menacing 2d and 3d, “[e]veryday objects can be dangerous instruments if used in a manner that can cause serious injury” and “if the tray and cup could not be considered dangerous objects, the father’s throwing them at the mother and child was sufficient to establish menacing in the third degree”; (3) “The mother's testimony supports Family Court’s finding that the father committed assault in the third degree when he grabbed her wrist and would not let her go, causing her to sustain wrist pain and redness”; (4) with respect to sexual abuse 3d and forcible touching, “on numerous occasions, the father carried [the mother] into his bedroom and forced her into nonconsensual sexual relations”; (5) “The finding of aggravating circumstances is supported by a \*\*\* showing that the child was present during a number of violent incidents directed at petitioner” and “repeated violations of prior orders of protection.” The Court concluded that “inclusion of the children was warranted, as certain of the family offenses occurred in their presence.”

## **Family Offense - Attempted Assault 3d – Brother and Sister – Found**

##  In Matter of McCLean v. McCLean, 2023 Westlaw 152025 (2d Dept. Jan. 11, 2023), the brother appealed from, as is here relevant, a March 2022 Family Court order of disposition, which, after a hearing, found that he had committed attempted assault 3d against his sister, and from the 6-month stay away order of protection issued therewith. The Second Department affirmed, holding that a preponderance of the evidence supports Family Court’s finding that the brother committed attempted assault 3d and that he acted with the intent “to cause physical injury” to the sister when he slammed the door while the sister’s hand was in the doorway.

## **Family Offense - Harassment 2d – Aggravating Circumstances Found**

##  In Matter of Gloria B. v. Rachelle B.T., 2023 Westlaw 152025 (1st Dept. Jan. 12, 2023), petitioner appealed from a March 2022 Family Court order, which found that respondent had committed harassment 2d, issuing a 2-year order of protection in favor of petitioner and the subject child and declining to find aggravating circumstances. The First Department modified, on the law and the facts, to the extent of finding that aggravating circumstances exist and replacing the 2-year order of protection with a 5-year order of protection. The Appellate Division held that Family Court “improvidently exercised its discretion in declining to find aggravating circumstances given the evidence that respondent repeatedly violated a final order of protection by sending harassing and intimidating text messages to petitioner and repeatedly calling her and hanging up.”

## **Family Offense – Suspended Judgment**

##  In Matter of Annissa D. v. Martha D., 2023 Westlaw 362978 (1st Dept. Jan. 24, 2023), petitioner appealed from a June 2022 Family Court order which, after a hearing, found that respondent committed disorderly conduct and harassment 2d, entered a suspended judgment set to expire immediately, vacated the temporary order of protection, and marked the matter off the calendar and dismissed. The First Department affirmed, holding that “Family Court's disposition is authorized by Family Court Act §841(b), which provides for issuance of a suspended judgment for a period not exceeding six months, with no minimum period specified” and that “Family Court providently exercised its discretion in imposing such a limit on the suspension period.” The Appellate Division concluded: “the matter had been pending for nearly two years with a temporary order of protection in place against respondent, and there had been no allegations that respondent failed to comply with the order or engaged in any behavior that would warrant an extension”; and “based on the same factors that supported the limit on the suspension period, Family Court providently determined that there was good cause to dismiss the petition,” while noting that petitioner “did not request a dispositional or other hearing, and, in any event, she fails to explain what purpose such a hearing would have served.”

## **Pendente Lite – Default Vacatur Denied; Notice of Hearing by NYSCEF**

## In Leonardo v. Aaron, 2023 Westlaw 403670 (1st Dept. Jan. 26, 2023), the husband appealed from a May 2022 Supreme Court order, which denied his motion to vacate a March 2022 temporary order. The First Department affirmed, holding that the husband “neither demonstrated a reasonable excuse for his failure to appear at the hearing on plaintiff’s motion seeking pendente lite support, nor a meritorious defense to the pendente lite order entered upon his default.” The Appellate Division concluded that Supreme Court “providently exercised its discretion in rejecting defendant’s claim that he was not properly served with notice of the hearing where defendant consented to electronic filing and service, as permitted” by 22 NYCRR 202.5-b(b)(2)(i), “and it is undisputed that plaintiff’s order to show cause was filed with NYSCEF.”

## **Legislative and Rule Items**

## **Adoption – Protection for Unmarried Fathers**

##  DRL 111 and 111-a, and various provisions of the Social Services Law are amended, **effective December 30, 2022**, to broaden the definition of "consent" fathers in cases of "public" adoptions, so that fathers who have been legally adjudicated to be the parent of a child or have timely executed a formal acknowledgment of parentage have full parental rights. The new provisions apply not to private adoptions, but only to adoptions that occur after a child has been involuntarily separated from the family, and the state seeks to terminate the parent-child relationship for an unmarried father. This legislation is intended to avert the potential consequence of an unmarried father's failure to comply with a support obligation to pay support to a third-party agency, so that his continued relationship to his child does not hinge on such payment alone. A07347/S06389, L. 2022, Ch. 828.

## **Family Court Forms – Revised**

##  Pursuant to Administrative Order 327 of 2022 (AO/327/2022), **dated December 27, 2022**, certain Family Court forms have been revised: **(1)** JD Form 3-7 has been revised in conformity with legislation effective December 29, 2022 (L. 2022, Ch. 810), which raises the minimum age for JD jurisdiction to 12, with the exception of homicide offenses, where the minimum age remains at age 7; **(2)** child support objection and rebuttal forms (Forms 4-7b and 4-7c), have been revised with the addition of new templates for an affidavit of service, to conform to CPLR Rule 306 and to include a provision for substituted service under CPLR §308(5); **(3)** child support orders (Forms 4-2, 4-6, 4-7, 4-7a, 4-7d, 4-11a, 4-12b, 4-12c, 4-13a, 4-19b and 4-SM-1), by expanding the payment directives in the form orders to include direct deposit and other means of transmittal.

## **Forensic Evaluator Training Requirements**

##  As reported last month, A02375C/S06385 was signed on December 23, 2022 and enacted as Laws of 2022, Ch. 740, **effective June 21, 2023**. The Governor’s approval menu stated that an agreement had been reached with the Assembly and Senate regarding revisions to the legislation. As anticipated, an **amendment** to the foregoing law has been introduced in both houses as of January 10, 2023 (S00860/A00632), passed in the Assembly on January 31, 2023 and **which, if passed by the Senate and signed**, would**: (a)** if the child is living out of state and if further than 100 miles from the New York border, permit the evaluator to conduct the evaluation utilizing video conferencing technology and so long as the evaluator takes all steps reasonably available to protect the confidentiality of the child's disclosures for any evaluation conducted remotely; **(b)** change the creation and oversight of the training to require the Office for the Prevention of Domestic Violence (OPDV), in conjunction with an organization recognized by the federal department of health and human services to coordinate statewide services for the prevention and intervention of domestic violence, to create and administer a training program for court appointed forensic evaluators. OPDV and the organization will be responsible for providing the training to psychiatrists, psychologists, and social workers who are licensed in New York state, so that they may conduct these evaluations. OPDV and the organization recognized by the federal department of health and human services must review and update the training every two years; and **(c)** amend the effective date from 180 days to 1 year following signing.

## **Limited Appearance by Attorney**

 New CPLR 321(d) is **added, effective December 16, 2022,** to allow an attorney to appear for a party in a civil action or proceeding for limited purposes, which shall be defined in a “notice of limited scope appearance,” which entitles the attorney to so appear “unless otherwise directed by the court.” When the limited purpose(s) are complete, the attorney files a notice of completion thereof, which constitutes a withdrawal from the action or proceeding, “unless otherwise directed by the court upon a finding of extraordinary circumstances and for good cause shown.”

## S06897/A04938, L. 2022, Ch. 710.

## **Notary Public – New Rules**

##  19 NYCRR Part 182 has been **amended, effective January 25, 2023**, by the addition of new sections 182.2 through 182.11. The changes are set forth in 7 pages of regulations. The new rules include, among other things, detailed requirements for evidence of identity, standards for communication technology used in remote notarial acts, and record keeping for notarial acts sufficient to document compliance with Executive Law §§130 and 135-c and the notary’s retention thereof for 10 years.