## **NYSBA FAMILY LAW SECTION UPDATE, April 2021**

## **Matrimonial Update**

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## **Agreements - Interpretation – Retirement Accounts**

## In Berlin v. Berlin, 2021 Westlaw 1010932 (2d Dept. Mar. 17, 2021), the husband appealed from a January 2018 Supreme Court order which, among other things, directed the wife to transfer $602,750 from her retirement accounts to him, in accordance with a June 2013 stipulation incorporated into an August 2013 judgment of divorce, and determined that she could use certain annuities to do so. The Second Department affirmed, holding that the clear and unambiguous language of the stipulation permitted the wife to use the subject annuities to satisfy her obligation to the husband, and rejected the husband’s argument that Supreme Court’s determination will cause him to “sustain the entire tax burden of the transfers,” finding that the stipulation “demonstrates that the parties anticipated the tax consequences of the transfers.”

## **Agreements -** **Oral Modification; Reformation of Deed**

## In Lewis v. Thomas, 2021 Westlaw 966580 (1st Dept. Mar. 16, 2021), the wife appealed from an October 2018 Supreme Court order, which granted the husband’s motion to compel her to sign a corrected deed, removing a life estate in her favor in a property in Trinidad she transferred to him, in exchange for $100,000 as required by a so-ordered stipulation of settlement. The husband’s attorney prepared the deed, which reserved a life estate to the wife. The wife contended that the life estate was the subject of an oral modification which arose by reason of the parties’ continued intimate relationship after their divorce. The First Department reversed, on the law, denied the husband’s motion and remitted to Supreme Court for a hearing, holding that since the wife presented evidence that the life estate language in the deed “memorialized the husband’s subsequent decision to give her a life interest” and the deed contained “contradictory provisions and ambiguous language, extrinsic evidence is admissible to determine the parties’ intent.”

## **Agreements -** **Prenuptial – Interpretation; Counsel Fees – After Trial; Maintenance - Durational**

In Rosen v. Rosen, 2021 Westlaw 799852 (2d Dept. Mar. 3, 2021), the husband appealed from a September 2016 Supreme Court judgment which, upon a July 2016 decision after trial of the wife’s March 2012 action, awarded the wife maintenance of $4,000 per month for 3 years, a distributive award of $363,665 and counsel fees of $30,000. The Second Department modified, on the law and the facts, by deleting the distributive award to the wife and substituting a distributive award to the husband of $75,201. The parties were married in 1985 and entered into a prenuptial agreement, which provided that the husband’s 2 premarital businesses and any property he may in the future purchase from the proceeds of, or in exchange for the same, would remain his separate property and the wife waived all claims thereto, including any increases in value. Supreme Court’s distributive award to the wife represented 30% of the value of the husband’s successor business, acquired through exchanges of his premarital business, which the Appellate Division held was error, in that the same constituted the husband’s separate property. The Second Department therefore deleted that award and substituted a sum due to husband from the wife, representing undisputed wasteful dissipation of marital property, while upholding the maintenance and counsel fee awards as proper.

## **Child Support - CSSA – Order Vacated – Failure to Comply**

## In Matter of Michael JF v. Jennifer MB, 2021 Westlaw 1093888 (1st Dept. Mar. 23, 2021), the father appealed from a March 2020 Family Court order denying his objections to an April 2019 Support Magistrate Order, which denied his motion to declare a June 2014 consent child support order invalid for non-compliance with the CSSA. The First Department reversed, on the law and remanded to Family Court for “an expeditious new hearing” upon the mother’s 2013 petition. The Appellate Division held that: “neither the record of the hearing nor the order sets forth the presumptive child support amount or states the parties’ incomes”; “there was no explanation as to whether or why there was a deviation from the child support calculation provided by the statute”; and “the order included three different basic child support awards and three separate pro rata allocations, which indicates that there were deviations from \*\*\* the CSSA guidelines.”

## **Child Support - Modification – Denied – Job Search Inadequate**

In Matter of Solomon M v. Adelaide M., 2021 Westlaw 816973 (1st Dept. Mar. 4, 2021), the husband appealed from a May 2019 Family Court order, denying his objections to a January 2019 Support Magistrate Order which dismissed his petition for downward modification. The First Department affirmed, noting that: the husband’s financial situation and earning potential had improved at the time of his petition (an MBA and earnings of $30,000/year) when compared to the time of the stipulation he sought to modify (unemployed, no income and no MBA); he produced no written proof to support his testimony that had he not resigned from his job at an investment firm, he would have been fired; and the husband “had not submitted competent proof of having diligently searched for re-employment commensurate with his earning capacity,” which, on Indeed.com “over a years-long period, yielded only a single job offer at a salary that was a fraction of his pre-MBA salary.”

## **Child Support - Modification – 15% - Denied**

In Matter of Ramon ZZ. v. Amanda YY., 2021 Westlaw 1033636 (3d Dept. Mar. 18, 2021), the father appealed from an August 2019 Family Court order, which upheld the Support Magistrate’s dismissal of his November 2017 petition seeking to modify a July 2017 order, which directed him to pay $181 per week plus 51% of add-ons for the parties’ child born in 2013. After a hearing, the Support Magistrate found that the father failed to show an involuntary reduction in his income. The Third Department affirmed, holding that the father, among other things, admitted at the hearing that he quit his part-time job.

## **Counsel Fees - Family Offense – Denied; Family Offense – Aggravating Circumstances; Criminal Mischief 4th**

In Matter of Michelle S. v. Luke R., 2021 Westlaw 816958 (1st Dept. Mar. 4, 2021), both parties appealed from a May 2019 Family Court order which, after a hearing, found that respondent committed various family offenses, including criminal mischief 4th and the existence of aggravating circumstances, granted a 5-year order of protection and denied counsel fees to petitioner. The First Department affirmed, finding that respondent committed criminal mischief 4th “when he poured brown, noxious liquid on petitioner’s clothing, leaving them soiled and stained, which she then turned over to the police.” The Appellate Division upheld the 5-year order of protection based upon “aggravating circumstances constituting an immediate and ongoing danger to petitioner.” The Court upheld the denial of counsel fees given that petitioner “failed to submit any proof of the fees at the hearing and did not indicate after the hearing that she was pursuing a claim for fees.”

**Counsel Fees - from Sale Proceeds**

In Motta v. Motta, 139 NYS3d 833 (1st Dept. Mar. 11, 2021), the wife appealed from an April 2019 Supreme Court order which, among other things, following a hearing, found her to be in criminal contempt and awarded the husband counsel fees payable from the proceeds of the sale of the marital residence. The parties’ April 2016 divorce judgment directed the parties to cooperate in the sale of the former marital residence and was affirmed on appeal (145 AD3d 560). The wife refused to cooperate in the sale, leading to the appointment of a receiver in March 2017. The husband and receiver presented evidence “detailing how the wife delayed the process, which included interference with potential purchasers.” The First Department affirmed, holding that Supreme Court providently exercised its discretion in awarding the husband’s counsel fees out of the sale proceeds, and that there was clear and convincing evidence of the wife’s contempt.

## **Custody - Evaluations Denied**

In Gilbert RR. v. Yaniry RR., 2021 Westlaw 1132364 (3d Dept. Mar. 25, 2021), the father appealed from a January 2020 Supreme Court order, which denied his motion in his 2019 divorce action to direct the parties and their child born in 2017 to submit to a forensic psychological evaluation, or in the alternative, to direct a mental health evaluation of the mother. The parties were married in 2017 and Family Court issued a consent order in October 2018, which provided for joint legal and shared physical custody. The Third Department affirmed, finding that Supreme Court noted “all of the issues raised by [the father] in \*\*\* his \*\*\* [motion] were fully known to him at the time the matter was settled” in Family Court. The Appellate Division concluded that Supreme Court did not abuse its discretion in denying the father’s motion and noted that “Supreme Court must ultimately make a custody determination in the final judgment of divorce,” citing DRL 240(1).

## **Custody - Failure to Cooperate in Forensic Evaluation – Sanction**

In Treanor v. Treanor, 2021 Westlaw 1010572 (2d Dept. Mar. 17, 2021), the wife appealed from a March 2020 Supreme Court order, which found her to be in violation of the court’s order to participate in an updated forensic evaluation and imposed the sanction of drawing an adverse inference against her regarding custody issues at the time of trial. The Second Department modified, on the law, by limiting the adverse inference “to the circumstances of the forensic evaluation.”

## **Custody - Modification–Corporal Punishment; Supervised Visitation;** **Evidence - Children’s Hearsay Statements – Admissible**

In Matter of Dixon v. Crow, 2021 Westlaw 1049339 (4th Dept. Mar. 19, 2021), the mother appealed from a May 2019 Family Court order which, after a hearing, granted the father’s petition to modify a prior order by requiring the mother’s visitation be supervised and occur in NY. The Fourth Department affirmed, holding that the children’s out of court statements were sufficiently corroborated and admissible under FCA 1046(a)(vi) as “an exception to the hearsay rule in custody [and visitation] cases involving allegations of abuse and neglect.” The Appellate Division found that the mother “subjected [the children] to excessive and inappropriate corporal punishment by repeatedly striking them with a belt thereby leaving bruises, deprived them of indoor bathroom facilities and necessities, and engaged in other mistreatment and inappropriate conduct while ostensibly caring for them.” The Court concluded that limiting the mother to supervised visitation in NY [the mother had relocated out of state – unspecified as to where] was proper.

## **Custody - Modification – Denied – Overlapping Family & Supreme Court Cases**

In Jessica WW. v. Misty WW., 2021 Westlaw 1033582 (3d Dept. Mar. 18, 2021), defendant appealed from a September 2019 Supreme Court order, which, without a hearing, denied her June 2019 motion, made in plaintiff’s November 2017 Supreme Court action, to modify a February 2018 Family Court stipulated custody order, which provided for joint legal and shared physical custody of the parties’ child born in June 2016. Plaintiff commenced the Family Court proceeding in February 2017 and the Supreme Court action came to trial in October 2018, at which time Supreme Court, over defendant’s objection, ruled that it would not revisit the issue of custody given the stipulation reached in Family Court only 6 months earlier. Defendant moved for custody modification on June 3, 2019 and Supreme Court thereafter rendered a judgment of divorce, continuing the February 2018 stipulated Family Court order of custody. The Third Department affirmed, finding that most of the claims made in defendant’s June 2019 motion were based upon allegations of fact which predated the February 2018 Family Court order and holding that although the parties’ relationship remains strained, it is no more acrimonious than it was in February 2018.

## **Equitable Distribution -** **Proportions – Increased on Appeal; Valuation – Medical Practice – Lack of Marketability Discount**

In Davenport v Davenport, 2021 Westlaw 1112911 (2d Dept. Mar. 24, 2021), the wife appealed from a March 2019 Supreme Court judgment, which upon a December 2018 decision after trial, among other things: (1) valued the marital portion of the husband’s medical practice at $500,000 and awarded her 10%; (2) awarded her 10% of the value of other entities; (3) awarded her only 10% of certain investment accounts; (4) awarded her only 25% of certain bank accounts; and (5) awarded her only 25% of the marital residence. The Second Department modified, on the law, on the facts and the exercise of discretion, by: (1) increasing the medical practice value to $1,344,686, holding that the court improvidently applied a discount rate “which far exceeded the 15-20% discount that both experts agreed was appropriate” for lack of marketability, and applied a 20% discount, but upheld the 10% award to the wife, “in light of the brief duration of the marriage and [her] minimal contributions to the practice”; (2) increased the wife’s share of the other entities to 25%, given that the husband’s involvement was nothing more than “investing marital monies” therein; (3) increased the wife’s share of the investment accounts to 25% which, although “actively managed,” the husband “admitted that he only spoke to the manager every couple months”; (4) upholding the 25% distribution of the husband’s bank accounts, “considering the parties’ relative financial contributions and the short duration of the marriage”; and (5) increased the wife’s share of the marital residence to 40%, “taking into consideration her significant direct contributions to the construction, design and decoration of the home.”

## **Evidence - Credibility – Covid-19 Telephone Testimony; Family Offense – Harassment 2d**

In Matter of Stephanie E. v. Efrain G., 139 NYS3d 538 (1st Dept. Mar. 2, 2021), the father appealed from a July 2020 Family Court order which, after a hearing, found that he committed harassment 2d, excluded him from the home and granted a 2-year order of protection. The First Department affirmed, citing petitioner’s testimony that the father “threatened to knock her out, shoved her repeatedly while cursing and yelling at her and commenced yelling and cursing at her again when the police arrived to escort him from the residence, \*\*\* respondent having behaved similarly with threats to get her evicted some time previously,” causing petitioner “to be frightened for her safety and for that of the parties’ adult son who resided with her and witnessed the outbursts.” The Appellate Division concluded: “Despite the fact that the parties’ testimony, as necessitated by the Covid-19 pandemic, occurred telephonically, there exists no basis for disturbing the Family Court’s credibility determinations.”