## **NYSBA FAMILY LAW SECTION, Matrimonial Update, February 2021**

## By Bruce J. Wagner

Whiteman Osterman & Hanna LLP, Albany

## **Agreements - Post-Nuptial; Set Aside Denied**

## In Hershkowitz v. Levy, 2021 Westlaw 191304 (2d Dept. Jan. 20, 2021), the husband appealed from a March 2018 Supreme Court order which denied so much of his motion, made in the wife’s November 2016 divorce action, as sought to set aside the parties’ October 2013 postnuptial agreement upon the grounds of unconscionability, overreaching, breach of fiduciary duty, fraud and lack of consideration. The husband alleged, among other things, that the wife “had misled him as to the contents of the postnuptial agreement” and “had kept the postnuptial agreement from him until moments before” its execution. The Second Department affirmed. The parties were married in July 2005, when the husband was 56 and an established attorney, and the wife was 52 and had founded her own successful business. The parties’ prenuptial agreement defined separate property as, among other things, “anything acquired by the parties prior to the marriage, and defined all earned income during the marriage as marital property.” The October 2013 postnuptial agreement “redefined separate property as including any and all earned income or other compensation earned during the marriage” and waived maintenance. The wife had an attorney and the husband waived counsel; the parties also waived the right to insist on financial disclosure. The Appellate Division held that there “is no credible evidence in the record” to support the husband’s contentions as to fraud or overreaching, given no indication that he requested a copy of the agreement before meeting with the notary, or that he could not have signed the agreement at a later time, and the 4-page document was neither complex nor beyond the understanding of “a trained attorney.” The Court noted that the absence of counsel, without more, does not establish overreaching, “especially where, as here, the postnuptial agreement specifically stated that the defendant had waived his opportunity to obtain counsel.” The court found no breach of fiduciary duty, given that the agreement was “signed well into the marriage and well before the plaintiff commenced this divorce action.” There was no lack of consideration, given that each party gave up the right to the other’s earnings in exchange for keeping his and her own compensation, and both parties waived maintenance. As to unconscionability, the Second Department found the agreement to be fair on its face, given the mutual separate property waivers and the “uncontroverted evidence that the parties kept their finances separate during the marriage and the defendant does not rely on the plaintiff for his support.”

## **Child Support - CSSA – Deviation – Health Insurance; Shared Summer Custody**

 In Matter of Beck v. Beck, 2021 Westlaw 125068 (3d Dept. Jan. 14, 2021), the father appealed from an October 2019 Family Court order sustaining a Support Magistrate Order which, after a hearing, granted the mother’s February 2019 petition to modify a July 2018 consent order, which had set the father’s child support obligation at $70 bi-weekly for the parties’ son and daughter born in 2003, to the extent of increasing his child support obligation to $450 bi-weekly, which was a downward deviation from the CSSA amount of $604.59 bi-weekly. At the time of the July 2018 order, the father had custody of the son and the mother had custody of the daughter. The mother’s petition alleged constructive emancipation of the son, which ground became moot based upon the son’s enlistment in the Army in July 2019. The Third Department affirmed, holding that Family Court properly deviated downward from the CSSA, giving the father due consideration for his payment of the entire cost of the children’s health insurance and the parties’ shared custody of their daughter during the summer months, and that the father was entitled to no further reduction.

## **Counsel Fees - Custody – Denied; Parenting Coordinator Fees Reallocated; Custody - Modification – 50/50 Granted; Children’s Wishes; Mother’s Employment Change; Third Party Caregiver**

 In Tsung v. Tso, 2021 Westlaw 189198 (1st Dept. Jan. 19, 2021), the mother appealed from: (1) an August 2019 Supreme Court order which, after a hearing, granted the father’s motion to modify the parties’ custody agreement pertaining to their two children so as to provide for 50/50 custody (a 5-2-2-5 schedule) and *sua sponte*, increased the mother’s share of the parenting coordinator’s fees from 10% to 15%; and (2) an October 2019 order of the same Court, which denied her motion for counsel fees and for reallocation of the AFC and forensic evaluator fees. The First Department affirmed, holding that the father established changed circumstances through his allegations that the mother had interfered with his access to the children, the parties’ inability to co-parent, and the mother’s new full-time employment which caused the children to be “often with their nanny rather than the mother after school.” The Appellate Division found that the 50/50 schedule was in the children’s best interests and was in accord with “the children’s expressed preference to spend more time with their father.” As to the mother’s increased share of parenting coordinator fees, the First Department held the “modest reallocation to have been a reasonable way to help fend against such conduct [father’s claims of non-cooperation] in the future.”

## **Custody - AFC Appointment and Private Pay Fees**

 In Deem v. Divella-Deem, 2021 Westlaw 262375 (2d Dept. Jan. 27, 2021), the father appealed from a March 2019 Supreme Court order which, in his November 2017 divorce action, appointed an attorney to represent the two children born in 2005 and 2006 and directed the parties to pay pro rata shares of the AFC’s fees, subject to reallocation at trial. The Second Department treated the father’s notice of appeal as a motion for leave to appeal, granted such leave, and affirmed. The Appellate Division held that appointment of an AFC “remains the strongly preferred practice” and that “[c]ourts are authorized to direct that a parent who has sufficient financial means to do so pay some or all of the [AFC’s] fees.”

## **Custody - Modification – Joint to Sole – Domestic Violence; Family Offense – Harassment 2d**

 In Matter of Paul Y. v. Patricia Z., 2021 Westlaw 55019 (3d Dept. Jan. 7, 2021), the father appealed from a November 2018 Family Court order which, following an 8-day trial held between July and December 2017, granted the mother’s petition to modify a November 2014 order (joint custody of their son born in 2012) by awarding her sole legal and physical custody of the son and which made an initial award to the mother of sole legal and physical custody of the parties’ daughter born in 2013, with graduated supervised time to the father. Family Court also directed the parties to create talking parents accounts to facilitate communication. The father also appealed from a separate November 2018 order which found that he committed harassment 2d and issued a 1-year order of protection in favor of the mother. The Third Department affirmed, noting that the record was replete with evidence that the parties’ relationship had deteriorated to such a point that joint custody was no longer feasible, thus establishing the requisite change of circumstances with regard to the parties’ son and allowing the Court to proceed with a hearing to determine the best interests of both children. As to best interests, the Appellate Division agreed with Family Court’s findings that the father is “rigid, unbending, intense, critical, opinionated and judgmental” and that his allegations of parental alienation were baseless. The Court noted and sustained Family Court’s determination that the mother is “loving, kind, patient and nurturing” and that the AFC’s position was that the mother should have sole custody. The Third Department concluded by noting the mother’s testimony as to 4 incidents of domestic violence, where the father “grabbed her by the hair and scrubbed the floor with her face”; “sat on her body and slapped her face”; “pushed her on the bed, jumped on her, kicked her in the back, and twisted her arm”; and “threatened her with a knife,” all of which supported Family Court’s issuance of an order of protection upon a finding that the father committed harassment 2d.

## **Custody - Sole - Despite Abuse History; Factors: Corporal Punishment; Drug Use; Failed to Provide Health Insurance; Supervision Deficits**

 In Matter of Carlos L. v. Eva P., 2021 Westlaw 27447 (1st Dept. Jan. 5, 2021), the mother appealed from a July 2019 Family Court order which, after a hearing, awarded the father sole legal and physical custody of the subject children. The First Department affirmed, holding that Family Court considered the mother’s testimony about the father’s abusive history toward her, “but found no evidence that the behavior she described affected petitioner’s current fitness as a parent.” The Appellate Division further noted that the mother: “entrusted the children’s medical care” to the father; placed the children in his care for most of 2016; and ensured that the children saw the father regularly when they were in her custody. The Court concluded that the factors which favored the custody award to the father included: the mother’s failure to obtain health insurance for the children for a year; the mother and her boyfriend use marihuana in the home; the mother left the children alone for extended periods; and that on several occasions the mother subjected them to excessive corporal punishment.

## **Custody - Sole - Domestic Violence; Primary Caretaker**

 In Matter of Stacey-Ann H.J. v. Ian J., 2021 Westlaw 54938 (1st Dept. Jan. 7, 2021), the father appealed from a December 2019 Family Court order which awarded the mother sole legal and physical custody of the parties’ 2 younger children. The First Department affirmed, noting that: the children have resided with the mother since birth; she has been their primary caretaker and source of financial support; and Family Court “properly considered respondent’s acts of domestic violence against petitioner in the children’s presence.”

## **Custody - Sole – Domestic Violence; Family Offense - Aggravating Circumstances – 5-Year Order; Assault 3d; Criminal Mischief 4th; Menacing 3d; Strangulation 2d**

 In Matter of Nicole W. v. Louis T., 2021 Westlaw 96071 (1st Dept. Jan. 12, 2021), the father appealed from April 2019 Family Court orders which, after a hearing, granted the mother sole legal and physical custody of the parties’ child, and which found that he committed Assault 3d, Criminal Mischief 4th, Menacing 3d, Strangulation 2d, the existence of aggravating circumstances and granted the mother a 5-year order of protection. The First Department affirmed, based upon the mother’s testimony that the father choked her to the point of unconsciousness, pulled her around by her hair, shoved her, screamed at her, and punched her, injuring her and scaring her, and that the child was present and in the zone of danger for at least two of the acts of violence. The father broke the mother’s cell phone, thus satisfying the elements of criminal mischief 4th. The Appellate Division found that the record supported Family Court’s determination of aggravating circumstances and the imposition of a 5-year order of protection. As to the issue of custody, the Court noted that the mother’s testimony was unrebutted, and the court possessed sufficient information to determine the child’s best interests.

## **Custody - UCCJEA – Modification Denied; Child’s Wishes (13 y/o); Mother Limited Contact; Third Party Caregiver**

 In Matter of Christie E.R. v. Pedro J.D., 2021 Westlaw 189435 (1st Dept. Jan. 18, 2021), the mother appealed from a May 2020 Family Court order, which denied her petition to modify a prior order (sole custody to the father) so as to award her sole legal custody and permit her to relocate with the child to California. The First Department affirmed, noting that Family Court had subject matter jurisdiction given the existence of a NY custody order and the child’s continued substantial connection to NY. The Court rejected the mother’s contention that Family Court “essentially awarded the [paternal] grandmother custody,” noting that while “the grandmother has been the child’s primary caregiver during the week while the father works nights running his restaurant business, the father is ultimately responsible for taking care of the child and has provided fully for all of the child’s needs.” The Appellate Division concluded that: “the mother’s involvement in the child’s life for the past eight years had been limited to infrequent visitation”; “custody to the mother would involve uprooting the child from his long-time home, and moving him to California”; and “the court properly gave consideration to the then 13-year-old-child’s wish to continue the existing custody and living arrangements.”

## **Custody - UCCJEA – NY Inconvenient Forum Finding Reversed**

 In Matter of Diana XX v. Nicole YY, 2021 Westlaw 202709 (3d Dept. Jan. 21, 2021), the paternal grandmother and the father (Christopher ZZ.) of the older of two children appealed from a May 2020 Family Court order, which dismissed the paternal grandmother’s May 2019 and November 2019 petitions, seeking, respectively, custody modification pertaining to, or custody of, two children born in 2007 (of whom Christopher ZZ. is the father) and 2013 (of whom respondent Jamie A. is the father). A 2016 order granted the paternal grandmother joint legal custody of the older child. In April 2019, the mother and Jamie A. traveled to TN with both children to visit the children’s maternal grandmother. Within 24 hours of their arrival, either the mother or Jamie A. called 911 to report that they may have overdosed upon a substance each had injected, while the younger child was present in their motel room. The older child was with the maternal grandmother at the time. The TN authorities commenced a neglect proceeding against the mother, both fathers and the paternal grandmother. Both children came into state custody in TN and have remained in foster care ever since. In September 2019, Family Court issued a default order of custody for the older child to the paternal grandmother, which the TN Court refused to honor based upon the effect of separation of the children. The TN Court conducted a hearing and issued a December 2019 order determining that: all 3 parents had neglected their respective children and that the paternal grandmother had neglected the older child; jurisdiction be transferred to Family Court; and the children remain in TN state custody pending Family Court’s review and acceptance of jurisdiction. On December 17, 2019, Family Court issued an amended custody order on default in favor of the paternal grandmother, declaring its continuing jurisdiction over the older child, and 2 days later, rendered a scheduling order accepting jurisdiction from TN regarding final disposition of the neglect proceeding and directing Chemung County DSS to work with TN authorities. DSS then objected to NY jurisdiction and included in its letter what the Third Department termed “hearsay statements regarding a review purportedly conducted pursuant to the Interstate Compact for the Placement of Children.” Family Court then invited DSS to seek a vacatur of its December 2019 order accepting jurisdiction. In May 2020, without hearing argument on DSS’ motion and without conducting a hearing, Family Court issued an order declining jurisdiction and returning the matter to TN, dismissing the paternal grandmother’s petitions and vacating its December 2019 amended order of custody. The Third Department stated: “all parties \*\*\* are in agreement that Family Court’s handling of this case was rife with error, that its May 2020 order should be reversed and that the matter should be remitted to Family Court before a different judge for further proceedings, including the immediate reclaiming of jurisdiction from the Tennessee Court. We agree. The circumstances of this case are heartbreaking and underscore the importance of Family Court learning and understanding the [UCCJEA] and applying it with diligence and care.” The Appellate Division found that NY was the home state of the children and had jurisdiction over the neglect proceeding commenced in TN, citing DRL 76(1)(a) and that Family Court failed to engage in the requisite consideration of the inconvenient forum factors as required by DRL 76-f. The Third Department reversed, on the law, and remitted to Family Court for proceedings before a different judge, with a direction that Family Court issue an order reclaiming jurisdiction from the TN court within 14 days.

## **Enforcement - Compel Vacatur of Residence for Sale**

 In Khalid Mario B. v. Rosa Yau Chi Wai B., 2021 Westlaw 189633 (1st Dept. Jan. 19, 2021), the wife appealed from an April 2018 Supreme Court order which granted the receiver’s motion to compel her to vacate the former marital residence. The First Department dismissed the appeal, given that the order was entered upon the wife’s default, and relieved her assigned counsel on appeal, based upon the absence of nonfrivolous issues. The Court noted that the wife’s “unrefuted and continuing refusal to cooperate in, and her obstruction of, the ordered sale of the marital residence and the distribution of the proceeds warranted the order to compel her to vacate the premises.”

## **Family Offense - Assault 3d; Criminal Obstruction of Breathing; Harassment 2d; 5-year order**

 In Matter of Tatyana G. v. Keith C., 135 NYS3d 637 (1st Dept. Jan. 5, 2021), respondent appealed from an August 2018 Family Court order which, after a hearing, found that he committed Assault 3d, Criminal Obstruction of Breathing and Harassment 2d and issued a 5-year order of protection to petitioner. The First Department affirmed, holding that a fair preponderance of evidence justified the 5-year order and established that on several occasions, respondent called petitioner derogatory names, choked her, threw suitcases at her, and hit her, causing her to sustain bruises which would leave her in pain for several days. On one occasion, respondent punched petitioner in her face and left her unconscious for several hours.

## **Family Offense - Assault 3d; Menacing 3d**

 In Matter of Genesis E.R. v. Jarel E.R., 2021 Westlaw 96123 (1st Dept. Jan. 12, 2021), respondent appealed from a January 2020 Family Court order which, after a hearing, found that he committed assault 3d and menacing 3d and granted a 2-year order of protection. The First Department affirmed, holding that the elements of menacing 3d were established by petitioner’s testimony that respondent shoved her to the floor after telling her he was going to beat her up, causing her to be frightened for her safety and the child’s well-being. As to assault 3d, the Appellate Division found that the offense was proved by petitioner’s testimony that respondent slammed her to the floor, causing her pain that was “more than slight or trivial.”

## **Maintenance - Modification – Extreme Hardship**

 In Palmer v. Spadone-Palmer, 2021 Westlaw 96220 (1st Dept. Jan. 12, 2021), the former wife (wife) appealed from a January 2020 Supreme Court order which, among other things, following a trial, modified so much of a judgment of divorce as incorporated a May 2014 written agreement by terminating the former husband’s (husband) maintenance and life insurance obligations. The First Department affirmed, noting that the husband established extreme hardship through his own testimony and that of his treating psychologist, that his “life and career had plummeted due to forces beyond his control,” including his “extensive history of childhood abuse and other trauma,” the memories of which “had been repressed,” and that the testimony was “credible as to the detrimental effects on the husband’s life and career caused by their resurfacing, which effects included panic attacks, PTSD, and abuse of alcohol to an extreme degree.” The Appellate Division noted that the wife “neither called an expert to present competing testimony at trial nor sought an independent mental health examination before trial.” With regard to the wife’s argument that the husband did not make a good faith effort to seek new employment after being terminated, the First Department noted that this contention “ignores that, by virtue of his guilty plea, he was disbarred and precluding from possessing any financial series licenses for 10 years.” The Court concluded that Supreme Court’s imputation of $305,000 in annual income to each party was reasonable and supported by the record.

**COURT RULE ITEM**

## **Page Limit Rules Apply to More Motions; Processing NYSCEF Documents - Costs**

 Pursuant to Administrative Order 31/2021, issued January 19, 2021 and **effective immediately**, the provisions of 22 NYCRR 202.16-b(2) are amended to provide that the rules and page limitations applicable to certain pendente lite motions, only, now apply to “all applications (including postjudgment applications) for alimony, maintenance, counsel fees, child support, exclusive occupancy, custody and visitation.” The same Administrative Order amends 22 NYCRR 202.16(k)(3) to define expenses subject to that rule to include “costs for processing of NYSCEF documents because of the inability of a self-represented party that desires to e-file to have computer access or afford internet accessibility.”