

**NYSBA FAMILY LAW SECTION, Matrimonial Update, January 2021**

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**Child Support - CSSA - Over the Cap - Reduced**

In Matter of Good v. Ricardo, 2020 Westlaw 7050405 (2d Dept. Dec. 2, 2020), the father appealed from a December 2019 Family Court order denying his objections to a September 2019 Support Magistrate order which, after a hearing, granted the motion's March 2019 petition for upward modification of child support. The parties' July 2011 stipulation, incorporated into their November 2011 divorce judgment, required the father to pay \$5,650 per month in child support for 2 children, based upon his 80% share of the parties' \$339,023 in combined parental income. The Support Magistrate, based upon the 15% modification ground (the 3-years ground also applied), set the father's child support obligation at \$6,650 per month, finding that his 72% share of the CSSA obligation based upon the entire combined parental income of \$475,390, or \$7,131 per month, was unjust and inappropriate, and Family Court sustained this determination. The Second Department reversed, on the law, on the facts and in the exercise of discretion, and restored the father's obligation to the \$5,650 required under the July 2011 stipulation, noting that although the Magistrate stated that she considered the standard of living the children would have enjoyed had the household remained intact, and their needs, "the

record does not demonstrate that the children are not living \*\*\* the lifestyle they would have enjoyed had the household remained intact," and the father was also paying 80% of significant add-on expenses, including uncovered health expenses, educational expenses, extra-curricular activities, summer camp, sleep away camp, a trip to Europe and electronics, plus \$1,600 per month in child care expenses, as against the mother's admission that she was only incurring \$530 per month for child care.

**Counsel Fees - After Trial; Maintenance - Durational Affirmed; Increase Upon Emancipation Reversed**

In *Sufia v. Khalique*, 2020 Westlaw 7636042 (2d Dept. Dec. 23, 2020), the husband appealed from an October 2019 Supreme Court judgment which, upon an April 2019 decision after trial of the wife's September 2015 action, awarded her maintenance of \$1,786.99 per month for 14 years, to increase to \$3,004.59 per month upon the emancipation of the youngest child and counsel fees of \$25,000. The Second Department modified, on the facts and the exercise of discretion, by deleting the maintenance increase provision and providing that maintenance shall terminate upon the wife's marriage or the death of either party. The parties were married in 1987 and have 4 children, 1 unemancipated as of the time of trial, and Supreme Court imputed annual income of \$150,000 to the husband and \$24,694 to the wife. The Appellate Division held that there was no basis in the record for the maintenance increase and the

counsel fee award was a provident exercise of discretion under the circumstances, citing the DRL 237(a) rebuttable presumption in favor of the less monied spouse.

**Custody - Housing; Sex Offender Contact with Child**

In Matter of Papineau v. Sanford, 2020 Westlaw 7653744 (4<sup>th</sup> Dept. Dec. 23, 2020), the mother appealed from a February 2019 Family Court order which awarded sole legal and physical custody of the parties' son to the father. The Fourth Department affirmed, noting that the father and child engaged in various activities together and that the father, who owns the home in which he lives with his wife, supported the child's educational needs and sought appropriate counselling for the child. The Court noted that the mother lived with her own mother and that the mother allowed the child to be in the presence of and supervised by, her partner, who was a registered sex offender.

**Custody - Modification - Arrest, Neglect**

In Matter of Richard EE. v. Mandy FF., 2020 Westlaw 7775404 (3d Dept. Dec. 31, 2020), the mother appealed from a February 2019 Family Court order, which granted the father's June 2018 petition to modify an August 2016 order (sole legal and primary physical custody to mother) so as to grant him sole legal and primary physical custody of the parties' daughter born in 2012. The father's petition was based upon the mother's arrest on various criminal charges. Family Court ordered an FCA 1034 investigation

and a DSS investigation sustained a report that the mother regularly left the child and her half siblings with a neighbor whom she suspected of trafficking women and drugs out of his home. The mother was thereafter convicted of assault 3d and criminal mischief 4<sup>th</sup> and was sentenced to probation. The Third Department affirmed, noting that the evidence revealed that the father lives in Ohio with his fiancée and that the child has lived with him since the mother's arrest and is enrolled in school, and concluding that the father's home environment was "more stable" and that he "is better equipped to provide for the overall well[-] being of the child."

**Custody - Modification - Child's Wishes (16 y/o); Unstable Employment and Housing**

In Matter of Anthony YY. V. Emily ZZ., 2020 Westlaw 7647730 (3d Dept. Dec. 24, 2020), the mother appealed from a May 2019 Family Court order, which granted the father's 2018 petition to modify a 2007 Family Court order (joint legal custody, primary to mother) so as to grant him primary physical custody of the parties' child born in 2003 and weekend time to the mother. The father's petition alleged that the mother's housing and employment were unstable and that she had a difficult relationship with the child. The Third Department affirmed, noting that the mother failed to provide a structured environment recommended by mental health professionals and subjected the child "to a string of relocations

and school transfers," which would require the child "to make a disruptively long commute to school if she continued to live with the mother," while the father lives in the child's school district. The Court concluded by noting the child's preference to live with the father which is entitled to "great weight" given her age.

**Custody - Modification-Educational Decisions, Hygiene, Relocation, Smoking**

In Matter of Mathena XX. v. Brandon YY., 2020 Westlaw 7061926 (3d Dept. Dec. 3, 2020), the mother appealed from a May 2019 Family Court order which, following a hearing, dismissed her August 2018 petition seeking modification of an August 2017 consent order (joint legal and shared physical custody of their children born in 2012 and 2015, father's residence for school enrollment) and granted the father's petition, to the extent of awarding him primary decision-making on education, designated his residence as primary for school enrollment and provided the mother with the 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> weekends of each month, plus shared holidays and vacations. The Third Department affirmed, noting that the father's relocation out of the previously agreed school district to a place 40 miles from the mother's home, constituted the requisite change in circumstances. The Appellate Division cited the father's testimony over hygiene concerns wherein he related that the children "were often returned to him unbathed and smelling strongly of cigarette smoke" and July 2018 photographs in evidence that

showed the mother's residence to be "unkempt and in complete disarray." The Third Department found that Family Court's decision was supported by the record and noted that Family Court was within its discretion to credit the father's testimony (he informed the mother in advance of his relocation, where he obtained a new Monday-Friday job) over the mother's testimony that she "could not recall having spoken with the father about his plans to relocate."

**Custody - Prohibit Exposure to Significant Other - Denied**

In Matter of Burke v. Livingston, 2020 Westlaw 7636397 (2d Dept. Dec, 23, 2020), the father appealed from an April 2019 Family Court order which, without a hearing, denied the father's application to prohibit both parents from exposing the subject children (born in 2012, 2016, 2017) to a significant other until the youngest child attains the age of 18. The mother opposed the application and the AFC supported the application in part, requesting that such a significant other not be permitted to spend the night when the children are in residence. The Second Department affirmed, noting that the father did not allege, in either his petition or supporting affidavit, that the mother has a significant other whose presence is a negative impact upon the children, or that she even has a significant other, concluding that the father failed to make an evidentiary showing warranting a hearing.

**Custody - Third Party - Grandparent Visitation - Standing Found**

In Matter of Noguera v. Busto, 133 NYS3d 884 (2d Dept. Dec.

9, 2020), the maternal grandmother appealed from an August 2019 Family Court order which, after a hearing, found that she lacked standing to seek visitation with her grandchild born in 2009. In 2012, while custody proceedings were pending between the mother and father, the mother fled to Argentina with the child, who was not returned to his father in NY until 2018. The Second Department reversed, on the facts, and remitted to Family Court for a best interests hearing and an in camera examination of the child. The Appellate Division held the evidence established that grandmother developed a relationship with the child early in his life and made repeated efforts to continue that relationship, and that "any knowledge, acquiescence, or participation by the grandmother in the mother's misconduct is a factor to be weighed" in the best interests hearing.

#### **Custody - UCCJEA - NY Inconvenient Forum**

In Matter of Sanchez v. Johnson, 2020 Westlaw 7379662 (2d Dept. Dec. 16, 2020), the mother appealed from a September 2018 Family Court order which granted the child's March 2018 motion to dismiss, upon forum non conveniens grounds and with the condition that a Florida proceeding be commenced, the father's January 2015 petition, seeking to modify a January 2013 consent order (physical custody to mother). Family Court had issued a temporary custody order in favor of the father; at or about the time of the father's January 2015 petition, the mother lived in NY and the father lived

in NC. In late 2016, the father and child moved from NC to FL. The Second Department affirmed, noting that the child has had no significant connection to NY since 2015 and since 2016, the substantial, relevant evidence pertaining to the child's "care, protection, education, and personal relationships is in Florida, not New York" and that the mother's use of excessive corporal punishment on the child, which precipitated the father's modification petition and the child's moves to NC and FL, weigh in favor of NY declining jurisdiction, citing DRL 76-f(2) (a).

#### **Custody - Visitation - Willful Violation**

In Matter of Harley K. v. Brittany J., 2020 Westlaw 7062110 (3d Dept. Dec. 3, 2020), the mother appealed from a July 2019 Family Court order which, after a hearing, granted the father's February 2019 petition to hold her in willful violation of a May 2018 order; granted her sole legal and physical custody of their daughter born in 2014; provided the father with two set weekdays and alternate weekends; and directed that the father shall ensure that the parties' daughter was not left alone with his girlfriend's son. The Third Department affirmed, noting that the mother did not dispute that she refused to allow the father's visitation with their daughter from late December 2018 through the filing of his petition in February 2019, based upon her allegation that he had violated the provision regarding his girlfriend's son. Family Court stated that "the mother took it upon herself to violate the

prior order even though a court-ordered investigation by Child Protective Services came back as unfounded" and found the mother in contempt because she "engaged in self-help." The Appellate Division concluded by noting that Family Court imposed no sanction upon the mother, instead warning her that she could be incarcerated for future violations.

### **Divorce - Adultery - Counterclaim Dismissed**

In *Agulnick v. Agulnick*, 2020 Westlaw 7234017 (2d Dept. Dec. 9, 2020), the husband appealed from an April 2019 Supreme Court order which, in his October 2018 divorce action, denied his motion for summary judgment dismissing the wife's adultery counterclaim. The parties were married in 2004. Adultery was of significance in this case, given the terms of the parties' September 2006 post-nuptial agreement, which contained his admission of prior infidelity and which provided that if he committed further adultery, the wife would receive 80% of his future lifetime earnings and 80% of all marital assets. The Second Department reversed, on the law, and granted the husband's motion for summary judgment dismissing the wife's counterclaim. The Appellate Division held that the wife's theory was based upon the husband's opportunity to commit adultery with a babysitter who was in the marital home and on vacations on an overnight basis, and who attended social events. The Second Department reasoned that: the wife's focus upon the husband's opportunity to commit adultery

"amounts to [his] mere proximity to [the babysitter] at various times and places"; "[t]here is no investigator, no photograph, and no suspicious documents, texts, emails or social media posts"; and "the wife's opposition to summary judgment amounts to mere unilateral speculation, conjecture, guess, and surmise stemming from the husband's and [the baby sitter's] mere proximity to one another, without anything more."

#### **Enforcement - Foreign Money Judgment (England)**

In *Akhmedova v. Akhmedova*, 2020 Westlaw 7502507 (1<sup>st</sup> Dept. Dec. 22, 2020), the husband appealed from a January 2020 Supreme Court order, which granted the wife's motion for summary judgment in lieu of complaint in an action seeking recognition and enforcement pursuant to CPLR Article 53 of 2016 and 2018 money judgments granted to her by the English High Court of Justice. The First Department affirmed, rejecting the husband's arguments that the action should be dismissed because he is not subject to personal or in rem NY jurisdiction and upon certain statutory defenses, and holding that the action may proceed even in the absence of personal or in rem jurisdiction and that the husband did not establish any of his defenses under CPLR 5304(a)(1), (b)(4), or (b)(5).

#### **Enforcement - Jail Sentence Reversed Where Arrears Paid**

In *Matter of Rondeau v. Jerome*, 2020 Westlaw 7647902 (3d Dept. Dec. 24, 2020), the father appealed from a July 2019 Family Court

order, which committed him for 90 days for a willful violation of an August 2013 order directing him to pay \$63 per week for child support for a child born in 2008. At the June 2019 confirmation hearing, the father was prepared to pay the outstanding arrears (\$1,403) in full, but Family Court found that the father's failure to abide by a judicial mandate was nevertheless deserving of punishment. The Third Department reversed, on the law and vacated the sentence, holding that a sentence may continue only until the offender, if able, complies with the support order (FCA 156, Judiciary Law 774[1]), and Family Court therefore "abused its discretion when it issued the order of commitment."

**Equitable Distribution - Business Valuation-Date of Commencement;  
Failure of Proof; Marital Debt Defined**

In *Izhaky v. Izhaky*, 2020 Westlaw 7502277 (1<sup>st</sup> Dept. Dec. 22, 2020), both parties appealed from a July 2019 Supreme Court order following a September 2017 Referee report. The First Department affirmed, rejecting the wife's contention that she did not consent to certain loans found to be marital debt, where she cited no contemporaneous proof, and noted that despite her argument that she did not benefit from loan proceeds, the same were used to support one or more marital businesses and she "does not try to argue" that the businesses did not support the family. As to a mortgage, the Appellate Division noted that the wife agreed to the same in exchange for keeping her dental practice and office space

and that she therefore benefited therefrom. The First Department found that the wife does not dispute that she had the burden of proof on the value of the husband's business, but held that while the business should be valued as of date of commencement as an active asset, the wife failed to meet her burden of proof by merely producing loan applications containing the husband's certified statements of value, where those applications "pre-dated the commencement of this action by years" and were therefore "not viable proof of value."

#### **Equitable Distribution - Credit for Down Payment**

In *Li v. Lin*, 2020 Westlaw 7502131 (1<sup>st</sup> Dept. Dec. 22, 2020), the wife appealed from a February 2019 Supreme Court order which, among other things, following a hearing before a referee, confirmed the recommendation to grant the husband a \$200,000 credit for the down payment toward the \$620,000 purchase of the marital residence in 2009. The First Department affirmed, holding that the wife failed to articulate a reason to disturb the referee's credibility determination, which accepted the husband's testimony about the sources of funds for the down payment.

#### **Family Offense - Aggravated Harassment 2d, Assault 3d, Harassment 2d - Found; 5-Year Order and Aggravating Circumstances**

In *Matter of Kalyan v. Trasybule*, 2020 Westlaw 7233566 (2d Dept. Dec. 9, 2020), the respondent, petitioner's ex-boyfriend, appealed from a July 2019 5-year order of protection issued after

a hearing, which found that he committed aggravated harassment 2d, assault 3d and harassment 2d, and the existence of aggravating circumstances. The Second Department affirmed, noting that the evidence established that respondent went to petitioner's home, where he caused her physical injury, namely, swelling to her face lasting over a week, a bloody nose and injuries which made it painful for her to move, as well as the presence of aggravating circumstances as defined by FCA 827(a)(vii).

**Pendente Lite - Custody - Decision-Making; Order of Protection - Influence of Alcohol**

In *Agulnick v. Agulnick*, 2020 Westlaw 7234025 (2d Dept. Dec. 9, 2020), the husband appealed from: (1) a January 2019 Supreme Court order which, after a hearing in his October 2018 divorce action, directed that the parents have temporary joint legal custody of their children, now ages 14, 10 and 4 and the wife have unsupervised access; and (2) a December 2018 order of protection directing the wife to stay away from him and the children only while she was under the influence of alcohol. The Second Department modified the January 2019 order on the facts, by directing that if the parties are unable to agree upon any medical, educational or therapeutic issue involving any of the children, after consulting in good faith, the father shall have final decision-making authority, and affirmed the order of protection, holding that Supreme Court's directives were supported by the circumstances of

the case (unspecified).