## **NYSBA FAMILY LAW SECTION, MATRIMONIAL UPDATE, June 2021**

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## **Agreements - Postnuptial – Interpretation**

## In Savignano v. Savignano, 2021 Westlaw 1773820 (2d Dept. May 5, 2021), the wife in her September 2013 separation action, in which the husband counterclaimed for divorce in April 2017, appealed from a September 2018 Supreme Court judgment, which upheld the terms of a June 2009 postnuptial agreement. The parties were married in 2007 and have 3 children born between 2009 and 2013. The Second Department affirmed, holding that although the commencement of a separation action does not serve to end the acquisition of marital property under DRL 236, the parties in their postnuptial agreement elected to “contract out of the [legislative] system of marital property” and included the commencement of a separation action among its defined “separation events,” thus limiting the wife’s rights thereunder to accruals as of that date. The Appellate Division upheld so much of the judgment as limited the husband’s CSSA obligations to a maximum income of $300,000, and denied the wife a housing allowance, inasmuch as a temporary order of protection excluded her from the residence in which the husband was residing with the children, such that she could not qualify as residential custodian of the children, which would have triggered the housing allowance.

## **Child Support - CSSA – Income – Most Recent Tax Returns; Non-Income Producing Property**

##  In Hint v. Hint, 193 AD3d 1340 (4th Dept. Apr. 30, 2021), the husband appealed from an October 2019 Supreme Court order which, among other things, directed him to pay child support based upon imputed annual income of $54,995. The Fourth Department affirmed, holding that “Supreme Court did not abuse its discretion in considering his gross income as ‘reported in the most recent federal income tax return’ (citation omitted) and the husband’s non-income producing real property holdings (citation omitted) which consist of three homes on significant acreage with a total value of nearly $300,000.”

## **Child Support - UIFSA & FFCSOA – No NY Jurisdiction to Modify FL Judgment**

##  In Matter of Nassau County DSS v. Ablog, 2021 Westlaw 1899886 (2d Dept. May 12, 2021), the father, a Florida resident, appealed from a March 2020 Family Court order denying his objection to a January 2020 Support Magistrate order which, after a hearing, directed him to pay $144 per week in child support to DSS for his daughter born in September 2000, who was emancipated under the terms of a Florida judgment of divorce. The Second Department reversed, on the law, granted the father’s objection, vacated the support order and dismissed the petition. The Appellate Division held that “under the plain language of the federal statute [28 USC 1738(b)(8)], the New York order of support is a ‘modification’ of the Florida judgment,” given that it “was made subsequent to the Florida judgment and changed, among other things, the duration of the initial order by extending it beyond the time that the daughter had turned 18 years old and completed high school,” noting further that since the father still resides in Florida, that state retains continuing exclusive jurisdiction, citing Matter of Spencer v. Spencer, 10 NY3d 60 (2008).

## **Custody - Bias Claim Unpreserved; In Camera – Denied – Child’s Distress**

##  In Matter of Mary Ellen H. v. Joseph H., 193 AD3d 1275 (3d Dept. Apr. 29, 2021), the father appealed from a March 2019 Family Court order, which granted the mother’s September 2017 petition to modify an August 2014 consent order (providing her with sole legal custody and the parties with equally shared physical custody during alternate weeks of their children born in 2001 and 2005), by awarding her sole legal and physical custody with alternate weekends and other time to the father. Noting that the appeal is moot as to the older child, who turned 18 in 2019, the Third Department affirmed, holding that the father’s claims that Family Court was biased against him based upon his sexual orientation and religious beliefs were “unpreserved for appellate review, as the father failed to move for a recusal during the hearing.” The father requested a *Lincoln* hearing and Family Court denied the same and agreed with the AFC, who stated that the same would put “added strain on [the younger child], who’s already been destroyed by the battling of these parents.” The Appellate Division upheld Family Court’s decision to not conduct an in camera examination where “the record reflects that the hearing itself may do more harm than good.”

## **Custody - Decision Making – Split Zones Reversed**

## In Matter of Scott W. v. Krizzia G., 143 NYS3d 202 (1st Dept. May 4, 2021), the father appealed from a December 2019 Family Court order, which granted the mother physical custody of their child and sole decision-making authority over education and sole decision making authority over medical and dental care to him. The First Department modified, on the facts, by vacating the decision-making awarded to the father and granting the same to the mother, holding that given “the child’s substantial and continuing behavioral issues in school and the resulting overlap between education and medical issues, it makes better sense to have the mother in charge of both areas.” The Appellate Division concluded that the physical custody award to the mother was proper, since she has always been the primary caretaker except for a brief period in 2017.

## **Custody - Modification – Relocation – Oneida County to Herkimer County**

##  In Matter of Menard v. Roberts, 143 NYS3d 653 (4th Dept. May 7, 2021), the father appealed from an October 2019 Family Court order, which determined that the mother violated a prior order by relocating with the child to Herkimer County without a court order or his written consent, but that such violation was not willful, and modified the prior order by permitting the mother and child to continue to reside in Herkimer County. The Fourth Department affirmed, finding that the mother offered to give residential custody to the father so that the child could remain in Oneida County, but he refused. The Court noted that the father thereafter verbally consented to the mother’s move to Herkimer County, but 6 months later, the father filed a violation petition and a modification petition. The Appellate Division found that since the father filed for modification, he could not be aggrieved by Family Court’s finding that he met his burden of changed circumstances, and concluded that the child’s best interests were served by remaining with the mother in Herkimer County.

## **Custody - Modification – School District Imposed; Sua Sponte – Painted Confederate Flag Removal “Suggested”**

##  In Matter of Christie BB. v. Isaiah CC., 2021 Westlaw 1795373 (3d Dept. May 6, 2021), the father appealed from an October 2018 Family Court order which partially granted the mother’s petition to modify a July 2017 stipulated order providing for joint legal and equally shared physical custody of their daughter born in 2014, which although it continued joint legal custody and the alternating week sharing, directed that the mother’s home shall be considered the child’s primary residence for the purpose of schooling. The Third Department modified, on the law, by directing that the child shall attend school in the Dryden Central School District until further court order or a mutual agreement between the parties. The Court concluded: “Finally, although not addressed by Family Court or the attorney for the child, the mother’s testimony at the hearing, as well as an exhibit admitted into evidence, reveal that she has a small confederate flag painted on a rock near her driveway. Given that the child is of mixed race, it would seem apparent that the presence of the flag is not in the child’s best interests \*\*\*, [and] if it is not removed by June 1, 2021, its continued presence shall constitute a change in circumstances and Family Court shall factor this into any future best interests analysis.”

## **Family Offense - Harassment 2d – Course of Conduct Found; Violation of Order of Protection**

##  In Matter of Marvin I. v. Raymond I., 193 AD3d 1279 (3d Dept. Apr. 29, 2021), the paternal grandfather appealed from May and June 2019 Family Court orders which, following a hearing, found that he committed harassment 2d against his son and violated an August 2018 stay away order of protection issued in favor of petitioner paternal grandmother and the 3 grandchildren born in 2007, 2008 and 2016. The Third Department affirmed. The hearing evidence established that while the father was traveling on a dead-end road toward a nearby lake, with his wife and children as passengers, the grandfather and his friend first pursued the father down the road in their vehicles and then used their respective trucks to block both lanes of travel and the father’s means of egress after he had turned around to drive away from the lake. The father exited his vehicle and walked to his father’s truck, whereupon the grandfather merely smiled and placed his hand upon a rifle next to him. As the father started to take photographs, the grandfather quickly reversed his vehicle and the father had to move out of his way twice to avoid being hit. The Third Department affirmed, holding that the grandfather committed harassment 2d by engaging in a course of conduct that served no other purpose than to harass and intimidate his son, and violated the stay away order of protection.

## **Pendente Lite - Counsel Fees – Increased on Appeal**

##  In Tomassetti v. Tomassetti, 143 NYS3d 617 (2d Dept. May 12, 2021), the wife appealed from an October 2018 Supreme Court order which granted her August 2018 motion seeking additional interim counsel fees of $376,524, only to the extent of awarding her $165,000. The wife commenced the action in 2017 and Supreme Court had awarded her $200,000 in counsel fees in April 2018. The Second Department modified, on the facts and in the exercise of discretion, by increasing the counsel fee award to $370,000, noting the “significant disparity between the financial circumstances of the defendant – a real estate investor and developer with considerable disposable income and a net worth approaching $200 million – and those of plaintiff cannot be seriously disputed.” In a separate appeal decided the same day, 143 NYS3d 613, the Appellate Division affirmed Supreme Court’s order made a year later, in October 2019, which granted the wife’s April 2019 motion for counsel fees of $461,914 to the extent of awarding her $460,000.

## **Pendente Lite - Counsel Fees and Maintenance – Denied**

##  In Steinberg v. Steinberg, 2021 Westlaw 2005362 (1st Dept. May 20, 2021), the husband appealed from a January 2020 Supreme Court order, which denied his motion for temporary unallocated tax-free support and counsel fees. The First Department affirmed, holding that Supreme Court properly determined that the husband failed to demonstrate exigent circumstances warranting a modification of the pendente lite award and made no showing that he is unable to meet his financial obligations. The Appellate Division noted that: the husband has substantial liquid assets and the proven ability to earn significant income ($3.4 million on the parties’ 2017 income tax return); the wife already bears the family’s expenses of more than $200,000 per month, which has continued the marital standard of living without adverse effects upon the 4 children; the husband continues to live at no cost in the marital residences during his custodial time under the parties’ “nesting arrangement”; and the husband has a separate rental apartment paid for by the wife. The First Department rejected the husband’s argument that Supreme Court’s denial of additional support and an award of counsel fees requires him to spend down his finite assets, finding that he did not demonstrate that his assets were indeed finite, while noting that the husband was 33 years old as of the time of the commencement of the action, has an MBA from Stanford and proven experience in investment management.

## **Legislative Items**

## **Equitable Distribution – Companion Animals**

##  Passed by both houses as of May 20, 2021, and if signed, this legislation would immediately amend DRL 236(B)(5)(d) to add a new factor 15 to the determination of an equitable disposition of property: “in awarding the possession of a companion animal, the court shall consider the best interest of such animal.” The term “companion animal” is defined to have the same meaning as in Agriculture and Markets Law 350(5). A05775/S04248.