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

## By Bruce J. Wagner

Whiteman Osterman & Hanna LLP, Albany

## **Agreements -** **Set Aside – Plenary Action Needed**

In Jagassar v. Deonarine, 2021 Westlaw 359472 (2d Dept. Feb. 3, 2021), the former wife (wife) appealed from a September 2018 Supreme Court order, which denied her motion to enforce an October 2014 stipulation incorporated into a May 2015 judgment of divorce and granted the former husband’s (husband’s) cross motion to vacate the equitable distribution and maintenance provisions thereof. The Second Department reversed, on the law, denied the husband’s cross motion and remitted to Supreme Court for a new determination of the wife’s motion, holding that a plenary action was required for the husband’s set aside claim, where, as here, none of the exceptions applied: reformation to conform the agreement to the parties’ intent; the matrimonial action is still pending; or in certain circumstances seeking enforcement of child support.

## **Child Support - Modification – Denied – Imputed Income from Family Support**

In Matter of Nannan L. v. Stephen L., 2021 Westlaw 559146 (1st Dept. Feb. 16, 2021), the father appealed from a February 2020 Family Court order, which denied his objection to a November 2019 Support Magistrate Order dismissing his petition for downward modification of child support. The First Department affirmed, holding that “[t]he Support Magistrate properly imputed income to the father based on cash and in-kind support provided by his family, both prior to and after the filing of the petition,” citing FCA 413(1)(b)(5)(iv)(D), “including payment for various in-patient drug treatment programs, medical and dental care, and other expenses.” The Appellate Division noted that the father sold gifted securities to purchase real property and then sold the property after he filed his petition and placed the proceeds in a trust, and that his family paid his rent for a 2-bedroom Upper West Side apartment and provided a substantial monthly stipend.

## **Custody - AFC Required**

## In Matter of Weilert v. Weilert, 2021 Westlaw 481217 (2d Dept. Feb. 10, 2021), the mother appealed from a March 2019 Family Court order which, after a hearing, denied the mother’s August 2018 petition to modify a May 2013 order awarding the father sole legal and residential custody of the parties’ 3 children ranging in ages from 12 to 16 at the time of the hearing. The mother failed to raise her contention that an AFC be appointed before Family Court, but the Appellate Division reached the issue in the interest of justice. The Second Department reversed, on the facts and in the exercise of discretion, and remitted to Family Court for the appointment of an AFC, a hearing and a new determination of the mother’s modification petition. The Court held that the appointment of an AFC is “the strongly preferred practice” and in this case, Family Court improvidently exercised its discretion by declining to appoint an AFC, given “the antagonistic nature of the parties’ relationship, and the parties’ conflicting assertions regarding each other’s conduct.”

## **Custody - Modification – Contact with Father’s Fiancée**

## In Matter of Jeremy EE. v. Stephanie EE., 2021 Westlaw 624253 (3d Dept. Feb. 18, 2021), the mother appealed from a July 2019 Family Court order, which partially granted the father’s October 2018 petition to modify an April 2018 stipulation incorporated into an order (sole legal and primary physical custody of a daughter born in 2014 to the mother, father’s fiancée barred from his parenting time), by increasing his time with the child and permitting his fiancée’ to be present, but providing that she not be left alone with the child and that only the father was permitted to discipline the child. The Third Department affirmed, noting that despite a 2015 indicated CPS report against the fiancée pertaining to her then stepdaughter, Family Court’s order contained reasonable provisions to protect the child.

## **Custody - Modification – Mother’s Relocation (FL)**

## In Matter of Antonio MM. v. Tara NN., 2021 Westlaw 726899 (3d Dept. Feb. 25, 2021), the mother appealed from a March 2019 Family Court order, which granted the father’s January 2019 petition to modify a June 2018 order (joint legal and shared physical custody in alternate weeks of a child born in 2013) by granting him primary physical custody with parenting time to the mother on specified dates each month. The Third Department affirmed, noting that the mother’s decision to relocate to Florida at the end of June 2018 rendered the June 2018 order unworkable, provided the requisite change in circumstances and that Family Court’s modification was in the best interests of the child.

## **Custody - Third Party – Grandparent Custody**

## In Matter of Tomlinson v. Horton, 138 NYS3d 422 (4th Dept. Feb. 11, 2021), the father appealed from a June 2019 Family Court order, which awarded sole custody of the subject 11-year-old child to the maternal grandparents. The Fourth Department affirmed, noting that the father’s imprisonment for 8 years prior to the filing of the petition provided the requisite extraordinary circumstances. The Appellate Division found that the grandparents have given the child a loving and stable home environment since birth and have provided “for the special therapeutic needs arising from the child’s \*\*\* autism and attention deficit hyperactivity disorder.”

## **Custody - Third Party – Maternal Great Aunt Custody**

## In Matter of Michael P. v. Joyce A., 2021 Westlaw 726863 (3d Dept. Feb, 25, 2021), the father appealed from a May 2019 Family Court order, which granted the maternal great aunt’s 2017 petition to modify a May 2016 order (joint legal custody to father and aunt, physical placement to aunt) by awarding her sole custody, with visitation to the father. The Third Department affirmed, holding that extraordinary circumstances included concerns with the father’s mental health, the father’s failure to address the child’s special needs, and the child’s residence with the aunt since birth. As to best interests, the Appellate Division found that the aunt “has completely devoted her home to the subject child” and that the father “does not understand the scope of the child’s autism diagnosis and sensory disorders.”

## **Custody - UCCJEA – Communication with Other Court; Family Offense – NY Jurisdiction**

## In Matter of Vashon H. v. Bret L., 2021 Westlaw 624233 (3d Dept. Feb. 18, 2021), the mother appealed from June 2019 Family Court orders, which dismissed her February 2019 custody and family offense petitions upon the ground of lack of jurisdiction. The parties’ child was born in NY in 2017. The mother alleged that she and the child reside in NY and travel to OH and the father lives in OH. The father filed a custody petition in OH in July 2018 and a June 2019 Order of the OH court stated that the proceeding was scheduled for an August 2019 trial. The Third Department reversed, on the law, and remitted to Family Court for further proceedings. The Appellate Division held that while Family Court communicated with the OH court, its “brief summary of its determination following the communication, which was not placed on the record in the presence of the parties, does not satisfy this statutory mandate” and Family Court further failed “to allow the parties an opportunity to present facts and legal arguments before it rendered a decision.” The Third Department determined that “Family Court’s jurisdiction extended to cover the subject matter of the family offense petition, regardless of the fact that the vast majority of the alleged acts were committed in Ohio.”

## **Divorce - Ex Parte Foreign Divorce – Statute of Limitations for Equitable Distribution; Tenancy by Entirety Not Severed**

## In Bernhardt v. Schneider, 190 AD3d 919 (2d Dept. Jan. 27, 2021), the former wife (wife) in an October 2016 action seeking partition of the former marital residence following an August 2010 ex parte Virginia divorce decree, appealed from a March 2018 Supreme Court order, which granted the former husband’s (husband) motion to dismiss for failure to state a cause of action pursuant to CPLR 3211(a)(7). The Second Department affirmed, holding that an ex parte foreign divorce decree cannot divest the non-appearing spouse of rights in a New York tenancy by the entirety. Therefore, the Virginia divorce decree did not sever the tenancy by the entirety and an action for partition does not lie. The Appellate Division noted that although the Virginia divorce decree “expressly left equitable distribution unresolved, the [wife] did not thereafter commence an action for equitable distribution in New York within the six-year statute of limitations.”

## **Enforcement - Willful Violation – Voluntary Failure to Collect Pension**

## In Matter of Mary H. v. Cedric R., 137 NYS3d 706 (1st Dept. Feb. 4, 2021), the father appealed from a November 2019 Family Court order, which confirmed the Support Magistrate’s finding of a willful violation of a support order, committed him to 6 months in jail and set a $10,000 purge amount. The First Department dismissed as academic the appeal from the sentence since the period of incarceration has expired, and dismissed the appeal from the willful violation finding, given that the order was made upon the father’s default and he did not move to vacate the default. The Appellate Division noted that the father testified that he was not completely disabled, obtained two jobs since his injury and that he “made a deliberate decision to depress his pension income for four years to pursue a social security disability income claim.” The Court concluded that the father “also testified that he did not entertain the notion to forego the disability case in order to collect the full amount of his pension and pay child support.”

## **Enforcement - Willful Violation – Incarceration Affirmed**

## In Matter of Sasha R. v. Marcus L., 138 NYS3d 319 (1st Dept. Feb. 11, 2021), the father appealed from a January 2020 Family Court order, which found that he willfully violated a child support order and committed him to jail for 6 months unless discharged by a $7,500 purge payment. The First Department affirmed, holding that the father: “failed to present evidence establishing that he made reasonable efforts to obtain gainful employment when he was unemployed or marginally employed”; “admitted that he did not intend to pay child support”; “and provided no documentary support of his inability to pay such support.”

## **Pendente Lite - Child Support and Carrying Charges; Support Collection Unit**

## In Barra v. Barra, 138 NYS3d 377 (2d Dept. Feb. 17, 2021), the parties were married in 2006 and the husband appealed from a December 2019 Supreme Court order, which directed him to pay temporary child support of $2,031.09 per month for the parties’ child through the Support Collection Unit and to pay the wife $1,575.83 per month, representing 50% of the mortgage, taxes and homeowner’s insurance on the marital residence. The Second Department affirmed, rejecting the husband’s argument that Supreme Court erred by applying the CSSA to combined parental income above the then $148,000 cap, and holding that he failed to establish exigent circumstances to justify a reduction of child support, while noting that the Court was not obligated to apply the CSSA when rendering a temporary order. Regarding the carrying charge order the Appellate Division: rejected the husband’s argument “that such payment should have been reduced by the sum the court directed him to pay for pendente lite child support”; reasoned that “[t]he burden of repaying marital debt should be equally shared by the parties, in the absence of any countervailing factors, and any such liability should be distributed in accordance with general equitable distribution principles and factors”; stated that it “is generally the responsibility of both parties to maintain the marital property and keep it in good repair during the pendency of a matrimonial action”; and cited Supreme Court’s intent to preserve the marital residence, when directing the husband to pay his 50% share of such carrying charges, as not being an “improvident exercise of its discretion.” The Court concluded that the directive to pay child support through the Support Collection Unit was appropriate.