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

## **Matrimonial Update**

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## **Agreements - Breach and Fraud Claims – Dismissed**

## In DePalma v. DePalma, 141 NYS3d 694 (1st Dept. Apr. 6, 2021), the ex-wife (wife) appealed from a May 2020 Supreme Court order, which granted the ex-husband’s (husband’s) motion to dismiss her fraud and breach of contract claims against the stipulation incorporated into the parties’ judgment of divorce. The First Department affirmed, finding that the wife was aware, prior to the stipulation, that the husband’s business was involved in a lucrative merger with another company. The Appellate Division noted that the husband’s failure to explicitly disclose his current business interests in the stipulation does not render it void, where the stipulation was fair on its face and the wife had ratified the same by accepting the benefits thereof for 4 years following the divorce before seeking rescission.

## **Agreements - Prenuptial – Arbitration Award Upheld**

## In Matter of Rokeach v. Salamon, 2021 Westlaw 1556222 (2d Dept. Apr. 21, 2021), the wife appealed from: (1) a December 2018 Supreme Court order, which denied her petition to confirm a November 2017 arbitration award and granted the husband’s cross petition to vacate the same; and (2) a February 2019 order which denied her motion for leave to renew her petition to confirm the award. The Second Department reversed, on the law, granted the wife’s petition and denied the husband’s cross petition. The parties’ prenuptial agreement contained an arbitration clause, which provided for submission of disputes to a rabbinical tribunal. The tribunal’s November 2017 award granted the wife $10,000 per month, to be held in escrow until she accepted a Get and directed the husband to arrange for the issuance of a Get by November 20, 2017. The Appellate Division noted that the husband submitted no evidence that he had arranged for the Get to be issued.

## **Child Support - CSSA – Income – Personal Injury Settlement**

## In Matter of Geraghty v. Muniz, 141 NYS3d 883 (2d Dept. Apr. 7, 2021), the mother appealed from a November 2019 Family Court order denying her objections to an August 2019 Support Magistrate Order which, after a hearing upon the father’s petition to modify a prior stipulated child support order ($5 per month due to the mother’s inability to work following a motor vehicle accident), directed her to pay child support of $464 per month for the parties’ 2 children who reside with the father. The Second Department modified, on the law and the facts, by reducing the child support obligation to $452 per month, based upon self-support reserve considerations. The Appellate Division held that the Support Magistrate properly calculated the mother’s income by applying a reasonable rate of return to her entire settlement award. The Court concluded that while the mother had spent a portion of the award, she “cannot insulate such resources ‘from consideration for child support by transforming [them] into … nonincome producing asset[s].’”

## **Child Support - Enforcement – Willful Violation**

## In Matter of Foley v. Dwyer, 192 AD3d 1652 (4th Dept. Mar. 26, 2021), the father appealed from a May 2019 Family Court order denying his objections to a Support Magistrate order, which determined that he willfully violated a child support order. The Fourth Department affirmed, holding that although he “testified that he had no source of income and no assets, he was able to provide for his own food and shelter (citation omitted) even though he had not applied for public assistance since losing his job in 2017.” The Appellate Division found that the father “admitted that he was not physically or mentally incapable of working, and he failed to present evidence that he made reasonable efforts to obtain gainful employment to meet his support obligation.”

## **Custody - Domestic Violence Claim Rejected; In Camera Denied – Child’s Distress**

## In Matter of McFarlane v. Jones, 2021 Westlaw 1556227 (2d Dept. Apr. 21, 2021), the mother appealed from a November 2019 Family Court order which, following an 8-day hearing, granted the father’s February 2018 petition for sole legal and physical custody of the parties’ child born in 2010 and denied her petition seeking the same relief. The Second Department affirmed, finding that the father was better able to promote stability for the child and was more likely to promote a relationship with the other parent. The Appellate Division noted that Family Court “credited the father’s testimony denying that he had committed acts of domestic violence against the mother and rejected the mother’s explanation that these purported incidents of domestic violence were the reason she repeatedly moved and transferred the child to new schools.” The Second Department concluded that “since the child expressed significant distress about attending an in camera interview with the Family Court, the court providently exercised its discretion in declining to proceed with the interview (citation omitted).”

## **Custody - Modification – School Absences**

## In Matter of Myers v. Myers, 192 AD3d 1681 (4th Dept. Mar. 26, 2021), the father appealed from an August 2019 Family Court order, which, after a hearing, dismissed his petition to modify a prior stipulated order of custody (made when the child was 5 years old and before she would have entered kindergarten), for failure to establish a change in circumstances. The Fourth Department reversed, on the law, reinstated the father’s petition and remitted to Family Court for further proceedings. The Appellate Division noted that the evidence included the child’s 3rd grade attendance records showing approximately 30 absences in a school year not then completed, which it found to be “excessive” and enough to establish a change of circumstances sufficient to warrant an inquiry into the child’s best interests.

## **Custody - Third Party – Default Order Vacated**

## In Matter of Melissa F. v. Raymond E., 2021 Westlaw 1216161 (3d Dept. Apr. 1, 2021), the father appealed from, among other things, a July 2019 Family Court order, which denied his motion to vacate a May 2018 order granting custody of a child born in 2011 to the maternal grandparents upon his default in appearance. The child’s mother died unexpectedly in or about August 2017, and less than 2 weeks thereafter, the father signed a handwritten note giving the maternal grandparents “authority to make all decisions regarding any and all medical needs or educational needs from this day forward.” In September 2017, the grandparents filed for temporary custody to get the child enrolled in school, obtain medical attention if needed and to have stability. The father failed to attend the September 2017 initial appearance and Family Court, without a hearing, issued an oral decision granting the grandparents permanent custody and entered an order upon such default in May 2018. The Third Department reversed, on the law, granted the father’s motion, and remitted for further proceedings, holding that Family Court abused its discretion in denying the father’s motion to vacate his default and in failing to hold a hearing to determine whether extraordinary circumstances existed in September 2017 and if so, whether an award of custody to the grandparents was in the child’s best interests. The Appellate Division left the provisions of the May 2018 order in effect on a temporary basis, pending further proceedings.

## **Counsel Fees – After Trial; Equitable Distribution –** **Prior Discontinued Action and Separation – No Marital Property Cut-Off**

## In Potvin v. Potvin, 2021 Westlaw 1556056 (2d Dept. Apr. 21, 2021), the husband appealed from a December 2017 Supreme Court judgment rendered upon a November 2017 decision after trial of the wife’s July 2015 action for separation, in which he counterclaimed for divorce, and which, among other things, denied his claim for counsel fees and found that the parties ceased any economic partnership upon their 1991 separation. The wife commenced a prior action for divorce in 1996, which she discontinued in 1998. The parties were married in 1974 and have 2 adult children. The husband moved back into the marital residence after the wife discontinued her 1996 action. The wife alleged that the parties had an oral agreement which provided they were not reconciling and that they were waiving each other’s assets, which claim the husband denied. The Second Department modified, on the law, on the facts and in the exercise of discretion, by deleting the equitable distribution provisions of the judgment and the direction that each party pay his and her own counsel fees, and remitting to Supreme Court for new determinations. The Appellate Division found that the parties: resided together from 1998 to 2015; during that time visited relatives, attended social functions and went on vacations together; periodically engaged in sexual relations; maintained separate bank accounts and credit cards, but filed joint tax returns and shared many family expenses, including the children’s college costs and home renovations; named each other as executors and beneficiaries in their wills; and had no DRL 236(B)(3) agreement to either keep their finances separate or to divide property in any particular manner. The alleged oral agreement did not qualify as a proper opt-out under DRL 236(B)(3). As to counsel fees, the Second Department found that the wife did not rebut the presumption that she was the monied spouse.

## **Maintenance - Durational – Advisory Schedule; Needs & Ability to Pay; Statutory Factors**

## In Gutierrez v. Gutierrez, 2021 Westlaw 1711367 (4th Dept. Apr. 30, 2021), the husband appealed from a March 2020 Supreme Court judgment, which directed him to pay the wife maintenance of $750 per week for 17 years. The husband contended that Supreme Court erred in awarding maintenance for a period of time greater than recommended by the advisory schedule set forth in DRL 236(B)(6)(f)(1)[recommended time not specified], without adequately considering the statutory factors enumerated in DRL 236(B)(6)(e). The Fourth Department agreed, modified on the law, and remitted to Supreme Court “to determine the amount and duration of maintenance, if any, after setting forth all relevant factors that it considered in making its decision.” Supreme Court’s decision awarded “an amount deviating from the statutory guidelines [guidelines amount not specified] – for a duration in excess of the statutory guidelines based on the length of the marriage, the parties’ disproportionate earning capacities, and defendant’s [the husband’s] tax debt.” The Appellate Division noted that: a decision upon maintenance must “reflect an appropriate balancing of [the wife’s] needs and [the husband’s] ability to pay”; “the length of the parties’ marriage is not a factor enumerated in section 236(B)(6)(e)”; “the court did not state what factors it considered, in addition to actual earnings, in determining the parties’ earning capacities”; and “the court did not determine whether defendant’s substantial tax debt would impede his ability to pay plaintiff’s maintenance award.”

## **Procedure - Appeal Dismissed – Appellant Not Aggrieved**

## In Youngwall v. Youngwall, 2021 Westlaw 1395688 (2d Dept. Apr. 14, 2021), the attorney for the wife appealed from a November 2018 Supreme Court order, which granted the wife’s motion seeking temporary counsel fees of $350,000 only to the extent of awarding her $35,000, payable to the attorney. The Second Department dismissed the attorney’s appeal, holding that the attorney “did not seek any relief in Supreme Court that was denied in whole or in part” and could therefore not be aggrieved by the order within the meaning of CPLR 5511.

## **Procedure - Sanctions – Sua Sponte – Reversed**

## In Melohn v. Melohn, 2021 Westlaw 1414237 (1st Dept. Apr. 15, 2021), the husband appealed from an October 2019 Supreme Court order which, sua sponte, imposed a $10,000 sanction upon each party. The First Department reversed, on the law, and remitted to Supreme Court for further proceedings “to give the parties an opportunity to be heard on the issue of sanctions.” The parties had appeared before Supreme Court in October 2019 upon an application for an interim stay of an ongoing trial arising from a disputed arbitration agreement. The Appellate Division noted that Supreme Court “raised valid concerns about whether the parties were wasting valuable court time, when after multiple days of trial had been completed they put before the court a disputed agreement to arbitrate the very issues that were being addressed at trial,” but did not give the parties “a reasonable opportunity to address the court’s concerns.”