## **NYSBA FAMILY LAW SECTION UPDATE – AUGUST 2022**

## **By: Bruce J. Wagner, Support Magistrate, Schenectady & Montgomery County Family Courts**

## ***WISHING A HAPPY 42ND BIRTHDAY TO THE EQUITABLE DISTRIBUTION LAW, EFFECTIVE JULY 19, 1980****.*

## **Matrimonial and Family Law Update**

## **Agreements - Pension – Court’s Addition of Military Service Reversed**

## In Gay v. Gay, 2022 Westlaw 2586496 (4th Dept. July 8, 2022), the husband appealed, by permission, from a June 2021 DRO which, despite an oral stipulation stating that the numerator of the Majauskas fraction was the 253 months of his police service, added an additional 36 months to the numerator attributable to his purchase of 3 additional years of credit for military service. The Fourth Department reversed, on the law, and remitted to Supreme Court for entry of an amended DRO, holding that “the stipulation unambiguously contemplates including no more than plaintiff’s police service credit during the marriage as the numerator of the *Majauskas* formula and does not contemplate the inclusion of any additional service credits” and that “the parties were fully aware that plaintiff had previously purchased additional years of credit for military service” and made no mention of including that credit in the numerator, such that Supreme Court erred in deviating from the parties’ stipulation.

## **Agreements - Set Aside – Duress – Complaint Reinstated; Ratification Defense**

## In Nagi v. Ahmed, 2022 Westlaw 2582390 (4th Dept. July 8, 2022), the wife appealed from a September 2021 Supreme Court order, which granted the husband’s motion to dismiss her complaint seeking to vacate in part, a 2018 divorce judgment and to set aside the parties’ incorporated agreement, upon allegations that she signed the agreement due to “extraordinary duress and pressure” exerted on her by the husband, such that the same is so favorable to the husband as to render it unconscionable and unenforceable. The husband’s motion sought dismissal upon the grounds of collateral estoppel and/or res judicata, based upon a motion the wife had filed in July 2018, seeking to modify certain provisions of the agreement, and upon the ground of ratification. Supreme Court dismissed the complaint based upon collateral estoppel and did not address the issue of ratification. The Fourth Department reversed, on the law, denied the husband’s motion and reinstated the wife’s complaint. The Appellate Division held that collateral estoppel did not apply because the issues in the July 2018 motion and in the plenary action were not identical. As to res judicata, the Fourth Department rejected this defense, because the wife could not have pursued the claims in her complaint in the July 2018 motion, given that a party seeking to set aside an agreement must do so in a plenary action. The Court concluded that the defense of ratification is not available, where, as is here the case, “a divorce settlement tainted by duress is void *ab initio* (citation omitted), not merely voidable, and is, therefore, not subject to ratification by the mere passage of time” (citation omitted). The Appellate Division noted that: despite a long-term marriage, the wife was unemployed at the time of divorce and received no maintenance; and in return for her share of two family businesses and an unencumbered marital residence valued at $149,000, she received a $15,000 lump sum payment and a seven-year old car.

## **Child Support – CSSA – Over Cap; Maintenance - Affirmed; Imputed Income – Averaging; Medical Testimony Not Required**

## In Anastasi v. Anastasi, 2022 Westlaw 2582269 (4th Dept. July 8, 2022), the husband appealed from a March 2021 Supreme Court judgment, which awarded maintenance (amount and duration not specified), imputed income to him and applied the CSSA to combined parental income in excess of the statutory cap. (The child support amount, cap amount and combined parental income were not specified, although the cap was likely $154,000, given a March 2021 judgment). The Fourth Department affirmed, holding that the record supports Supreme Court’s determination that the wife was unable to work to support herself financially, now or at any point in the future, noting that the wife “testified concerning her diagnosis of multiple sclerosis and its debilitating effects, and submitted voluminous medical records corroborating her testimony.” The Appellate Division noted that the husband “never disputed [the wife’s] diagnosis and medical condition” and the wife was therefore “not required to call an expert medical witness at trial to establish her inability to work.” The Fourth Department determined that Supreme Court properly considered the factors required by former DRL 236(B)(6)(a), including that the wife “has not worked outside the home since 1998 and that the parties enjoyed a lifestyle commensurate with a substantial income during the marriage.” Regarding imputed income, the Appellate Division approved Supreme Court’s determination, “which included averaging the last eight years of self-reported income from the business that [the husband] ran with his brother, as well as taking into account that the profitable business paid for many items for defendant, such as a motor vehicle, meals and country club membership.” As to the CSSA cap, the Fourth Department upheld Supreme Court’s determination that application thereof would be “inequitable, because it would not afford the child the same standard of living that the child would have enjoyed had the marriage not been dissolved.” The Appellate Division concluded that Supreme Court’s application of the CSSA “to an income level \*\*\* above the statutory cap but below the income imputed to him for \*\*\* maintenance is supported by the record.”

## **Child Support - Modification – Changed Circumstances; Imputed Income – Expenses Paid by Business; No Imputation from Law and Master’s Degrees**

## In Yezzi v. Small, 206 AD3d 1472 (3d Dept. June 30, 2022), the husband appealed from a December 2019 Supreme Court order, which granted the wife’s motion to modify the child support terms of a judgment of divorce and an incorporated 2012 agreement, based upon a 2018 reduction of the father’s time with the children from equally shared physical to 2 days per week. Supreme Court found the father’s income to be $170,014, despite the father’s contention that he earned $9,162 per year from his farm business. Supreme Court attributed $34,309 to the father from personal expenses paid by his business, plus $73,705 representing his draw from the business, plus $12,000 in rent he could have received from his aunt who lived rent free in an apartment located upon the farm premises, for a total of $120,014. Supreme Court imputed an additional $50,000 in income to the father representing his earning potential from his law and master’s degrees, to arrive at the total of $170,014. The Appellate Division upheld the $120,014 in imputed income, but rejected the $50,000 based upon the degrees, finding that: the father “had never practiced law, and the last time he held a job that was directly related to his Master’s degree was in 2004”; the record “was devoid of any evidence providing a basis for Supreme Court’s finding that the father could earn $50,000 by entering the job market with these advanced degrees”; the father was not obligated to utilize his degrees “when, as here, [he] was pursuing a plausible means of support” by running his farm business. As to counsel fees, even though the father did not file any opposition to the mother’s application, the Third Department reviewed the issue in the interest of justice, and determined that “Supreme Court improvidently exercised its discretion in awarding the mother counsel fees in the sum of $50,000” and remitted for a hearing on that issue.

## **Child Support - Modification – Dismissed Without a Hearing**

## In Matter of Jean-Baptiste v. Jean-Baptiste, 2022 Westlaw 2823478 (2d Dept. July 20, 2022), the father appealed from a September 2021 Family Court order denying his objections to an August 2021 Support Magistrate Order which, without a hearing, dismissed his December 2020 petition to modify the provisions of a 2017 judgment of divorce, which required him to pay $973 per month toward the support of the parties’ 3 children. The father alleged as a substantial change in circumstances his loss of work as a result of a lack of business. The Second Department affirmed, holding that the father “failed to establish a prima facie case warranting a hearing.” The Appellate Division noted: “the father failed to make any allegations or provide any evidence that after he lost work due to the effects of the COVID-19 pandemic on the economy, he engaged in ‘diligent attempts to secure employment commensurate with his … education, ability and experience’”; “[n]or did he make allegations or provide evidence to demonstrate, prima facie, that his knee injury prevented him from working.”

## **Custody - Modification – School Choice**

## In Matter of McCall v. McCandlish, 2022 Westlaw 2962601 (2d Dept. July 27, 2022), the father appealed from an August 2021 Family Court order, which, after a hearing, granted so much of the mother’s May 2021 petition to modify a June 2016 Pennsylvania order, so as to provide that the parties’ children shall attend the Mattituck School District for 7th and 8th grades. The Pennsylvania order granted the parties joint legal custody and provided that the parties were to jointly agree upon a private school starting in 6th grade. The father had proposed the children attend Peconic Community School, which had previously offered classes through 6th grade, but Family Court found that there was no evidence that said school has an 8th grade class, and if the children were enrolled thereat for 6th grade, they might have to change schools again for either 7th or 8th grade. Family Court further determined that the only private high schools in the region would require approximately an hour of travel to get to school, while noting that the father raised no specific concerns regarding the Mattituck schools. The Second Department affirmed, holding that Family Court’s order was proper.

## **Custody - Modification – Supervision Based on Sexual Abuse Allegations (30 years ago) is Error; *Lincoln* Hearing is Best Practice**

## In Matter of Benjamin V. v. Shantika W., 2022 Westlaw 2975539 (3d Dept. July 28, 2022), the father appealed from a September 2021 Family Court order which, “following a lengthy, virtual fact-finding hearing that concluded in June 2021,” among other things, dismissed his September 2019 and July 2020 petitions to modify a July 2017 Family Court consent order (joint legal custody, primary to mother, alternate weekends to father) and limited him to 6 hours of bi-weekly supervised time with the children in Pennsylvania, where the mother resides. The Third Department modified, on the law, by reversing the provisions regarding supervised time to the father, and remitted to Family Court. The Appellate Division noted that the limited and supervised time to the father “was based entirely on the sexual abuse allegations made against the father by his niece, which occurred nearly 30 years ago [when he was a teenager and the niece was under 10 years old].” The Third Department found that “there was no evidence establishing that the father had any inappropriate sexual contact with either of the children \*\*\* [or] that the father had engaged in or been accused of engaging in sexual misconduct toward the children’s half siblings, both of whom had previously lived with the father for a period of time.” The Appellate Division further observed that: “none of the parties advocated for supervised parenting time to the father or otherwise opposed a schedule of expanded parenting time”; and “following testimony from the father’s niece in February 2021 regarding the allegations of past sexual abuse, Family Court did not alter its temporary order [rendered following the father’s July 2020 emergency order to show cause and a virtual hearing] awarding the father sole legal and primary physical custody of the children.” The Third Department stated in a footnote that none of the attorneys requested a *Lincoln* hearing and “although Family Court is not mandated to conduct one (citations omitted), the best practice here would have been for Family Court to conduct a *Lincoln* hearing.”

## **Custody - Third Party – Aunt – Supervised Video Visits to Mother**

## In Matter of Byler v. Byler, 2022 Westlaw 2382450 (4th Dept. July 1, 2022), the mother appealed from an August 2021 Family Court order which awarded sole custody of the subject children to their paternal aunt. The Fourth Department affirmed, holding that extraordinary circumstances were established by the 5-year separation between the mother and the children and consideration of threatening text messages and website posts made by the mother, which were admitted into evidence with her consent. The Appellate Division upheld the video supervised visits, noting the mother’s status of incarceration.

## **Custody - UCCJEA – Communicate with Other Court – Premature Decision**

## In Matter of Touchet v. Hortsman, 2022 Westlaw 2823157 (2d Dept. July 20, 2022), the mother appealed from a June 2021 Family Court Order which dismissed her petitions seeking enforcement and modification of a November 2013 California order, which granted her sole custody of the parties’ child born in 2007, with access to the father, and permission to her to relocate to NY. The father filed a petition for modification in California in 2021, after the mother had relocated to NY and the mother thereafter filed her aforesaid petitions for enforcement and modification, seeking, among other things, to direct that the father’s access occur in NY. The father obtained temporary custody from the California Court in April 2021, and after communicating with the California Court, Family Court dismissed the mother’s petitions. The Second Department reversed, on the law, reinstated the mother’s petitions, and remitted to Family Court for further proceedings. The Appellate Division held that after Family Court communicated with the California Court, made a record, and informed the parties, “who had not participated in the communication, immediately announced its decision on the issue of jurisdiction, without affording the parties an opportunity to present facts and legal arguments,” which “did not comport with \*\*\* Domestic Relations Law §75-i(2).”

## **Equitable Distribution - Pension – NYSRS – Pop-Up Option – Participant Bears Cost**

## In Ulrich v. Ulrich, 2022 Westlaw 2382909 (4th Dept. July 1, 2022), the husband appealed from a February 2021 Supreme Court judgment, which in the wife’s November 2019 divorce action, based upon a Referee’s report, awarded the wife a share of his pension without reduction for the “Pop-Up” option. (If the Alternate Payee dies first, the pension reverts to a single life allowance for the Participant). The parties were married in August 2004, by which time the husband had 16.5 years of service. He retired in 2015 with 27.5 years of service. The Fourth Department affirmed, holding that the trial court “has the authority in a divorce action to require a pensioned spouse to elect a pension option providing a pension benefit for the other party that survives the pensioned spouse’s death” and “also has the power to direct equitable distribution of the irrevocable choice of a survivor pension benefit made during the marriage.” The Appellate Division noted that the Referee properly considered, among the reasons for her decision with respect to the pension benefit, that the wife “made significant contributions to the parties’ marriage to the extent that she cared for their shared home with both of their children from prior marriages.”

## **Family Offense - Intimate Relationship – Hearing Required**

## In Matter of Charter v. Allen, 206 AD3d 994 (2d Dept. June 29, 2022), the petitioner appealed from a May 2021 Family Court order which dismissed her family offense petition against respondent, her sister’s partner, for lack of subject matter jurisdiction. The Second Department reversed, on the law, denied the motion to dismiss, reinstated the petition, and remitted to Family Court. The Appellate Division held that a determination as to whether petitioner and respondent are or have been in an “intimate relationship” within the meaning of FCA 812(1)(e) is fact-specific. The Second Department concluded that Family Court should have denied respondent’s motion to dismiss, given that: petitioner knew respondent for more than 20 years, and respondent and petitioner’s sister held themselves out as husband and wife; petitioner and respondent engaged in social activities at each other’s homes, attended holiday and birthday celebrations together, and traveled together; the petitioner’s sister and respondent have a daughter (age 18 at the time of the hearing) who identified the petitioner as her aunt; petitioner’s sister, respondent and their daughter resided in one of the units of a 3-family home owned by the mother of petitioner and her sister, and the petitioner resided in one of the other units of the same home.

## **Pendente Lite - Custody – Modification – Mental Health Decision-Making – Without Hearing; Mother only Evaluation Ordered**

## In Mack v. Mack, 206 AD3d 593 (1st Dept. June 30, 2022), the mother appealed from: (1) an October 2020 Supreme Court order which, without a hearing, granted the father’s motion to modify a prior order by awarding him temporary mental health decision-making for the then 15-year-old child; and (2) a June 2021 order which directed a physician to conduct a mental evaluation of the mother, only. The First Department affirmed both orders, holding that the evidence before Supreme Court showed that the mother was interfering with the child’s “urgent need for therapy, to the child’s detriment.” As to the evaluation of the mother, only, the Appellate Division noted several factors justifying the same: “the child’s allegations that the mother engaged in abusive and controlling behavior”; “the choice by the child, now 17 years old, to live exclusively with the father and refuse contact with the mother”; “concerns expressed by the attorney for the child about the mother’s mental health”; “and the court’s own observations of the mother.”

## **LEGISLATIVE & COURT RULE ITEMS**

## **Court Rules and Matrimonial Rules - Amended**

## Pursuant to Administrative Order 141 of year 2022 (AO/141/22) dated June 13, 2022 and **effective July 1, 2022**, the Uniform Civil Rules for the Supreme Court and the County Court (22 NYCRR Part 202), including harmonization with the Matrimonial Rules (22 NYCRR 202.16) are amended. The Order includes a detailed table of contents and exhibits which are a “must read” and which may be found at this link: [AO-141-22.pdf (nycourts.gov)](https://www.nycourts.gov/LegacyPDFS/RULES/trialcourts/AO-141-22.pdf)

## **Forensic Evaluator Training Requirements**

## As previously reported, Passed by the Legislature as of June 1, 2022, and **if signed,** DRL 240(1) **would be amended, effective 180 days from signing**, by the addition of a new paragraph (a-3), which, among other things, requires an appointed forensic custody evaluator to be a psychologist, social worker or psychiatrist, and to complete biennial domestic violence training in order to qualify for the appointment. The training is established by an amendment to Executive Law 575(3), which adds a new paragraph (n), requiring the Office for the Prevention of Domestic Violence to contract with the NYS Coalition Against Domestic Violence to develop the training program. The Chief Administrator of the Courts, with the approval of the Administrative Board, is authorized to promulgate any rule (to be made and completed on or before the effective date) which is necessary to implement the law on its effective date. As of this writing on July 31, 2022, the legislation had not yet been delivered to the Governor for signature. A02375C/S06385B.

## **Preliminary Conference Order - Revised**

## Pursuant to Administrative Order 142 of year 2022 (AO/142/22), the official UCS Form for the Preliminary Conference Stipulation and Order in Contested Matrimonial Actions is **revised, effective July 1, 2022**. It is available in both pdf and fillable pdf and is intended to implement the newly harmonized Matrimonial Rules (see AO/141/22) into the form. The new form may be found at this link: [Divorce Forms | NYCOURTS.GOV](http://ww2.nycourts.gov/divorce/forms.shtml#Statewide)

## **Uncontested Joint Divorce Form Pilot Project**

## This project is available in Kings, Queens, Broome, Ontario and Westchester Counties. Information is available at this link: [Uncontested Joint Divorce Pilot Project - Divorce Resources | NYCOURTS.GOV](http://ww2.nycourts.gov/uncontested-joint-divorce-pilot-project-divorce-resources-34191)