## **NYSBA FAMILY LAW SECTION UPDATE, August 2023**

## **Matrimonial Update**

## **By Bruce J. Wagner**

## **Support Magistrate, Schenectady & Montgomery County Family Courts**

**Editor’s Notes**: With this issue, we observe the 43rd Anniversary of the Equitable Distribution Law, enacted July 19, 1980.

## **Agreements - Ambiguity – College – Hearing Required**

In Matter of Napolitano v. Napolitano, 217 AD3d 948 (2d Dept. June 28, 2023), the father appealed from a September 2022 Family Court Order denying his objections to an August 2022 Support Magistrate Order, which denied so much of his 2022 modification petition as sought to reduce his obligation to pay 50% of the college expenses of the parties’ 2 children. A 2013 judgment of divorce incorporated a written agreement which provided that each party would “pay 50% for the college/technical/vocational school expenses of the children.” A handwritten sentence was added stating: “The said payments are limited by each parent’s ability to pay.” The Support Magistrate found that the foregoing handwritten sentence “limited the father’s payments, but not his obligation to pay a total of 50% of those expenses,” and concluded that the father’s “obligation for college costs could be limited to a modest weekly payment plan.” The Second Department reversed, on the law, granted the father’s objections, and remitted for a hearing “to determine the parties’ intent in allocating post-secondary school expenses for the subject children in the context of their settlement agreement and a new determination thereafter” of that portion of the father’s petition which sought a reduction of his obligation to pay 50% of college expenses.

**Agreements - Health Insurance – Age 29 Law – Granted**

In B.D. v. E.D., 2023 Westlaw 4770159 (1st Dept. July 27, 2023), the mother appealed from a May 2022 Supreme Court order, which denied her March 2022 motion to direct the father to pay for continued health insurance coverage under New York’s Age 29 law for the parties’ eligible children, to reimburse their daughter for payments she already made, and for counsel fees. The First Department modified, on the law, to grant the mother’s motion, to the extent of directing the father to pay for the Age 29 Law health insurance for the daughter until she is no longer eligible therefor, to reimburse the daughter for payments she already made, and remitting for further proceedings. The parties were divorced in May 2015 and their February 2015 agreement provided that the children were covered under the father’s plan, and stated that he “shall keep and maintain for the benefit of the Child such health and medical insurance plans greater than or equal to the coverage presently provided by his employer until the latter of (i) each Child is emancipated pursuant to this Agreement; (ii) each Child is no longer allowed by law to be covered under a parent’s insurance.” At the time of the agreement, the daughter was 19 years old and was covered under the father’s employer-subsidized family health insurance plan. The mother’s motion was made in March 2022, when the daughter was 26 years old and had aged out of coverage under the father’s plan pursuant to the Affordable Care Act [effective September 23, 2010]. The Age 29 Law, effective in 2009, provides that the unmarried child must live, work or reside in NY, and must not be insured or eligible for coverage under any employer sponsored insurance offered by the child’s employer. The Appellate Division rejected the father’s arguments that: (1) the “law” to which parties referred in the agreement was the Affordable Care Act, which imposed an age 26 limit upon his obligations for health insurance; and (2) his employer does not subsidize the daughter’s Age 29 Law coverage, which costs $1,300 per month. The First Department found that the daughter, “owing to the Age 29 Law, \*\*\* by virtue of the fact that [the father] has health insurance through his employer, was ‘allowed by law’ to obtain health insurance coverage under [the father’s] insurance.” Given that the Age 29 Law satisfies the “allowed by law to be covered under a parent’s insurance” provision of the parties’ agreement, the Court concluded: “we enforce the plain language of the agreement regardless of any economic hardship that [the father] may encounter”; and “we may not rewrite the plain contractual language in an effort to right some perceived inequity in the parties’ bargain.”

**Child Support – CSSA - Downward Deviation – Reversed; Equitable Distribution – Debt – Credit for Loan and Payments to Neutrals**

## In Wagner v. Wagner, 217 AD3d 1509 (4th Dept. June 30, 2023), the wife cross-appealed from an October 2021 Supreme Court judgment which, among other things, deviated downward from the CSSA “in part on the ground that the child shared the residences of the parents,” and the husband appealed Supreme Court’s failure to award him a credit for half of the amount of the loan used to purchase new windows for the marital residence and for half of the debt the parties incurred for neutral evaluators. The Fourth Department modified, on the facts and the law, holding that “the shared custody arrangement [details unspecified] was not a proper basis for downward deviation from the presumptive support obligation”; [t]he remaining grounds on which the court relied in granting the variance lack support in the record,” and vacating the child support award and remitting for a new determination. The Appellate Division agreed with the husband that he is entitled to the 50% credit he sought for both the loan for the new windows and for the debt incurred for the neutrals.

## **Child Support - CSSA – Health Insurance Reimbursement, Imputed Income Denied, Over Cap ($148,000); Counsel Fees - After Trial – Denied - Disruptive, Obstreperous and Prolix Conduct; Equitable Distribution - Business – Proportions (57%/43%), Valuation, Debt – Proportions (57%/43%), Separate Property Credit, Wasteful Dissipation – Not Found**

## In Yentis v Yentis, 2023 Westlaw 4628521 (1st Dept. July 20, 2023), both parties appealed from a December 2021 Supreme Court judgment which, after trial: (1) determined that the husband's business was valued at $691,000; (2) awarded the wife a separate property credit of $150,000; (3) imputed additional annual income of $98,000 to the husband for the purposes of calculating child support in excess of the then-statutory cap of $148,000; (4) declined to award the husband $14,941.04 representing 50% of COBRA payments made in 2015 and 2016; (5) apportioned 43% of the liability of a collateral mortgage on the marital condominium to the wife; (6) declined to credit the wife $110,705.44 for cash taken home by the husband; and (7) awarded the wife $125,000 in counsel fees. On appeal, the First Department: (1) affirmed the valuation of the husband’s business at $691,000, holding that “[t]o the extent the husband seeks to challenge the court's adoption of the wife's expert's valuation of his business by arguing that it was error to strike the neutral expert's trial testimony, this issue is not properly before us since the husband failed to appeal from the order denying his motion to unstrike”; (2) affirmed the $150,000 separate property credit two the wife for the purchase of the marital apartment, noting that “[w]hile the wife did not provide a complete paper trail documenting the source of the money used for the down payment and closing costs, the record supports the conclusion that the only possible source for that money was the [wife’s] premarital Paine Webber brokerage account”; (3) modified, on the law and the facts, to decrease the husband's monthly basic child support to $2,950 per month retroactive to the date of entry of the judgment, to remand for recalculation of child support arrears, and to delete the provision in the judgment directing that child support arrears be credited against the husband's distributive share in the condo, holding that “imputing an additional $98,000 to the husband's income for the purposes of calculating child support was not supported by the record,” given that Supreme Court used the husband’s 2015 tax return, “but then imputed the additional $98,000 based on evidence that the husband took home approximately that amount in cash in 2014. However, the husband testified that he reported his cash earnings, as reflected on his tax return, and there is no evidence to contradict this. Accordingly, we find that the husband's income for CSSA purposes is $141,526. In view of the children's reported expenses and comfortable living standard during the marriage, we find it appropriate to calculate child support on total combined parental income of $295,009, resulting in the husband contributing $2,950 in monthly basic child support”; (4) modified, on the law and the facts, to credit the husband $14,941 for COBRA payments made in 2015 and 2016, noting that Supreme Court “ordered the parties to equally share the family's COBRA payments” and the wife “did not directly dispute this amount”; (5) affirmed the allocation of 43% of the collateral mortgage on the marital apartment to the wife, which was used to secure a line of credit for the husband's business, noting that “[t]he wife's financial contributions were explicitly factored into awarding her 43% of the value of the business \*\*\* and [s]he is not further entitled to a credit for the marital debt incurred during the marriage to start the business”; (6) affirmed Supreme Court’s determination that “[t]he wife is not entitled to a credit for cash the husband took home from the business because there is insufficient evidence that these funds were wastefully dissipated \*\*\* [and] this cash income was largely reported on the husband's tax returns and used for marital expenses”; and (7) affirmed the $125,000 counsel fee award to the wife, noting “the Referee's findings as to the husband and his counsel's disruption of the proceedings, prolonging of the proceedings, and overall obstreperous behavior.”

## **Child Support - CSSA – Imputed Income – Based on Expenses Paid, Overpayment Credits; Counsel Fees - After Trial - Denied – Distributive Award, Expert Fees Paid for Witness Not Called, Improperly High Temporary Award, Income Parity; Equitable Distribution - Business – Proportions (45%), Debt (50%), Separate Property - Found, Valuation – One Unopposed Expert; Maintenance - Denied - Distributive Award, Income Parity**

## In McGovern v. McGovern, 2023 Westlaw 4769188 (3d Dept. July 27, 2023), the parties were married in 1997 and have 2 children, born in 1999 and 2002. The wife appealed from an October 2021 Supreme Court judgment, which, following trial of the wife’s 2017 divorce action: (1) found that the pendente lite order ($300,000 income imputed to the husband, $2,000/month maintenance, $3,275.95/month child support, $7,100 counsel fees and $5,000 accounting fees) was based on erroneous representations in the parties' respective statements of net worth, imputed an income of $85,000 to the husband and recalculated the child support and maintenance awards; (2) awarded the wife the marital residence and ordered the husband to pay the wife a distributive award of $419,517.45, equivalent to 45% of the value of his businesses, minus certain credits such as his overpayment of pendente lite child support and maintenance; (3) found that the husband’s self-directed IRA was his separate property; (4) denied maintenance; (5) found that the husband was responsible for $1,635.36 monthly in child support until the older child’s May 2020 emancipation and $1,102.05 monthly for support of the younger child thereafter; and (6) denied counsel fees. The Third Department affirmed, holding: (1) “There is ample support in the record for Supreme Court's decision to impute an annual income of $85,000 to the husband, rather than the $300,000 the wife claimed. \*\*\* While the husband's W-2s from 2012 through 2016 showed an average annual income of roughly $56,000 — well below $85,000 — the wife made transfers into the parties' checking account between 2012 and 2016 to pay the household expenses — on average, roughly $81,000 a year. The testimony showed that the husband was responsible for paying all the household expenses during that time, implying that this sum was the approximate income needed to support the parties' lifestyle. \*\*\* The wife claimed that the husband was hiding money in his complicated business network, but her failure to put forth a forensic accountant was critical.” (2) [The wife did not appear to challenge her 45% share, but argued that it should have been higher]. The Appellate Division found that “the court relied on the [husband’s] tax expert's testimony that, while McGovern Enterprises would recoup $1,984,000 in a hypothetical sale of its properties, it would incur $703,334 in taxes from such a sale, leaving the value of the business at the difference, $1,280,666. \*\*\* As the wife ‘presented no expert testimony that would support a different valuation,’ and Supreme Court credited the expert's report, the wife failed to prove that McGovern Enterprises was worth more than $1,280,666.” (3) “The testimony of the husband and the [husband’s] bookkeeper, which Supreme Court found credible, showed that the husband's self-directed IRA was established using funds transferred from an account he established in 2005, which itself contained funds from an account he created in 1983, prior to the parties' marriage. While the husband did transfer money between his other accounts and 970 Broadway, the record evidence demonstrated that those sums were rent owed to 970 Broadway. Further, the husband's testimony, as well as his bank records, showed that he made no contributions to his self-directed IRA during the marriage. Therefore, Supreme Court did not err in determining that his self-directed IRA, which included 970 Broadway's properties, was the husband's separate property, as he showed that the properties owned by 970 Broadway were acquired with premarital assets.” (4) “The record supports Supreme Court's determination that the wife was not entitled to maintenance. The wife was employed at the time of trial, earning $76,000 a year with healthcare benefits, and she was awarded the marital residence, which was fully paid off other than a $100,000 line of credit taken out on the property by the parties. [The Court stated in footnote 4: The wife argues that it was inappropriate for Supreme Court to hold her responsible for half of this line of credit and deduct it from her award, asserting that the husband forged her notarized signature on the loan document and that she was unaware of the loan's existence. Despite listing a handwriting expert on her pretrial witness list, the wife provided no evidence for this contention at trial beyond her own testimony that the signature on the document was not her own, which the court did not find credible. Deferring to the court's credibility determination, we find no error in the wife being held responsible for half of this $100,000 loan”]. As stated earlier, the husband's imputed income was $85,000, and the evidence showed that he had taken a $200,000 loan from 970 Broadway to pay for the pendente lite maintenance. Based upon Supreme Court's proper consideration of the factors and the totality of the circumstances herein — including the distributive award of $419,517.45 — it did not abuse its discretion in declining to award maintenance to the wife.” (5) The Appellate Division found no error in Supreme Court’s child support calculations or its decision to credit the husband’s child support payments, noting that “because the husband had paid his pendente lite child support obligation, premised on an improperly-imputed income of $300,000, until August 2021, well past the oldest child's emancipation, the court determined that he was entitled to an $86,552.97 credit for child support. The court then found that this overpayment covered the husband's obligation for both children's college expenses but not for their unpaid medical expenses.” (6) “In light of the size of the wife's distributive award, the fact that her yearly income was comparable to the husband's and the interim relief she was awarded, including an improperly high temporary maintenance award and fees for an expert witness she never called, Supreme Court did not abuse its discretion in denying the wife's request for counsel fees.”

## **Child Support - CSSA – Income Cap, College – SUNY Cap - Student Loan Debt, Dependency Exemption Claim Not Preserved; Counsel Fees - After Trial – Denied – Court’s Discretion; Maintenance - Durational – Affirmed, Credit for Voluntary Payments, Tax Impacting Claim Not Preserved**

In Lisowski v. Lisowski, 2023 Westlaw 4837709 (4th Dept. July 28, 2023), both parties appealed from a March 2022 judgment, rendered following trial of the husband’s February 2018 divorce action before a referee, which began in May 2019 after resolution of custody of the parties’ 3 children, and which trial resumed in May 2021, following the wife’s failure to ratify a July 2019 stipulation upon the Court record. The referee’s report was adopted in part and modified in part by Supreme Court. Both parties appealed from the judgment. An August 2018 temporary order required the husband “to pay all of the expenses he has paid throughout the marriage” except the cellular telephone phone bills for the wife and the parties’ 3 children, and to continue to pay the sum of $300.00 per week to the wife for unallocated support. According to a spreadsheet to which the parties stipulated, the husband had been paying all the household expenses and $300 per week to the wife since March 2018. As to maintenance, the Fourth Department affirmed, noting that “using the 2021 maintenance cap \*\*\*, the Referee, and by adoption the court, determined that the husband owed $1,950 a month in maintenance for a duration of seven years. Neither the Referee nor the court awarded maintenance above the income cap \*\*\*. With respect to the duration of maintenance, which is covered by section 236(B)(6)(f), the Referee, and by adoption the court, awarded the wife durational maintenance within the statutory range.” Regarding child support, the Appellate Division affirmed, finding: “the Referee, and by adoption the court, capped the child support award at the statutory amount for combined parental income \*\*\*. Neither the Referee nor the court set forth the factors it considered in electing not to include income over the statutory cap, in violation of section 240(1-b)(c)(3) (citations omitted). Nevertheless, this Court ‘has the power to assume the functions and obligations of the trial court and make its own findings’ (citations omitted). In addressing the various factors related to maintenance, the Referee, and by adoption the court, addressed many of the factors relevant to the determination whether child support should be capped at the statutory amount (citations omitted). Upon review of the voluminous record on appeal, we exercise our power to make our own findings with respect to the relevant factors, including the age of the children, the husband's maintenance obligations, his payment of college expenses, and his numerous contributions both before and after the divorce, and we decline to disturb the determination regarding child support.” The parties’ contentions regarding credits due were addressed by the Fourth Department: (1) “we initially conclude that the wife's challenge on her cross-appeal to the husband's spreadsheet of expenses is waived inasmuch as that exhibit was admitted in evidence upon the parties' stipulation.” (2) “Contrary to the husband's contention on his appeal, we conclude that the Referee, and by adoption the court, did not err in declining to credit him for household expenses he paid during the pendency of the divorce (citations omitted). Although there is authority to award a payor spouse credit for carrying costs on a marital residence (citation omitted), the husband, here, resided in the marital residence during the pendency of the proceeding, and we discern no error in declining to award him credits for those payments. (3) “Regarding the credits to the husband for the $300 weekly payments that he made to the wife, we reject the wife's contention on her cross-appeal that the husband was not entitled to any credit for those payments and we likewise reject the husband's contention on his appeal that he was entitled to additional credits for those payments. The Referee, and by adoption the court, determined that the husband should be entitled to some credit for the $300 per week payments he made to the wife. The Referee granted credit for those payments retroactive to the temporary order, but the court modified that determination and awarded the husband credit retroactive to the date when he began making voluntary payments in that amount. Inasmuch as there is authority to award a spouse retroactive credit for voluntary payments made before any temporary order was issued (citations omitted), the issue then becomes whether the award related to ‘unallocated support’ can be credited against the ultimate maintenance award. Although the matter could be remitted to the court to clarify if those payments were intended as maintenance payments (citations omitted), we see no need for remittal where, as here, the husband paid all household expenses, aside from cellular telephone bills, as well as an additional $300 per week to the wife. Exercising our broad authority to determine issues of maintenance (citations omitted) we conclude that the husband is entitled to credit against his maintenance obligation for all of the $300 weekly payments he made to the wife.” As to the tax impacting and dependency exemption issues, the Appellate Division determined: (a) “Assuming, arguendo, that the husband preserved for our review his contention on his appeal that the maintenance award should be tax impacted to account for the changes in federal tax law imposed by the Tax Cuts and Jobs Act of 2017 (citations omitted) we reject his contention that the Referee, and by adoption the court, erred in refusing to tax impact his maintenance obligations (citations omitted)”; and (b) “We conclude, however, that the husband's contention on appeal that the Referee, and by adoption the court, erred in failing to account for changes in the federal tax law concerning tax dependency exemptions (*see* 26 USC §151[d][5][a]) is not preserved for our review inasmuch as the husband is raising that contention for the first time on appeal (citations omitted). On the issue of college expenses, the Fourth Department found: (i) that "[s]uch costs may be awarded based upon 'the circumstances of the case and of the respective parties and in the best interests of the child[ren], and as justice requires’” (citations omitted). Nevertheless, "in contrast to other add-ons, educational expenses are not necessarily prorated" (citations omitted). \*\*\*. The Referee's decision, as adopted by the court and incorporated into the judgment, states that "[t]he parties shall *ratably contribute* to the cost of a 4-year undergraduate education," capped at the cost of a SUNY school (emphasis added). \*\*\* [T]he Referee's decision had already stated that the parties' pro rata percentages were 80% for the husband and 20% for the wife and previously used the phrase "ratably contribute" with respect to health care expenses, thus leading the Appellate Division to conclude that the same percentages applied to college expenses; and (ii) Supreme Court “erred in failing to address in any respect the husband's failure to pay $12,622.27 in outstanding college debt for one of the parties’ sons. The temporary order directed the husband to ‘pay the college tuition and expenses’ for that child, without limitation or condition. We therefore direct the husband, upon receipt of either an invoice from the school or proof of payment by the wife, to pay that amount to either the school or the wife, as appropriate, and we modify the judgment accordingly.” Regarding counsel fees, the Fourth Department affirmed the denial of an award therefor to the wife, noting the rebuttable presumption of DRL 237(b) but concluding “we discern no basis to modify the judgment to grant any award of attorneys’ fees to the wife.”

## **Child Support - Imputed Income – PPP Loans**

## In Matter of Houck v. Houck, 217 AD3d 1556 (4th Dept. June 30, 2023), the father appealed from an October 2022 Family Court order denying his objections to a Support Magistrate Order, which, following a hearing upon his petition, modified but did not terminate his child support obligation for the parties’ 3 children. The Fourth Department affirmed, holding that the Support Magistrate properly imputed income to the father from a PPP loan he received in 2021, noting that the PPP monies brought the father ‘s income for 2021 back up to an amount generally consistent with pre-pandemic levels.

## **Child Support - Right to Counsel–Failure to Advise–Order Vacated**

## In Matter of Moor v. Moor, 2023 Westlaw 4751946 (2d Dept. July 26, 2023), the mother appealed, *pro se*, from an April 2022 Family Court order denying her objections to a February 2022 Support Magistrate order which, upon the father’s October 2021 petition, directed her to pay him $319.32 bi-weekly toward the support of the parties’ child, of whom the father had sole custody since July 2020. The Second Department reversed, on the law, vacated the child support award and remitted to Family Court for further proceedings. The Appellate Division held that the Support Magistrate “erred in failing to advise the mother that she had ‘an absolute right to be represented by counsel at the hearing at [her] own expense, and that [s]he was entitled to adjournment for the purpose of retaining the services of an attorney,’” citing, among other things, Family Court Act 433(a). The Court concluded that the Support Magistrate “further erred in proceeding with the hearing without an explicit waiver of the right to counsel from the mother as there is no word or act in the record upon which Family Court could have concluded that the mother explicitly waived that right.”

## **Custody - Contact with Paternal Grandfather Prohibited**

## In *Matter of Ceravalo v. Lefebvre*, 217 AD3d 1523 (4th Dept June 30 2023), the father and paternal grandfather appealed from a June 2022 Family Court order, which modified a judgment of divorce and incorporated agreement (joint custody and shared residency), by awarding sole legal and primary physical custody of the subject children to the mother, and further directed the mother and father to ensure that the paternal grandfather has no contact with the children. The Fourth Department affirmed, holding that the modification threshold had been met, inasmuch as the paternal grandfather and father both concealed from the mother the fact that the grandfather (who adopted the father as an adult) is a convicted sex offender, and that contact between the children and the grandfather persisted against the mother’s wishes. The Appellate Division affirmed Family Court’s determination that allowing the grandfather to have contact with the children created an unnecessary risk to their well-being and was not in their best interests.

## **Custody - UCCJEA – NY Inconvenient Forum (v. NC); AFC Not Needed**

## In Matter of Gabriel v. Pierre, 217 AD3d 944 (2d Dept. June 28, 2023), the father appealed from, among other things, two October 2021 Family Court orders, which: (1) dismissed his August 2021 petition to modify a 2017 custody order pertaining to the parties’ 3 children, who had moved to NC with the mother in 2019, and as to whom the mother’s custody was continued by a January 2020 consent order; (2) granted the mother’s September 2021 petition for a writ of habeas corpus and directed that the children be returned to the mother; and (3) declined to appointing an attorney for the children. The Fourth Department affirmed both orders, holding that: (1) “Family Court properly exercised its discretion in deferring jurisdiction to North Carolina” considering “the length of time the [children have] resided outside [the] state,” DRL 76-f(2)(b), “the nature and location of the evidence required to resolve the pending litigation,” DRL 76-f(2)(f), and “the familiarity of the court of each state with the facts and issues in the pending litigation,” DRL 76-f(2)(h); (2) Family Court properly granted the writ upon its determination that the children were wrongfully withheld from the mother following the expiration of the children’s 6-week visit to NY which began in June 2021; and (3) Family Court “providently exercised its discretion in not appointing an attorney for the children” in this case, “which turns primarily on an issue of jurisdiction and includes a prior order \*\*\* entered on consent.”

## **Custody - Violation – Phone Contact, Therapy – Not Found**

## In Matter of Craig K. v. Michelle K., 2023 Westlaw 4628509 (3d Dept. July 20, 2023), the father appealed from an April 2022 Family Court order which, following a fact-finding hearing and a *Lincoln* hearing, dismissed his February 2020 petition seeking to hold the mother in willful violation of so much of a 2018 order which: (1) entitled the father, who has lived in Ohio since 2015, to twice weekly phone contact with the parties’ child born in 2005 and who lives in NY with the mother; and (2) directed the parties to cooperate to retain a provider for therapeutic counseling to be retained by the father. The father testified that he has had no phone contact with the child since the 2018 order, either being told that by the mother or the child, directly, that the child did not want to speak to him; the mother testified that she told the child to talk to the father, encouraged the child to take the calls, and, eventually, the child no longer expressed a desire to contact the father. As to the counselling, the father had sent 2 emails to the mother to arrange the same but then made no further contact on the subject; the mother testified that the child expressed no interest in the counselling. The Third Department affirmed, holding that “the father’s contentions alleging that the mother had willfully interfered with his efforts to contact the child are at best speculative and otherwise unsubstantiated.” As to the counselling, the Appellate Division determined that “while the father contends that he meaningfully pursued arrangements to commence therapeutic counseling with the child, he produced no emails corroborating his efforts.” The Court concluded that the mother did not willfully interfere with the father’s phone contact or the establishment of counselling.

## **Enforcement - Willful Violation - No Reasonable Efforts to Find Employment**

## In Matter of Kelly v. Napier, 217 AD3d 1538 (4th Dept. June 30, 2023), the father appealed from a March 2022 Family Court order, confirming a Support Magistrate order determining him to be in willful violation of a child support order. The Fourth Department affirmed, holding that the father “failed to meet that burden [inability to pay] inasmuch as he failed to present evidence establishing that he made reasonable efforts to obtain gainful employment to meet his support obligation,” and noting that there was “no basis to disturb the Support Magistrate’s determination” that the father “was not credible.”

## **Maintenance - Modification – Extreme Hardship – Denied**

## In Matter of Valvo v. Valvo, 2023 Westlaw 4353769 (3d Dept. July 6, 2023), a 2012 judgment of divorce incorporated a written agreement, which directed the husband to pay child support for the parties’ 3 children of $1,245.34 bi-weekly and maintenance of $1,840.41 bi-weekly. In June 2018, the father petitioner for modification and the Support Magistrate reduced the father’s child support obligation to $250 bi-weekly until February 2020, when the same was further reduced to $200 bi-weekly, and left the maintenance unchanged. In August 2020, the father filed another petition, alleging that his income had decreased since the parties’ divorce and requested that both the judgment and 2018 order be modified due to a substantial reduction in his salary in 2020. Following a hearing, the Support Magistrate determined that the father had proved an extreme hardship, reduced his maintenance obligation, and directed a corresponding increase in child support. Upon the mother’s objections, Family Court’s May 2022 order: (1) found that the father had failed to demonstrate an extreme hardship; (2) reinstated the maintenance obligation; (3) determined that he proved a sufficient change in income to warrant modification of child support; and (4) remanded to the Magistrate to determine child support modification and to recalculate maintenance and child support arrears. The father appealed and the Third Department modified, on the facts and the law, by reversing so much thereof as directed modification of child support and reinstating the 2018 child support obligation, leaving in place the remittal to the Support Magistrate to determine arrears. The Appellate Division found that: the father’s prior employer first reduced his salary and then after giving him notice in September 2020, terminated his employment in October 2020; the father began searching for jobs in November 2020, 2 months after learning he would be terminated, but did not submit any applications until January 2021; the father limited his search for jobs to computer software work, despite the father that he has a Bachelor’s degree in accounting and pursued no opportunities in that field; the father did not file for unemployment benefits “because he was concerned that he would lose his government security clearance \*\*\*, but offered no concrete basis for his belief and \*\*\* acknowledged that his failure to meet his child support obligations also put his clearance at risk.” The Third Department concluded that it agreed with Family Court “that the father’s support for his alleged hardship is at least partially attributable to his self-imposed limitations on potential employment and reluctance to take advantage of any unemployment he may have been entitled to.” The Court concluded that Family Court properly considered that the father modified his mortgage, resulting in higher payments, and that “the record amply supports \*\*\* [a] determination that the father failed to meet his burden warranting a modification of his maintenance obligation.”

## **Pendente Lite - Temporary Maintenance – Upward Deviation; Payee Shares 30% of Marital Residence Costs**

## In Khazaneh v. Khazaneh, 217 AD3d 629 (1st Dept. June 29, 2023), the wife appealed from a November 2022 Supreme Court order, which granted her motion seeking temporary maintenance of $64,956 per month, only to the extent of awarding her $17,000 per month and directing her to pay 30% of the carrying costs of the marital residence therefrom. The First Department affirmed, holding that Supreme Court “considered numerous statutory factors and found that the statutory presumptive or guideline amount of temporary maintenance of $5,075 per month was ‘unjust or inappropriate.’” The Appellate Division noted that in the absence of any exigent circumstances, the wife’s remedy is a speedy trial. The Court concluded: “As maintenance awards are intended to include all basic living expenses, including housing costs, the court’s directing the wife to pay a proportionate amount of her maintenance income to cover a share of the carrying costs of the marital residence was not in error.”