## **NYSBA FAMILY LAW SECTION UPDATE, August 2024**

## **Matrimonial Update**

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

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## **Child Support - CSSA – Current Income v. Tax Returns, Deviation; Counsel Fees – After Trial – Partial; Maintenance – Denial - Upheld**

## In Doores v. Doores, 2024 Westlaw 3287230 (4th Dept. July 3, 2024), the wife appealed from a May 2023 Supreme Court judgment which, among other things: (1) declined to award her maintenance; (2) set her income for child support purposes according to job she obtained pendente lite and deviated downward from the CSSA (amount and reasons unspecified); and (3) awarded her only a portion of the sum she sought for counsel fees. The Fourth Department affirmed, holding that: (1) Supreme Court properly determined that the wife was capable of self-support, considering “the length of the marriage, [her] education, employment history, and earning potential, and the fact that [she] was the beneficiary of many expenses paid by [the husband] while the divorce was pending,” and further “balanced [her] needs and [the husband’s] ability to pay” (citations and internal quotation marks omitted); (2) Supreme Court properly determined the wife’s income based upon “a joint stipulation of undisputed facts, which reflected that [the wife] had been employed in a full-time capacity earning certain hourly wages since approximately seven months prior to trial” and the court “was not required to determine her income based on previous tax returns or W-2s”; and (3) as to the partial award of counsel fees, given “the financial circumstances of both parties, the relative merits of the parties’ positions …, the existence of any dilatory or obstructionist conduct …, and the time, effort and skill required of counsel (citations omitted) \*\*\*[,] [w]e perceive no abuse of discretion here.”

## **Child Support – Imputed Income – Expenses Paid, Family Support**

## In Matter of Fallin v. Haruna, 2024 Westlaw 3547959 (4th Dept. July 26, 2024), the father appealed from a March 2023 Family Court order denying his objections to a Support Magistrate Order. The Fourth Department affirmed, holding that the Support Magistrate properly imputed $100,000 in income to the father, based upon “evidence of the amounts that the father paid for household expenses, private school tuition, the mother’s use of a vehicle, and miscellaneous child care expenses, as well as evidence of his access to financial support from his family.”

## **Child Support - Modification – Dismissed – Insufficient Changed Circumstances**

## In Matter of Donohue v. Katerle, 2024 Westlaw 3287326 (4th Dept. July 3, 2024), the father appealed from an April 2023 Family Court order denying his objections to a Support Magistrate order which, after a hearing, dismissed his petition for “further modification of the child support opting out provisions \*\*\* in the parties’ \*\*\* agreement \*\*\* incorporated \*\*\* into the parties’ judgment of divorce and previously modified by Supreme Court in 2020.” The Fourth Department affirmed, noting that to the extent the father “seeks to void a term of a settlement agreement,” such a contention “would not have been properly before Family Court inasmuch as Family Court \*\*\* is without the power to set aside … the terms of a settlement agreement.” The Appellate Division concluded that the father “failed to demonstrate the requisite ‘unanticipated and unreasonable change in circumstances warranting an adjustment of support or that the current level of support is inadequate to meet the children’s basic needs.”

## **Child Support – Willful – Upheld – No Inability to Pay**

## In Lombardi v. Lombardi, 2024 Westlaw 3351675 (2d Dept. July 10, 2024), the husband appealed from a September 2022 Supreme Court order, which granted the wife’s motion in her 2011 divorce action seeking: (1) to hold him in civil contempt for violating the child support ($350 per week) and health insurance provisions of a December 2011 order of the same court; and (2) temporary counsel fees, to the extent of awarding her $10,000. The Second Department affirmed, holding that: (1) the wife “demonstrated that the [husband] failed to comply with the clear and unequivocal mandates set forth in the 2011 order by failing to pay temporary child support and maintain medical insurance for the [wife]” and that he “failed to refute this showing or establish an inability to comply with these mandates”; and (2) given “the significant disparity in the financial circumstances of the parties, the Supreme Court properly awarded the [wife] interim counsel fees in the sum of $10,000,” noting that she “is the less monied spouse and the award of interim counsel fees will permit her to carry on the litigation.”

## **Counsel Fees – After Trial – Denied – Circumstances of the Case; Equitable Distribution - Debt – Child’s Student Loans and Tax Liability; Equal; Separate Property Credit; Wasteful Dissipation – Not Found; Maintenance – Denial Upheld**

## In Kopko v. Kopko, 2024 Westlaw 3446834 (3d Dept. July 18, 2024), the husband appealed from a February 2023 Supreme Court judgment which, following a July 2022 trial of the wife’s 2019 divorce action, denied his requests for counsel fees and maintenance, found that he wastefully dissipated marital property, divided the parties’ marital property essentially equally, and held the wife liable for only 37.4% of a student loan debt incurred in his name for the benefit of their child born in 1996. The parties were married in 1992 and the husband, a practicing attorney, was 73 as of the time of trial and the wife was 58. In June 2022, a month prior to trial, the husband moved for temporary counsel fees. The Court deferred decision to trial but allowed each party to withdraw $8,000 from a joint account to pay attorney fees. The Third Department affirmed, noting that “the divorce judgment reflects a balanced decision on the merits,” while observing that the husband suffered fatigue due to health problems, and his doctor “testified that he should be putting all of his limited energy into improving his health as opposed to maintaining his profession.” The Appellate Division held that Supreme Court properly awarded “an $85,000 separate property credit to the husband for a down payment he had made on the parties' prior marital residence in Rhode Island,” but “reasonably rejected the husband’s undocumented assertion that the appreciation in the value of the Rhode Island property — which the parties sold upon relocating to New York — constituted separate property.” The Third Department determined that Supreme Court “properly deemed the husband solely responsible for the tax liability arising from a significant contingent fee he earned in 2019, which he admittedly opted not to pay due to concerns over COVID-19” and correctly divided the remaining assets “in a substantially equal fashion, while awarding the marital home to the husband at his request.” The Third Department held that Supreme Court properly denied the husband’s request for maintenance, while imputing his income earning potential from the practice of law at 50% of his historical earnings, amounting to $57,772 on a yearly basis, finding that he has “sufficient income to be self-supporting given that he receives $42,256.80 per year in Social Security benefits, as well as $8,266.34 in required minimum distributions from a SEP IRA” and that “the wife's annual income was $89,501.77.” The Appellate Division rejected the husband’s contention that “Supreme Court abused its discretion in finding the wife liable for only 37.4% of the outstanding student loan debt incurred on behalf of their child solely in the husband's name,” finding that: “the court's decision is grounded in the trial evidence, which demonstrated that the wife paid a significant share of the outstanding debt with income she received after the commencement of the divorce action — i.e., with separate property”; and Supreme Court “rejected the wife's argument that the husband should be solely liable for the remaining balance — a balanced decision demonstrating a fair consideration of the issue.” The Third Department upheld Supreme Court’s denial of counsel fees to the husband, citing the trial court’s finding that the parties had “relatively equal incomes” and that, by virtue of its equitable distribution award, “neither party c[ould] be considered the less monied spouse.” The Appellate Division agreed that the marital funds the husband spent on a campaign for District Attorney in 2020 “did not constitute a wasteful dissipation of marital assets, as Supreme Court erroneously found,” but “the wife did not seek a credit for the money spent and no such credit was given — rendering this issue of no moment.”

## **Custody - *Lincoln* Hearing Required – Child Opposed to Contact with Father**

## In Matter of Dionis F. v. Daniela Z., 2024 Westlaw 3434406 (2d Dept. July 17, 2024), the child appealed from a June 2023 Family Court order which, over the AFC’s objection based upon the child’s desire to have no contact with the father, incorporated a stipulation granting the mother sole custody and providing the father with supervised and therapeutic access to the child, and which stated “[w]hen the agency/parents determine that supervised parenting time is no longer necessary, the parties shall mutually agree upon an expansion of the Father’s parenting time.” The Second Department reversed, on the law and in the exercise of discretion, and remitted to Family Court for an in camera interview with the subject child, to be conducted with all deliberate speed, and for a new determination thereafter. The Appellate Division held that Family Court “improvidently exercised its discretion in failing to conduct an in camera interview of the child, particularly given the child’s position, as stated by the attorney for the child,” while noting that “[t]he record reflects that the child is of such an age [unspecified] and maturity that his preferences are necessary to create a sufficient record to determine whether parental access would be in his best interests.”

## **Disclosure - Custody – Mental Health Records – Denied**

## In Matter of King v. Pelkey, 2024 Westlaw 3287272 (4th Dept. July 3, 2024), the father appealed from a January 2023 Family Court order which, after a hearing, awarded the mother sole legal custody of the subject children. The Fourth Department affirmed, rejecting the father’s contention that Family Court erred in denying his request for a judicial subpoena duces tecum for the mother’s mental health records, holding that he “did not allege in his cross-petition that the mother’s mental health was at issue and failed to demonstrate that the mental health records were material or necessary for the determination of the mother’s petition.” The Appellate Division further rejected the argument of the father and the AFC that Family Court “erred in admitting hearsay statements of one of the children at the trial,” noting the well settled “exception to the hearsay rule in custody cases involving allegations of abuse and neglect of a child, \*\*\* as evidenced in [FCA] §1046(a)(vi).” The Court concluded that the child’s hearsay statements “were corroborated by the testimony of the mother, documentation contained in the child’s school records, and the father’s testimony on cross-examination.”

## **Disclosure - GPS Tracking Device Records**

## In A.S. v. A.B., 2024 Westlaw 3335688 (Sup. Ct. Kings Co., Sunshine, J., July 3, 2023), the Court framed the issue: “This Court must determine if DRL §236B(5)(d)(14), as amended on April 3, 2020, which requires the Court to consider ‘whether either party has committed an act or acts of domestic violence, as described in subdivision one of section four hundred fifty-nine-a of the social services law, against the other party and the nature, extent, duration and impact of such act or acts’ when determining equitable distribution, permits subpoenaed non-party discovery of a tracking device in a divorce action.” The wife “subpoenaed the non-party to produce records relating to a GPS tracking device that she alleges the \*\*\* husband put or had caused to be put on her automobile, when there was an existing temporary order of protection that specifically provided that he refrain from: “remotely \*\*\* monitoring \*\*\* any \*\*\* property of [plaintiff] by connection to or through \*\*\* the internet \*\*\* or other wireless technology.” The Court concluded that “consideration of domestic violence impacts the Court's determination of issues of equitable distribution and maintenance as well as issues of custody and parenting time and is therefore well within the general compulsory disclosure provisions of the Domestic Relations Law,” and denied the husband’s motion to quash the wife’s subpoena.

## **Enforcement - Contempt – Failure to Comply with Order for Therapeutic Boarding School**

## In Agulnick v. Agulnick, 2024 Westlaw 3351669 (2d Dept. July 10, 2024), the mother appealed, by permission, from an October 2021 Supreme Court order which, after a hearing in the husband’s 2018 divorce action, adjudged her to be in criminal contempt of court for failure to comply with an order of the same court issued the previous day, which required her to appear with the parties’ then 15-year-old son and to both encourage him and place him in the care and custody of the transportation team of a therapeutic boarding school in Maine, and imposed a penalty of 30 days’ incarceration. The Appellate Division, by Order dated December 6, 2021, stayed enforcement pending hearing and determination of the appeal. The Second Department modified, on the facts and in the exercise of discretion, by reducing the penalty imposed from 30 days to time served upon the ground of excessiveness, otherwise affirmed, and remitted for further proceedings for the imposition of an appropriate fine. Members of the transport team testified and the Appellate Division held that the “evidence before the Supreme Court was sufficient to support a finding, beyond a reasonable doubt, that the defendant willfully disobeyed the October 25 order, a clear and unequivocal mandate of the court, by discouraging the child from cooperating with the transport team.”

## **Enforcement – Willfulness and Incarceration Reversed – Lack of Hearing, Judge’s Preconceived Opinion, Remitted to Different Judge**

## In Matter of Onondaga County v. Taylor, 2024 Westlaw 3548340 (4th Dept. July 26, 2024), the father appealed from a March 2023 Family Court order which found that he had willfully violated a child support order and imposed a 6-month jail sentence. The Fourth Department reversed, on the law, and remitted to Family Court before a different Judge, finding that Family Court “denied respondent’s assigned counsel an adjournment to prepare for the hearing, for which she had no prior notice, and further prohibited her from conferring with respondent before the court attempted to swear in respondent to testify, and the court in so doing denied respondent his right to counsel and, thus, denied him a fair hearing \*\*\*.” The Appellate Division noted that Family Court, among other things, “inquired of respondent’s counsel whether respondent would ‘like to answer my questions now or would he like to go to jail today’; and asked respondent if he had ‘clean underwear on.’”

## **Paternity - Equitable Estoppel – Rebutted**

## In Matter of Brandon J. v. Leola K., 2024 Westlaw 3362594 (3d Dept. July 11, 2024), Aaron L., named on the birth certificate as the father of a child born in May 2021 to the mother Leola K., while she was engaged to him, appealed from an April 2023 Family Court order which, after a hearing upon the July 2022 petition of Brandon J. seeking to be named the father of the same child, ordered genetic marker testing. Family Court stayed its April 2023 order pending appeal. The Third Department found that: around the time of conception, the mother was also having sexual relations with Brandon J., who was incarcerated a few months after the child’s birth, at which time the mother was residing with Aaron L., the subject child, an older child they had in common and Aaron L.’s child from a prior relationship; the mother maintained contact with Brandon J., permitting him to communicate with the child through several FaceTime calls from jail; and the mother also established a relationship with Brandon J.’s mother. The Support Magistrate referred the proceeding to a Family Court Judge pursuant to FCA 439(b), after the mother raised equitable estoppel in defense. The Third Department noted that the child refers to Aaron L. as “daddy” and calls his mother “grandma,” finding that “Aaron L. and the mother adequately demonstrated that a parent-child relationship existed between the child and Aaron L.,” shifting the burden to Brandon J. “to demonstrate that ordering a genetic marker test would be in the child’s best interests.” The Third Department affirmed, holding that Brandon J. “met this burden,” finding it “significant that the child was not quite two years old at the time of the hearing” and that Brandon J. “demonstrated a basis to claim he is the biological father, provided financial support and made an effort to establish a relationship with the child, as did his mother.” The Appellate Division concluded that “Family Court's determination that now is the time to resolve [Brandon J.’s] claim through a genetic marker test in the best interests of the child has a sound and substantial basis in the record.”

## **Pendente Lite - Counsel Fees – Granted**

## In Voorham v. Hicks-Voorham, 2024 Westlaw 3448004 (1st Dept. July 18, 2024), the wife appealed from June and November 2023 Supreme Court orders, which granted her motions for temporary counsel fees to the extent of $60,000 and $40,000, respectively, without prejudice to further applications. The First Department affirmed, holding that Supreme Court providently exercised its discretion, and “there is neither evidence nor a finding by the motion court that the husband has attempted to unnecessarily prolong litigation, drive up the wife’s legal fees, or create an uneven playing field for the parties.”

## **Procedure - CPLR 2104 Custody Stipulation – Hearing on Vacatur Motion Needed**

## In Matter of Izzo v. Salzarulo, 2024 Westlaw 3351693 (2d Dept. July 10, 2024), the mother appealed from a June 2023 Family Court order which, without a hearing, denied her motion to vacate an August 2022 order awarding the parties joint legal custody of their 2 children, with physical custody and final decision-making authority to the father and certain access to the mother, who alleged she did not consent to the terms thereof. The Second Department: (1) deemed the mother’s notice of appeal to be an application for leave to appeal and granted the same, FCA 1112(a); and (2) reversed, on the law, and remitted to Family Court for a hearing on the mother’s motion and a new determination thereafter, noting that “Family Court, without stating the terms of the settlement on the record, allocuted the parties, who both stated that they had reviewed the settlement with their respective attorneys and were agreeing to the settlement voluntarily and freely.” The Appellate Division noted: “[p]ursuant to CPLR 2104, an agreement between parties is binding against them where, as here, it was reduced to the form of an order and entered”; however, “settlement agreements must abide by the principles of contract law, ‘for an enforceable agreement to exist, all material terms must be set forth and there must be a manifestation of mutual assent’”; but, “CPLR 2104 does not require the parties or the court to place on the record an agreement between the parties that is reduced to an order” and “failing to do so makes the agreement open to collateral litigation.” The Court concluded that given “the mother’s averment that she did not consent to the terms of the custody order, the fact that the terms of the settlement were not placed on the record, and the fact that there was no writing subscribed by the parties, there is an unresolved issue as to whether there was a manifestation of mutual assent to the terms set forth in the custody order.”