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

## **Matrimonial Update**

## **By Bruce J. Wagner**

**Support Magistrate, Schenectady & Montgomery County Family Court****s**

## **Child Support - CSSA – Imputed Income – Subchapter S Corporation**

## In Matter of Ho v. Tsesmetzis, 2021 Westlaw 5099025 (2d Dept. Nov. 3, 2021), the father appealed from a February 2021 Family Court order, denying his objections to a February 2020 Support Magistrate Order which, after a hearing, directed him to pay $381 per week in child support, arrears of $5,334 and 78% of uninsured health expenses for the parties’ one child. The Second Department reversed, on the law, vacated the order and remitted for a new hearing and determination. The Appellate Division held that while the Support Magistrate properly imputed income to the father as the sole shareholder of the subchapter S corporation, it was improper to use the gross receipts of the corporation, without accounting for returns and allowances or the cost of goods sold, and should have used the corporation’s gross profits.

## **Child Support - Modification – 2010 Amendments – 15%; Over Cap Denied**

## In Matter of Giraldo v. Fernandez, 2021 Westlaw 5226159 (2d Dept. Nov. 10, 2021), the father appealed from an August 2020 Family Court order, denying his objections to a March 2020 Support Magistrate Order which, after a hearing, granted the mother’s May 2019 petition to modify a September 2013 stipulation incorporated into a February 2014 judgment of divorce, which directed him to pay $300 per month toward the support of the parties’ child, by increasing the obligation to $522.55 biweekly. The mother’s petition alleged an increase in the father’s income, increased needs of their son and the passage of 3 years, along with the father’s 2018 income tax return showing income of $117,316, as opposed to $45,000 per year at the time of the stipulation. The Second Department affirmed, holding that the Support Magistrate properly relied upon the 15% modification ground even though it was not alleged in the petition, while noting that the 3 year and substantial change in circumstances grounds were also supported by the evidence. The Court concluded that the Support Magistrate properly limited the award to combined parental income up to the $148,000 cap, in this case where the combined parental income was $193,462.

## **Child Support – CSSA – Needs-Based; Evidence – Photographs of Money Orders**

## In Matter of Juliana R. v. Obiajulu N., 154 NYS3d 242 (1st Dept. Nov. 9, 2021), the father appealed from a November 2020 Family Court order, denying his objections to a July 2020 Support Magistrate order determining his child support obligation. The First Department reversed, on the law, and remanded for further proceedings including a hearing on the child’s needs and standard of living. The Appellate Division held that insufficient evidence was adduced at the hearing, noting that no tax returns or wage statements were submitted for years 2017, 2018 and 2019 and referring to “the father’s incomplete financial disclosures and his incredible testimony.” The Court concluded that the father’s support obligation “should have been based on the needs of the child or the child’s standard of living, whichever was greater,” citing FCA 413(1)(k). The First Department held that the Support Magistrate erred by declining to receive into evidence the father’s photographs of money orders he sent to the mother.

## **Counsel Fees - Family Offense**

## In Matter of Kathryn K. v. Derek S., 153 NYS3d 848 (1st Dept. Nov. 4, 2021), respondent appealed from a November 2019 Family Court order which, after a hearing, granted petitioner’s motion for counsel fees by awarding her $28,583.96 for her proceeding alleging a violation of an order of protection. The First Department affirmed, rejecting respondent’s argument that a finding of willfulness was required as a prerequisite for counsel fees under FCA 846-a, as being raised for the first time on appeal, noting that respondent conceded that a counsel fee award is available under FCA 841 and holding that Family Court properly concluded that FCA 841 and 842(f) allow an award of counsel fees where, as here, the Court extended and modified the order of protection.

## **Custody -** **Abduction Not Found; COVID-19 Issues**

## In Matter of Toussaint v. Doucey, 2021 Westlaw 5099056 (2d Dept. Nov. 3, 2021), the father appealed from an August 2020 Family Court order which dismissed the father’s petition for a writ of habeas corpus and custody of the parties’ 2 children, wherein he alleged that the mother had abducted the children. The Second Department affirmed. For the summer of 2020, the mother and children moved from NY to France, where her relatives reside. The father, who resides in Haiti, demanded that the mother send the children to NY for July 2020, so that he could visit with the children. The mother refused and instead offered to pay for the father’s air travel to France to visit with the children. The parties signed a written agreement in 2018 stating that the children would reside with the mother in either the US or Europe, depending upon her place of employment. There was no custody order, which led the Appellate Division to conclude that “the father had no greater right to the custody of the children than the mother, the children were not being illegally detained by the mother, and the father cannot establish a right to habeas corpus relief.” The First Department noted that the children and the mother were born in France, and her temporary move to France with the children “was prompted by challenges created by the global COVID-19 pandemic and was undertaken to provide the children with a healthier environment in which to thrive.” The Court concluded that Family Court’s determination was in the children’s best interests.

## **Custody - Educational Decision-Making; Religious Exposure Restriction Removed**

## In Weichman v. Weichman, 2021 Westlaw 5226234 (2d Dept. Nov. 10, 2021), the mother appealed from a February 2020 Supreme Court judgment, rendered upon a December 2019 decision after trial of her March 2014 divorce action, which failed to award her educational decision-making pertaining to their son born in 2006 and directed that she “shall not take the child to a place or expose the child to an activity that violates the rules, practice, traditions and culture of the child’s Orthodox Jewish Chasidic Faith.” The Second Department noted that the mother “identifies as a member of the LGBTQ community and considers herself an Orthodox Jew.” The Appellate Division affirmed the award of educational decision-making to the father, given that the child “had been enrolled in the same yeshiva since he was two years old, where he was doing well socially and academically, and the [mother] failed to establish that her desired plan of enrolling the child in a different type of yeshiva or a public school would be in the child’s best interests.” The Second Department noted that the father testified that he was “concerned that the child would be exposed to people involved in a ‘gay lifestyle’ and testified that, if the [mother] became involved in a relationship with or married a woman, he would request that the partner not be present during periods of parental access because same-sex relationships are inconsistent with Chasidic principles.” The Appellate Division deleted the restriction and concluded: “Such restrictions on a parent’s ability to ‘express oneself and live freely’ go beyond requiring a noncustodial parent to support and enable the child’s religious practices, and impermissibly infringe on the noncustodial parent’s rights.”

## **Enforcement - Receiver to Sell Residence**

## In Saks v. Saks, 2021 Westlaw 5348876 (2d Dept. Nov. 17, 2021), the former husband (husband) appealed from an October 2018 Supreme Court order, which confirmed a referee recommendation granting so much of the former wife’s (wife) February 2018 motion to appoint her as receiver to sell the former marital residence, as required by a February 2017 stipulation incorporated into a June 2017 judgment of divorce. The stipulation: mandated an initial listing price of no less than $1 million; directed the parties to consult with the broker concerning price reductions and if there was no agreement, mandated a 5% price reduction if the home did not sell within 90 days, with further reductions only upon mutual consent. The home was listed in April 2017, and the broker urged a price reduction, with which the wife agreed and to which recommendation the husband did not respond for several months, ultimately declining to agree to any reduction; there were no offers as of the time of submission of the wife’s motion. The Second Department affirmed, holding that the record supports the referee’s recommendation to appoint the wife as receiver (CPLR 5106) and the finding that the husband “failed to cooperate in effectuating the sale in derogation of the parties’ stipulation of settlement.”

## **Enforcement - Willful Violation Foun**d

## In Matter of Amanda YY v. Faisal ZZ, 2021 Westlaw 5497289 (3d Dept. Nov. 24, 2021), the father appealed from a May 2020 Family Court order upholding a Support Magistrate order which, after a hearing, found him to be in willful violation of a May 2018 order directing child support for the parties’ children born in 2013 and 2016, and issued a 30-day suspended sentence. The Third Department affirmed, stating: “According deference to the Support Magistrate’s credibility assessment, which Family Court did not disturb, we agree that the father’s proof was ‘clearly inadequate to meet his burden of showing an inability [to pay child support] that would defeat the prima facie case of willful violation.” As to the sentence, the Appellate Division held that the suspended term of incarceration was well within Family Court’s discretion under FCA 454(3)(a) upon its finding of a willful violation.

## **Equitable Distribution - Pretrial - Property Classification and Valuation Dates – Denied; Pendente Lite - Temporary Maintenance - Imputed Income; Modification on Appeal Denied**

## In Carter v. Fairchild-Carter, 2021 Westlaw 5496974 (3d Dept. Nov. 24, 2021), the husband appealed from a May 2021 Supreme Court order, which granted the wife’s December 2020 motion for temporary maintenance and denied his January 2021 motion to classify certain assets as his separate property and to set the valuation date for his business assets as the date of trial. The Third Department affirmed, first noting that this is the 3rd interlocutory appeal in this action. See 189 AD3d 1060 (2020) and 159 AD3d 1315 (2018). As to temporary maintenance, the Appellate Division held that Supreme Court properly imputed income to both parties, while noting inconsistencies in the husband’s financial submissions and that “the record seems to demonstrate that he did not report all of his income, and his gross income was far higher than he maintains in his affidavit.” The Court held that while Supreme Court did not adequately set forth the basis for its imputed income figure, “any error in this regard can be corrected with a trial and a complete review of the husband’s finances.” With regard to the classification of the husband’s premarital acquisitions of real property and business interests as separate property, the Third Department noted that while such assets are presumed to be separate property, the wife’s opposition indicated that she supported the husband financially and in other ways, which refutes the husband’s contention that all appreciation during the marriage was “only passive market forces.” The Appellate Division further found that “the husband did not provide any information or documentation related to the current value of the properties or businesses, nor any improvements made beyond his own self-serving statements in his affidavits.” As to so much of the husband’s motion to value his businesses as of the date of trial, the Third Department held that Supreme Court properly determined that setting the valuation date pretrial was not “practicable (citations omitted), particularly given that the proof before the court was limited to the husband’s affidavits, tax documents and financial submissions, which the court found ‘suspect.’”

## **Equitable Distribution -** **Proportions – Marital Residence (50%); Mortgage & HELOC Payment Credits Denied; Retirement (1%)**

## In Cuomo v. Moss, 2021 Westlaw 5099104 (2d Dept. Nov. 3, 2021), the wife appealed from an April 2019 Supreme Court judgment, which, upon an October 2018 decision after trial of her November 2017 action, awarded the husband 50% of her interest in the marital residence, declined to award her credits for payments toward a home equity line of credit, awarded the husband $34,000 in credits for mortgage payments, and awarded the husband 1% of the value of her retirement accounts. The Second Department modified, on the law, on the facts and in the exercise of discretion, by deleting the $34,000 credit to the husband, and otherwise affirmed. The parties were married in October 1996 and have no children. In February 1997, the wife and the husband’s mother each acquired a one-half interest in the marital residence. The parties both made payments toward the mortgage until 2011, when the wife left to live in TN for a job, and the husband thereafter solely paid the remaining $68,000 due on the mortgage, which was satisfied in October 2017. The wife obtained a home equity loan, which she solely paid after leaving the residence in 2011. As to the marital residence, the wife failed to overcome the presumption that her one-half interest therein was marital property. The Appellate Division held that the wife’s retirement accounts, to which the husband did not contribute and which accumulated funds during the separation but prior to the commencement of the action, were marital property properly distributed 99% to the wife and 1% to the husband. The Second Department held that the $34,000 credit to the husband for the mortgage was improper, given that he satisfied the mortgage by October 2017, “before either party [was] anticipating the end of the marriage” and “prior to the commencement of the action.” As to the home equity loan, the Appellate Division made no specific comment, other than to state that the wife’s “remaining contentions are either without merit or not properly before this Court.”

## **Equitable Distribution -** **Separate Property – Joint Tenancy – 20% of Increase in Value; Damages for Abuse of Process**

## In Gulick v. Beckett, 154 NYS3d 224 (1st Dept. Nov. 9, 2021), defendant appealed from a July 2020 Supreme Court judgment of divorce, which awarded him 20% ($235,000) of the appreciation in value of an apartment during the parties’ joint tenancy thereof and directed him to pay plaintiff damages of $30,048 for abuse of process. The First Department affirmed, holding that defendant failed to prove by clear and convincing evidence that plaintiff intended to gift him 50% of the aforesaid apartment plaintiff purchased before the parties met, so as to entitle him to 50% of the value upon a divorce, and that the joint tenancy did not automatically entitle him to 50% of the value as a matter of law. The Court noted that the joint tenancy was subject to a partition action, which is equitable in nature, and, further, it was undisputed that plaintiff paid the carrying costs, mortgage and extensive renovation expenses, such that Supreme Court’s 20% award to defendant was proper for his non-monetary contributions. As to abuse of process, the Appellate Division noted that: defendant filed criminal charges against plaintiff, which were dismissed and deemed a nullity; defendant does not deny that the charges were false and intended to harm plaintiff without justification; and the criminal action satisfied his goal of gaining temporary exclusive occupancy of the apartment.

## **Evidence - Cell Phone Video; Family Offense - Attempted Assault 3d; Harassment 2d; Menacing 3d**

## In Matter of Brooke A.D. v. Rajiv D., 2021 Westlaw 5113286 (1st Dept. Nov. 4, 2021), the husband appealed from a March 2020 Family Court order of protection which, upon a fact-finding determination made after a hearing, found that he committed attempted assault 3d, harassment 2d and menacing 3d and directed him to stay away from the wife for 2 years. The First Department affirmed, noting that the husband’s intent was properly inferred from his actions and the surrounding circumstances. The Appellate Division upheld the finding of harassment 2d (PL 240.26[1]) based upon the wife’s testimony that she recorded an argument between the parties until the husband lunged at her while he swung his fist at her, scaring her. Harassment 2d (PL 240.26[3]) was sustained as a course of conduct or repeatedly committed acts, in that the husband: smashed a hard plastic pitcher on the counter during an argument, at an arm’s length distance; screamed and lunged at the wife on 2 occasions, creating fear that he was going to hit her; and sent numerous “combative and insulting” text messages, all of which supported a finding that he had the intent to seriously annoy or alarm her. The elements of menacing 3d were satisfied based upon the wife’s testimony that she was scared and believed the husband was going to hit her. The First Department held that the cellphone video footage, which was properly admitted into evidence upon the wife’s testimony that it “fairly and accurately depicted the incident,” showed that the husband “almost hit her with his fist.” The Court concluded that attempted assault 3d (PL 110.00/120.00[1]) was established by the video footage, which showed that the husband “swung his fist in petitioner’s direction with great force, \*\*\* with the intent to cause her physical injury.”

## 