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

## **Matrimonial Update**

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

## **Agreements - Acknowledgement – COVID-19 Executive Order – Mailing to Notary Valid**

## In Ryerson v. Ryerson, 2023 Westlaw 7201028 (3d Dept. Nov. 2, 2023), the husband appealed from a July 2021 Supreme Court order which, in the wife’s action for divorce, denied his motion to declare the parties’ March 29, 2020 separation agreement invalid. At the time of execution of the agreement, Executive Order No. 202.7 (9 NYCRR 8.202.7) was in effect, authorizing audio-visual technology for the remote execution of notarial acts required by state law. The parties signed the agreement at the wife’s home before a notary via videoconference, and advised the notary that they had no access to a scanner or fax machine to electronically transmit the document to the notary in accordance with Executive Order 202.7, whereupon the notary gave instructions to mail the agreement to him, to which solution the husband did not object. The notary received the agreement, acknowledged the parties’ signatures within a few days thereafter, and mailed a copy to each party. The parties then complied with certain terms of the agreement. The husband’s answer in the wife’s divorce action asserted that the agreement was invalid for failure to comply with the Executive Order, which argument Supreme Court rejected in denying the husband’s motion. The Third Department affirmed, noting that the husband’s sole argument is that the agreement did not comply with the Executive Order’s requirement to “transmit by fax or electronic means a legible copy of the signed document directly to the [n]otary on the same date it was signed.” The Appellate Division held that “absen[t] any substantive defect in the acknowledgement itself, the election to send the agreement by mail rather than electronic means is a mere technical irregularity that the courts may overlook.” The Court concluded: “The two substantive aspects of an acknowledgement – the oral declaration of the signers and the written certificate of acknowledgement (citation omitted) – are present here, and the two purposes of acknowledgement – proving the identity of the signatories and imposing a measure of deliberation upon them (citations omitted) – have been fulfilled.”

**Agreements – Interpretation – Accidental Disability Pension**

## In Fanning v. Fanning, 197 NYS3d 597 (2d Dept. Nov. 8, 2023), the parties were divorced pursuant to a September 2017 judgment, which incorporated a stipulation providing that the former wife (wife) would receive 50% of the value of that portion of the former husband’s (husband’s) police accidental disability pension which was “based upon the length of service.” A consent DRO, drafted by the husband’s counsel, was thereafter entered, and stated that the wife’s share was to be based upon a fraction of the husband’s hypothetical retirement benefits and calculated as if he had not been injured. In January 2022, Supreme Court denied the husband’s January 2021 motion to vacate the DRO, rejecting his contention that its terms conflicted with the stipulation and he appealed. The Second Department affirmed, holding that the calculation in the DRO was consistent with the stipulation and finding that the husband’s “apparent contention that no portion of his accidental disability pension represented deferred compensation related to his length of service is without merit.”

## **Agreements - Reformation – Granted – Fraud, Mutual Mistake**

## In Baird v. Baird, 2023 Westlaw 7982187 (4th Dept. Nov. 17, 2023), the former husband (husband) appealed from an August 2022 Supreme Court order, which denied his motion to dismiss the former wife’s (wife’s) complaint, seeking reformation of the parties’ written agreement incorporated into their judgment of divorce. The wife argued that the agreement failed to provide for a distribution to her of a portion of the husband’s defined benefit pension plan, which she alleged was omitted due to fraud or mutual mistake. The Fourth Department affirmed, holding that the wife’s complaint stated a cause of action for mutual mistake and met the CPLR 3016(b) particularity requirements, in that she alleged that there was an agreement to divide all assets, but the pension was omitted because neither party believed the husband was entitled to the same, due to his employer’s bankruptcy. The Appellate Division determined that the wife’s complaint stated a case for fraud, given its assertion that the husband falsely represented that he did not have any pension benefits (a material fact), while intending to deceive the wife, who justifiably relied upon the misrepresentation, signed the agreement, and sustained damages.

## **Child Support - Failure to File Financial Disclosure – Grant Relief or Preclude – FCA 424-a(b)**

## In Matter of Grant v. Seraphin, 2023 Westlaw 8102714 (2d Dept. Nov. 22, 2023), the mother appealed from a January 2023 Family Court order, denying her objections to a September 2022 Support Magistrate Order which, after a hearing upon her April 2022 petition, directed the father to pay child support of only $283 bi-weekly. The Second Department reversed, on the law, granted the mother’s objections and remitted to Family Court. The Appellate Division found that the father failed to file any financial disclosure as mandated by FCA 424-a(a), such that Family Court was required to either grant the relief demanded in the petition or preclude the father from offering evidence as to his financial ability to pay support, citing FCA 424-a(b) and “should have determined the amount of child support based on the needs of the child \*\*\*.”

## **Child Support - Modification – Voluntary Reduction in Income – Denied**

## In Matter of Rose v. Lewandowski, 2023 Westlaw 8100537 (3d Dept. Nov. 22, 2023), the father appealed from a May 2022 Family Court Order, denying his objections to a Support Magistrate Order which, after a hearing, dismissed his February 2021 petition seeking modification of child support, alleging that he had attained the age of 62 and was retired. The Support Magistrate found that “the father failed to show an involuntary reduction in his income and, therefore, did not demonstrate a sufficient change in circumstances so as to warrant a downward modification.” The Third Department affirmed, rejecting the father’s contention that he was “forced” to retire due to bad knees, which were replaced in September 2019, noting that: “he failed to present any medical proof that he is disabled and unable to continue to operate his [automotive repair] business”; and the Support Magistrate “aptly” observed that while the father’s decision to retire “might be a perfectly acceptable one for people who do not have young children to support, that is not the case for [the father].”

## **Custody - Father – Available to Children; Mother Used Unknown Caregiver**

## In Thomas v. Thomas, 2023 Westlaw 7172523 (2d Dept. Nov. 1, 2023), the mother appealed from an August 2022 Family Court order which, after a hearing upon the mother’s April 2021 petition and the father’s November 2021 petition, both seeking sole legal and physical custody of the parties’ children born in 2013 and 2014, awarded the father sole legal and physical custody. The parties separated in June 2018 and the children initially lived with the mother. The father was granted temporary custody upon the filing of his petition, which alleged that “the mother exposed the children to possible imminent danger because she left them in the care of an unknown adult.” The Second Department affirmed, holding that Family Court’s determination had a sound and substantial basis in the record and noting: “the evidence adduced at the hearing demonstrated that the father was available for the children any time they needed him, and that he did not need to rely regularly on others to care for the children”; and “the mother’s decision to leave the children in the care of an unknown adult against the father’s wishes raised questions about the mother’s willingness and ability to place the children’s needs ahead of her own.”

## **Custody - Modification – Dismissal During Trial Reversed – Remit to Different Judge**

## In Matter of Shayne FF. v. Julie GG., 2023 Westlaw 7750133 (3d Dept. Nov. 16, 2023), the father appealed from an October 2021 Family Court order, which granted the mother’s motion, upon the close of his proof, to dismiss his March 2021 amended petition, which sought modification of a 2012 consent order providing for sole legal custody of the parties’ child born in 2009 to the mother. The Third Department reversed (3-2 split), on the law, denied the mother’s motion, and remitted for hearing before a different judge, to be commenced within 45 days. The Appellate Division held that “the father sufficiently alleged that the mother had moved to a different county and that [her] move led to a significant increase in the travel time required to effectuate custodial exchanges” and “if proved, may necessitate a modification of the prior order,” while noting that “nine years had elapsed since the 2012 order,” such that “the child’s changing needs over time may establish a change in circumstances.” As to the remittal to a different judge, the Third Department held that Family Court “committed a plethora of errors which curtailed significant testimony that would have been relevant and material to the father’s claim that a change of circumstances had occurred.”

## **Custody - Modification – Dismissal of Petition Reversed**

## In Matter of Melish v. Rinne, 2023 Westlaw 7983166 (4th Dept. Nov. 17, 2023), the mother appealed from a July 2022 Family Court order, which granted the AFC’s motion to dismiss her petition seeking to modify a prior consent order pertaining to the parties’ children. The Fourth Department modified, on the law, denied the AFC’s motion, reinstated the mother’s petition, and remitted for further proceedings, holding that the same sufficiently alleged changed circumstances, namely, that she and the father have been unable to co-parent regarding education and after-school care.

## **Custody -** **Modification – Sole Custody to Aunt; Father’s Violation a Factor**

## In Matter of Pritty-Pitcher v. Hargis, 2023 Westlaw 7982342 (4th Dept. Nov. 17, 2023), the father appealed from an August 2022 Family Court order, which found him to be in contempt of an order granting visitation to the child’s paternal aunt and modified a prior order to grant sole legal and physical custody of the subject child to the aunt. The Fourth Department affirmed, noting that the father “does not dispute that he violated the order by refusing to abide by the provisions granting visitation to” the aunt. The Appellate Division found that the element of extraordinary circumstances was established by a prior order in favor of the aunt on the same issue, and the child’s best interests were served by sole custody to the aunt, considering: “the father had absconded with the child to another state and had repeatedly interfered with [the aunt’s] ability to see the child who she raised for the majority of [her] life”; and “the father’s contempt of court, his disregard for the child’s relationship with a person the child considers to be her mother, and the child’s wishes.”

## **Custody - Modification – to Father – Sole – Domestic Violence, Interference, Neglect**

## In Matter of Castle v. Barnes, 2023 Westlaw 8006874 (4th Dept. Nov. 17, 2023), the mother appealed from a December 2021 Family Court order, which modified a prior order by granting the father sole custody, with visitation to her on alternate weekends and once weekly for dinner. The Fourth Department affirmed, holding that joint custody was inappropriate where “the majority of [the parties’] interactions were acrimonious,” and that the award of sole custody to the father was appropriate, given that “the mother neglected the child, interfered with the father’s relationship with the child, and engaged in domestic violence with the father of her two younger children in the child’s presence.”

## **Custody - Passport Custodian; Procedure - Time Constraints – Virtual Proceedings – Upheld**

In Matter of Jorge R.C. v. Julieta A.C., 220 AD3d 612 (1st Dept. Oct. 31, 2023), the mother appealed from a March 2022 Family Court Order which, after a hearing, granted the father’s motion to modify a prior order pertaining to the subject 2 children, by directing that he be the custodian of the children’s passports. The First Department affirmed, holding that there was a substantial change of circumstances, noting that “while the mother was the custodian of the children’s passports, there were numerous conflicts about the passports \*\*\* [which] had a negative impact on the children” and “the mother had repeatedly withheld the passports.” The Appellate Division rejected the mother’s contention that the time limits imposed during virtual proceedings conducted during the COVID-19 pandemic, to which she had consented, denied her due process, finding that Family Court “imposed time constraints in an even-handed manner as to both parties and conducted the proceedings fairly.”

## **Custody -** **Relocation (TN) – Primary Caregiver, Assistance from Family, Father Not Closely Involved**

In Matter of Martin v. Martin, 2023 Westlaw 7982707 (4th Dept. Nov. 17, 2023), the father appealed from a September 2022 Family Court order, which granted the mother sole legal and physical custody of the subject children and permission to relocate to Tennessee. The Fourth Department affirmed, noting that: the mother has been the children’s primary caretaker; her mother is in TN and has and will continue to offer financial assistance to the mother and help with childcare; and the father has “no accustomed close involvement in the children’s everyday life.”

## **Custody - Standing – Extraordinary Circumstances**

In Matter of Lashawn K. v. ACS, 2023 Westlaw 7391728 (1st Dept. Nov. 9. 2023), petitioner appealed from a December 2021 Family Court order which, after a hearing, dismissed her petition for custody and visitation of the subject child with prejudice, for lack of standing. The First Department reversed, on the law, and remanded to Family Court for a further hearing on extraordinary circumstances. Family Court found that petitioner failed to establish a pre-conception agreement to conceive and co-parent the subject child with the child’s biological mother, who died only months after the child was born and before she and petitioner were to be married. The Appellate Division held that “Family Court erred in dismissing \*\*\* without permitting petitioner the opportunity to present evidence \*\*\* that she had standing based on extraordinary circumstances.”

**Custody - Third Party – Grandparent Visitation**

## In Matter of Nichols v. Nichols, 2023 Westlaw 7982130 (4th Dept. Nov. 17, 2023), the mother appealed from a July 2022 Family Court order, which granted visitation with the subject children to the maternal grandmother. The Fourth Department affirmed, rejecting the mother’s contention that her mother did not establish standing, and holding that it was “undisputed that the grandmother has a long-standing, extensive and loving relationship with the children \*\*\*, who visited the grandmother overnight on a monthly basis and saw her several times a month,” which constitute “conditions \*\*\* [in] which equity would see fit to intervene,” as contemplated by DRL 72(1). The Appellate Division agreed with Family Court that the visitation award to the grandmother is in the children’s best interests.

## **Enforcement - Foreign Divorce Decree – Distribution Award, Sale of Property**

In Hardy v. Hummel, 2023 Westlaw 7201003 (3d Dept. Nov. 2, 2023), the former wife (wife) appealed from an April 2022 Supreme Court order, which partially granted the former husband’s (husband’s) motion to enforce a January 1998 Indiana divorce decree ratifying a January 1998 agreement merged therein. The decree required the wife to pay the husband $70,000 within 1 year following the agreement, and to list a property for sale, from which the husband would be entitled to 25% of the profit. The agreement did not specify when the wife had to list the property. The husband filed the Indiana decree with the County Clerk, CPLR 5402(a), and moved for enforcement thereof pursuant to CPLR 5402(b). Supreme Court awarded the husband a judgment for $70,000 and directed the wife to list the property for sale within 90 days. The Third Department affirmed, holding that Supreme Court properly granted the husband a money judgment pursuant to DRL 244, rejecting the wife’s argument that the husband’s motion was time barred pursuant to the 6-year statute of limitations applicable to contractual obligations, CPLR 213(2), given that the January 1998 agreement had merged into the Indiana decree and no longer existed as a contract. The Appellate Division determined that Supreme Court did err in applying a contractual principle (“the law implies a reasonable time when a contract is silent on the time of performance”), because the agreement merged into the decree and ceased to be a contract. However, the Third Department held that Supreme Court had the authority to modify the decree pursuant to DRL 234, which permitted it “to determine any question as to the title to property.” While the husband did not explicitly request this relief, the same statute allows title determinations to be made “as in the court’s discretion justice requires having regard to the circumstances of the case and of the respective parties \*\*\* subsequent to final judgment,” such that the Appellate Division affirmed so much of the order as directed the wife to list the property within 90 days upon the authority of DRL 234.

## **Enforcement - Willful Violation – Found – Insufficient Job Search and Medical Evidence**

In Matter of Alisha B. v. Dominique S., 2023 Westlaw 7497668 (1st Dept. Nov. 14, 2023), the father appealed from an August 2022 Family Court Order confirming a Support Magistrate Order finding him to be in willful violation of an order of support. The First Department affirmed, holding that the father “failed to present competent medical evidence that he was unable to perform work of any kind” and “[h]is submission of an unaffirmed letter from a doctor was insufficient to establish his inability to work.” The Appellate Division further found that the father failed to “offer proof of his efforts to find any type of work before his alleged accidents in 2019 and 2020, but rather, blamed his unemployment of multiple factors, including \*\*\* [being] not vaccinated against COVID.” The Court concluded that “Family Court providently denied the father’s request for an adjournment to get a further medical examination.”

## **Equitable Distribution - Enhanced Earnings – 0% to H on W Nursing License; Proportions – Pension – Increased (30% to 50%) – Marital Fault Not Egregious**

## In Ilyasov v. Ilyas, 2023 Westlaw 7561961 (2d Dept. Nov. 15, 2023), the husband appealed from an April 2020 Supreme Court judgment which, among other things, declined to award him any share of the enhanced earnings derived from the wife’s nursing licenses and degrees and awarded him only 30% of the marital portion of the wife’s pension. The Second Department modified, on the law and in the exercise of discretion, by increasing the husband’s share of the pension from 30% to 50% and affirming the 0% award to him for the wife’s enhanced earnings. The Appellate Division held that Supreme Court erred in its distribution of the pension based upon “the abusive environment created by the [husband],” finding that the husband’s marital misconduct was not “so egregious or uncivilized as to bespeak a blatant disregard of the marital relationship.” The Court concluded that Supreme Court properly denied the husband an award for the wife’s enhanced earnings, holding the record confirms that he “did not substantially contribute to the [wife’s] acquisition of her nursing degrees and licenses.”

## **Family Offense -** **Aggravating Circumstances – 5-year order, Children Included; Assault 3d, Criminal Obstruction of Breathing & Blood Circulation, Harassment 2d, Strangulation 2d – Found**

In Matter of Elizabeth F. v. Wilfredo F., 220 AD3d 615 (1st Dept. Oct. 31, 2023), the father appealed from a January 2023 Family Court order which, after a hearing, directed him to stay away from the mother and children for 5 years, subject to orders of visitation. The First Department affirmed, holding that “the father’s actions of shoving the mother in the stomach while she was six months pregnant, grabbing her by the neck, strangling her to the point of unconsciousness, lifting her off the ground and slamming her body on the floor, and hitting her on the back with a bottle” satisfied the family offenses of Assault 3d, Criminal Obstruction of Breathing & Blood Circulation, Harassment 2d, and Strangulation 2d. The Appellate Division concluded that: the 5-year order of protection “was warranted, given the aggravating circumstances of \*\*\* having caused the mother physical injuries on multiple occasions, committed acts of domestic violence in the presence of the parties’ children, and violated prior orders of protection”; and “the inclusion of the children was warranted because multiple family offenses occurred in their presence.”

## **Family Offense - Criminal Obstruction of Breathing or Blood Circulation – Found**

In Matter of Davis v. Davis, 2023 Westlaw 8100315 (3d Dept. Nov. 22, 2023), the father appealed from a May 2022 Family Court order which granted the mother’s October 2021 petition, to the extent of finding that he committed the family offense of criminal obstruction of breathing or blood circulation against the mother in March 2020, and issuing a stay away order of protection. The Third Department affirmed, citing the wife’s testimony that: the husband “put his hands . . . on [her] neck” and “squeezed very strongly” and, as she tried to hit and scratch him, she "was breathing a little bit”; and he then pushed her against the wall and "with all his strength . . . squeezed [her] neck,” such that she “couldn't breathe” and “started losing strength [and] had no air[,] . . . [then] passed out.” The Appellate Division concluded that the order of protection was properly issued, noting testimony that: “the husband had precise details regarding the wife's daily activities”; “the husband knew which particular parking space she was using at the [domestic violence] shelter”; and “the husband was even present at the time that she filed her petition, watching her in an intimidating manner.”

## **Family Offense - Order of Protection – Visitation Provision Not Required**

In Matter of Daquana S. v. Jeff M., 197 NYS3d 234 (1st Dept. Nov. 2, 2023), the father appealed from a September 2022 Family Court order of protection which, after a hearing, directed him to stay away from the mother for 2 years and did not provide for in-person visitation with the subject child. The First Department affirmed, holding that “Family Court was permitted, but not required, to provide for visitation with the child in the order of protection,” citing FCA 842(b). The Appellate Division noted “evidence that the father violently assaulted the mother in the child’s presence over a four-year period and failed to return the child for one week after the mother permitted visitation.” The Court observed that the order of protection permitted phone and video calls to communicate with the child and emails to the mother “to discuss the child’s welfare or visitation” and “was subject to any order of custody or visitation issued by a court of competent jurisdiction.”

**Paternity – Equitable Estoppel**

In Matter of Eddie G. v. Gisbelle C., 2023 Westlaw 7172593 (2d Dept. Nov. 1, 2023), petitioner appealed from an August 2022 Family Court order which, after a hearing, dismissed his petition filed in 2022, seeking to be declared the father of the subject child born in 2014, upon the ground of equitable estoppel. Petitioner moved to the Dominican Republic around the time of the child’s birth and did not return to NY until 2019. In Petitioner’s absence, the mother married Christopher C. The Second Department affirmed, noting that: “the evidence \*\*\* demonstrated that the petitioner spent time with the child for only five days when the mother brought the child to the Dominican Republic in 2014 when the child was two months old”; “[t]he only other contact that the petitioner had with the child was through a video call when the child was three years old”; and “Christopher C. has assumed a parental role toward the child and \*\*\* the child believed Christopher C. to be his father.”

## **Procedure - Amend Answer – Change Marriage Date to Pre-MEA Religious Ceremony – Allowed**

In Mackoff v. Bluemke-Mackoff, 2023 Westlaw 7561813 (2d Dept. Nov. 15, 2023), the parties were married on July 28, 2011, 4 days following the July 24, 2011 effective date of the Marriage Equality Act (MEA). In July 2005, the parties participated in a religious ceremony, solemnized by a rabbi, for which they, as two women, could not obtain a marriage license. Defendant appealed from a March 2021 Supreme Court order, which denied her December 2020 motion to amend her May 2019 answer to her spouse’s complaint in the subject January 2019 divorce action, so as to change the date of the parties’ marriage from July 28, 2011 to the date of the July 2005 religious ceremony. The Second Department reversed, on the law and in the exercise of discretion, and granted defendant’s motion, holding that “the stated legislative intent of the MEA \*\*\* indicates that it is a remedial statute, and that its statutory amendments are eligible for retroactive application.” The Appellate Division concluded: “Neither the length of time between the defendant’s original answer and her motion for leave to amend, nor the fact that the amendment may affect the plaintiff’s maintenance and equitable distribution obligations, are sufficient to establish prejudice to the plaintiff.”

**Procedure – Default – Inquest Required**

In Matter of Otero v. Walker, 2023 Westlaw 7363407 (2d Dept. Nov. 8, 2023), the father appealed from a June 2022 Family Court order which, upon his failure to appear at a hearing and following denial of his attorney’s request to schedule the proceeding for an inquest, granted the mother’s petition to modify a December 2017 consent order (joint legal, primary to mother), and awarded her sole legal and residential custody of the parties’ child. The Second Department reversed, to the extent of reviewing matters subject to contest –- here, the denial of the application to schedule an inquest -- granted the application therefor and remitted to Family Court for an inquest and new determination of the mother’s petition. The Appellate Division held that Family Court “improvidently exercised its discretion in denying the application of the father’s attorney to set the matter down for an inquest.”