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

## **Matrimonial Update**

## **By Bruce J. Wagner**

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

## **Child Support - Imputed Income – Past Earnings; Counsel Fees – After Trial - Granted**

## In Bailey v. Bailey, 2024 Westlaw 4684390 (2d Dept. Nov. 6, 2024), the parties were married in 2002 and have 4 children. The husband appealed from a September 2019 Supreme Court judgment, rendered upon an August 2019 decision following trial of the wife’s 2017 divorce action which, among other things, directed him to pay the wife $4,124 per month in basic child support and $40,000 in counsel fees. The Second Department affirmed, finding that “Supreme Court’s child support determination reflects a thorough consideration of the evidence regarding the [husband’s] voluntary reduction of his salary after the action was commenced and the reduction in the [wife’s] income due to her employer’s elimination of her division and her acceptance of a lower paying position within the same company \*\*\*.” The Appellate Division held that Supreme Court “did not improvidently exercise its discretion in declining to impute additional annual income to the [wife]” and “in imputing $170,334 of annual income to the [husband] based upon his past earnings.” The Court upheld the attorney fee award, based upon the trial court’s consideration of “the equities and circumstances of the case, including the parties’ respective financial conditions, the relative merit of the parties’ positions, and the [husband’s] apparent obstructionist tactics \*\*\*.”

## **Custody -** **Modification – Joint to Sole – Deteriorated Relationship, Needs of Child, Wishes of Child (12 y/o)**

## In Matter of Llanos v. Barrezuata, 2024 Westlaw 4684386(2d Dept. Nov. 6, 2024), the mother appealed from a January 2023 Family Court order which, after a hearing, denied her November 2021 petition to modify a November 2015 judgment of divorce and June 2015 incorporated stipulation (joint legal and residential custody), to award her sole legal and residential custody of the parties’ child born in 2009. The Second Department reversed, on the facts and in the exercise of discretion, by granting the mother sole legal and residential custody and remitting for establishment of a schedule for the father. The Appellate Division held that the evidence “showed that the parties’ relationship had deteriorated to the point that they do not communicate other than by text and do not engage in joint decision making with respect to the child,” such that “joint custody is no longer feasible.” The Court upheld the award of sole custody to the mother, given that she “has more involvement with the child’s needs on a day-to-day basis, and the record reflects that the mother made decisions regarding the child’s social and emotional needs.” The Second Department concluded that “Family Court failed to give sufficient weight to the strong preference of the child, who was 12 years old at the time of the hearing, to reside with the mother.”

## **Custody - Relocation (Erie County - NYC) – Granted**

## In Matter of Rodriguez v. Young, 2024 Westlaw 4798378 (4th Dept. Nov. 15, 2024), the father appealed from an October 2022 Family Court order which, after a hearing, granted the mother’s petition for relocation with the parties’ child from Erie County to NYC. The Fourth Department affirmed, finding that: “the mother established at the hearing that she has been the primary caregiver of the child and that the father’s visitation with the child was inconsistent”; the mother “initially planned a temporary move to New York City to care for her mother, who was undergoing cancer treatment”; while in NYC, “the mother, who had lost her job, apartment and car due to the COVID-19 pandemic, was able to obtain suitable housing and full-time, salaried employment”; and “the record establishes that the father has no ‘accustomed close involvement in the child[]’s everyday life’ (citation omitted).”

## **Custody - Relocation (SC) – Granted on Appeal**

## In Matter of Scotto v. Alexander, 2024 Westlaw 4611085 (2d Dept. Oct. 30, 2024), the father appealed from a January 2023 Family Court order which, after a hearing, denied his November 2021 petition to modify an April 2017 consent order (sole legal to father, supervised time to mother), to permit him to relocate to South Carolina with the parties’ children born in 2012 and 2016. The Second Department reversed, on the facts and in the exercise of discretion, granted the father’s modification petition and remitted for the establishment of a schedule for the mother. The Appellate Division held that the father’s testimony demonstrated that: “he was unable to continue renting his grandmother’s house in New York, where he and the children had been residing, and that the mother provided only $25 per month in support of both children”; “if permitted to relocate, he would be able to obtain employment in his field of expertise with at least the same salary as he earned in New York and that his living expenses would be lower”; and he “would have support from extended family in South Carolina, including the paternal grandmother, a certified behavioral analyst and special education administrator who has assisted the father in addressing one of the children’s special needs.” In contrast, “the hearing testimony demonstrated that the father has been the children’s primary caregiver since 2017 and that the mother was not involved in the children’s day-to-day lives, education or healthcare.”

## **Custody - Sole – Primary Caregiver; Wishes of Child (11 y/o)**

## In Matter of Navarro v. Clarke, 2024 Westlaw 4830385 (2d Dept. Nov. 20, 2024), the mother appealed from a November 2023 Family Court order which, after a hearing, granted the father’s 2018 petition seeking sole custody of the parties’ child born in 2012, and denied the mother’s 2022 petition seeking the same relief. The child began living with the father in 2015 pursuant to a verbal agreement. The Second Department affirmed, holding: “Accepting the court’s credibility determinations, the evidence at the hearing established that the father, who had been the primary caregiver for most of the child’s life, was better suited to promote stability in the child’s life and was the parent most likely to foster a relationship between the child and the noncustodial parent (citations omitted).” The Appellate Division noted that “the mother sporadically exercised her parental access rights” and Family Court “accorded proper weight to the child’s wishes,” who was approximately 11 years old at the time of the order appealed from.

## **Custody - Sole – with Relocation to GA; Transportation Costs Remitted**

## In Matter of Mendoza v. Riera, 219 NYS3d 427 (2d Dept. Nov. 6, 2024), the father appealed from a July 2023 Family Court order which, after a hearing: (1) granted the mother’s May 2019 petition for sole legal custody and permission to remain in Georgia with the parties’ child, who was born in Georgia in 2017; and (2) directed the parties to equally share the children’s travel costs between NY and GA, and if the mother failed to produce the child, “she shall reimburse the father for twice the cost of the father’s monetary outlay.” The parties lived together in NY with the child from January 2018 until April 2019, when the mother and child moved to Georgia. The father filed a custody petition in April 2019. The Second Department modified, on the law, by deleting the travel cost provisions and remitting to Family Court for a new determination thereof, and otherwise affirmed. The Appellate Division found on the issue of custody: “the mother had always been the child’s primary caregiver and that the father failed to appreciate the child’s special needs”; and “the mother made an effort to produce the child for parental access with the father in New York despite the challenges posed by the COVID-19 pandemic, the child’s medical conditions, and the father’s refusal to communicate.” As to Family Court’s determination to permit the child to remain in Georgia, the Second Department held that “the evidence established that the mother was the child’s primary caretaker and that she was responsible for the child’s therapeutic and educational needs” and “the child’s emotional and economic circumstances would be enhanced by” remaining in GA. The Court concluded that the transportation sharing directives failed to evaluate “the parties’ ‘economic realities’” and their “respective ability to pay and the actual cost of each visit,” and remitted for a hearing to resolve those issues.

## **Evidence - Best Evidence Rule – Postnuptial Agreement Not Proved**

## In Deutsch v. Deutsch, 2024 Westlaw 4830380 (2d Dept. Nov. 20, 2024), the wife appealed from a December 2020 Supreme Court order rendered in her December 2018 action for divorce, which denied her motion to enforce an alleged August 2000 postnuptial agreement. The parties were married in September 1998. The wife alleged that the husband “stole and destroyed the original postnuptial agreement, and she submitted a purported copy of the postnuptial agreement, which was unsigned and undated.” The husband denied the wife’s allegations and maintained that the wife’s submission “was not an accurate portrayal of the original.” The Second Department affirmed, noting that under the exception to the best evidence rule: “secondary evidence of the contents of an unproduced original may be admitted upon threshold factual findings by the trial court that the proponent of the substitute has sufficiently explained the unavailability of the primary evidence and has not procured its loss or destruction in bad faith (citations omitted)”; the proponent of the secondary evidence “has the heavy burden of establishing, preliminarily to the court’s satisfaction, that it is a reliable and accurate portrayal of the original”; and “the trial court must be satisfied that the proffered evidence is authentic and correctly reflects the contents of the original before ruling on its admissibility (citations omitted).” The Appellate Division concluded that the wife “failed to meet her heavy burden of establishing that the proffered copy was a reliable and accurate portrayal of the original” and although her counsel had allegedly “retained a final, unsigned digital copy of the postnuptial agreement, \*\*\* the digital copy contained grammatical errors and different fonts throughout the document.”

## **Procedure - Default – Vacated; Denial of Adjournment Abuse of Discretion**

## In Matter of Betz v. Betz, 2024 Westlaw 4798379 (4th Dept. Nov. 15, 2024), the mother appealed from an August 2023 Family Court order which awarded the father sole custody of the subject child, after having denied her counsel’s request for an adjournment and proceeding by default following the mother’s late appearance at a hearing upon the father’s modification petition. The Fourth Department reversed, on the law, and remitted to Family Court, noting that “only after the mother’s counsel represented that the mother would not agree to the proposed resolution \*\*\* the court ordered the mother out of the courtroom.” The Appellate Division found that contrary to the AFC’s contention that the order was upon default and thus not appealable, the denial of the mother’s request for adjournment was the subject of contest and therefore reviewable upon appeal. The Court concluded that Family Court “abused its discretion in denying [the mother’s] counsel’s request to adjourn the hearing,” while observing that: “[t]he notice sent by the court \*\*\* stated that the purpose of the appearance was to address a ‘motion,’” such that “it was unclear to the parties \*\*\* whether a trial was to happen on that date \*\*\*”; and “the father’s attorney had requested an adjournment of the trial \*\*\* two weeks prior \*\*\* and indicated that the mother’s attorney and the AFC consented \*\*\*.”

## **LEGISLATIVE & COURT RULE ITEMS**

## **Adultery – Penal Law Provision Repealed**

## Penal Law §255.17, which codified adultery as a Class B Misdemeanor, is **repealed, effective November 22, 2024**. A.04714, S.08744, signed November 22, 2024, Laws of 2024, Ch. 462.

## **Attorney Registration**

## By Administrative Order **effective December 1, 2024**, 22 NYCRR §§118.1 and 118.3, are amended, and require all New York attorneys to: (1) report information in their biennial registrations regarding other jurisdictions where they are admitted to practice law (excluding *pro hac vice* admissions) in other U.S. states and territories, U.S. federal courts, or jurisdictions outside of the U.S; (2) confirm whether they remain in good standing in those jurisdictions; and (3) disclose whether they have ever been the subject of public discipline in any other jurisdiction and, if so, when they provided notice to the appropriate court and committee [22 NYCRR §1240.7(a)(2)], as required by 22 NYCRR §1240.13(d).

## **Charitable In-Kind Donation Drives in Courthouses**

## If approved by the Administrative Board of the Courts, 22 NYCRR §§34.3 and 100.4 would be amended, “to permit judicial participation in charitable in-kind donation drives in courthouses.” (See Memorandum of David Nocenti, Esq., Counsel, NYS Unified Court System, dated November 4, 2024). Comments were requested by December 13, 2024. The text of the proposed amendments may be accessed through the NYS UCS website and found at: <https://www.nycourts.gov/LegacyPDFS/rules/comments/pdf/RequestForPublicComment-CourthouseFundraisers-110424.pdf>

## **E-Filing May Be Made Mandatory**

## Passed by both houses, and if signed, this legislation would authorize the Chief Administrative Judge to make e-filing mandatory in various types of actions, including matrimonial actions. A.10350, S.07524. **Update: As of about noon on November 25, 2024, this bill had not yet been delivered to the Governor**.

## **Page and Word Limitations and Statements of Material Fact**

## If approved by the Administrative Board of the Courts, 22 NYCRR §202.8-b would be amended “to eliminate word [and page] limits on evidentiary materials,” such as affidavits, affirmations or reports from lay or expert witnesses, and 22 NYCRR §202.8-g would be repealed, “to eliminate the need for Statements of Material Facts to accompany summary judgment motions.” (See Memorandum of David Nocenti, Esq., Counsel, NYS Unified Court System, dated November 4, 2024). Comments were requested by December 13, 2024. The text of the proposed amendments may be accessed through the NYS UCS website and found at:

## <https://www.nycourts.gov/LegacyPDFS/rules/comments/pdf/RequestForPublicComment-WordLimits&StatementOfMaterialFact-110424.pdf>

## **Proof of Service – Stop Civil Discrimination Act**

## CPLR Rule 306(b) is **amended, effective November 22, 2024**, to remove from the required list of items to be included in proof of service the terms “sex” and “color of skin” and replace those words with “the process server’s perception of the person’s: gender, race \*\*\*.” A.08081B, S.07801A. Signed November 22, 2024, Laws of 2024, Ch. 473.

## **Surrogacy – Technical Amendments and Sanitized Captions**

## Passed by both houses, and if signed, this legislation would amend numerous provisions of the statutes pertaining to surrogacy. In particular, Family Court Act 581-205 would be amended to provide that the surnames of the child or parties shall not be displayed in any caption, document, index, minutes or other record available to the public. A.04921C, S.05107C. **Update: As of about noon on November 25, 2024, this bill had not yet been delivered to the Governor**.

## **Venue in Matrimonial Actions**

## Passed by both houses, and if signed, this legislation would amend CPLR 509, which allows “the place of trial of an action” to be “in the county designated by the plaintiff,” to be subject to an exception set forth in new CPLR Rule 515, which provides that in actions for divorce, dissolution, annulment, declaration of nullity, distribution following a foreign judgment, supreme court actions for custody or visitation, applications to modify the same, and all post-judgment proceedings, venue shall be in a county where either party or one of the children resides, subject to certain narrow exceptions or subject to an order on motion. This legislation would be effective 60 days after signing and would apply to actions commenced on or after the effective date. A.10353, S.09733. **Update: As of about noon on November 25, 2024, this bill had not yet been delivered to the Governor**.

## **Verification of Pleadings Governed by CPLR 2106**

## Passed by both houses, and if signed, this legislation would amend CPLR 3020(a), effective upon signing, to define a verification as “a statement subscribed and affirmed to be true under the penalties of perjury in accordance with rule twenty-one hundred six of this chapter \*\*\*.” A.09478A, S.09032A. **Update: As of about noon on November 25, 2024, this bill had not yet been delivered to the Governor**.

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