## **NYSBA FAMILY LAW SECTION UPDATE, February 2022**

## **Matrimonial Update**

## **By Bruce J. Wagner**

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

## **Child Support - CSSA – Imputed Income; Income Capped at $350,000; Extracurricular Activities Are Not Add-Ons; Maintenance – Nondurational, Imputed Income**

## In Tuchman v. Tuchman, 2022 Westlaw 221204 (2d Dept. Jan. 26, 2022), both parties appealed from an August 2018 judgment of divorce which, upon an April 2018 decision following trial of the wife’s November 2012 divorce action, among other things, based upon annual imputed incomes of $800,000 to the husband and $62,231 to the wife and capping CSSA income at $350,000, awarded the wife: (1) nondurational maintenance of $25,000 per month for 5 years, $20,000 per month for an additional 5 years until her age 65, and $12,000 per month thereafter until the death of either party or her remarriage; and (2) $4,611 per month in child support plus 93% of extracurricular activities and summer camp for the youngest (born in 2005) of the parties’ 4 children. The parties were married in January 1985. The Second Department modified, on the law, on the facts, and in the exercise of discretion, by increasing the child support award to $4,958 per month and deleting the directive as to extracurricular activities and summer camp. The Appellate Division found no basis for the imputed income to the mother, which was based upon assumptions as to purported investment return from her distributive award, while noting that the mother left the workforce over 30 years ago at the husband’s request. The Court upheld the $350,000 combined income cap, but found that as to summer camp, the mother “failed to establish an entitlement to child care expenses” and that “[e]xpenses for extracurricular activities are not specifically delineated as an ‘add-on’ under the Child Support Standards Act” and “[t]he substantial basic child support award should be sufficient to cover the child’s expenses, including her extracurricular activities.” The Second Department affirmed the maintenance award as a proper exercise of the Court’s discretion.

## **Child Support - CSSA–Over Cap ($148,000)–Granted–Income, Needs, No Add-Ons**

## In Moradi v. Buhl, 2022 Westlaw 221153 (2d Dept. Jan. 26, 2022), the husband appealed from a June 2019 judgment of divorce, which, after trial of the wife’s February 2014 divorce action, directed him to pay child support for the parties’ daughter born in 2004 of $2,599.58 per month, calculated upon the parties’ combined parental income over the $148,000 cap. The Second Department affirmed as a proper exercise of discretion, noting Supreme Court’s findings based upon “the parties’ considerable income, the needs of the child, and that fact that the [wife] was not seeking any add-on contributions from the [husband] for the child’s expenses, other than basic child support.”

## **Child Support - CSSA – Over Cap ($154,000) – Denied – Actual Needs - Rent-free living; Custody - Visitation – Increased on Appeal**

## In Hepheastou v. Spaliaras, 2022 Westlaw 164200 (2d Dept. Jan. 19, 2022), the husband appealed from an October 2020 judgment of divorce, upon a June 2020 decision after trial of the wife’s June 2016 divorce action, which directed him to pay child support of $3,072 per month for the parties’ 2 children and awarded him parental access one weekday per week and alternating weekends. The Second Department modified, on the law, on the facts and in the exercise of discretion, by adding parental access from 4-8 p.m. on alternate Tuesdays following each weekend not already assigned to the father, and modifying the child support downward to $1,896.19 per month. The Appellate Division increased the father’s access to the children “in light of the frequency of parental access that [he] enjoyed during the pendency of this matter,” namely, a March 2017 stipulation of equal access. The Second Department held that Supreme Court’s decision to award child support upon combined parental income over $154,000 was not supported by the record, finding that: (1) the record “does not demonstrate that the children are not living in accordance with the lifestyle they would have enjoyed had the household remained intact”’ (2) “a court should consider the children’s actual needs and the amount required for them to live an appropriate lifestyle”; and (3) “[t]he record demonstrates that the [wife] has no extraordinary expenses, lives rent-free at her parents’ house, reported no child care costs, and reported minimal costs for education and extracurricular activities.”

## **Counsel Fees – Enforcement**

## In Tuchman v. Tuchman, 2022 Westlaw 221206 (2d Dept. Jan. 26, 2022), the parties were divorced by an August 2018 judgment. Both parties appealed from an August 2019 Supreme Court order, which granted so much of the wife’s February 2019 motion in a proceeding to enforce the judgment, seeking over $34,000 in counsel fees, to the extent of awarding her $13,643.81. The Second Department affirmed, holding that “considering the equities and circumstances of the case [unspecified], the Supreme Court providently exercised its discretion in awarding the [wife] attorney’s fees in the sum of $13,643.81,” citing, among other authorities, DRL 238.

## **Custody -** **Relocation – Initial (Canada) – Granted**

## In Lvovsky v. Lvovsky, 2022 Westlaw 210314 (1st Dept. Jan. 25, 2022), the father appealed from a January 2020 Supreme Court order which, after a custody trial in the mother’s 2014 divorce action, awarded sole legal and physical custody of the children to her, with permission to relocate to Ottawa, Canada. The First Department affirmed, finding that the mother has been the children’s primary caretaker since commencement of the action in 2014 and has made all major decisions regarding their education, health and care. The Appellate Division noted that the forensic expert’s opinion that the children should have “significant amounts of time” with the children was issued over 3 years prior to the order appealed from and “was not determinative of the parties’ dispute.” The mother testified that the children’s quality of life would significantly improve in Ottawa, where she would have greater job opportunities and the financial and emotional support of her parents. The First Department concluded that Supreme Court “properly considered the father’s failure to pay pendente lite child support as a factor.”

## **Custody - Sole Residential - Modified to Shared – Ability to Foster Relationship with Other Parent; Time Sharing History**

In Schlosser v. Hernandez, 156 NYS3d 901 (2d Dept. Jan. 12, 2022), the mother appealed from a September 2020 Family Court order which, after a hearing upon the parties’ 2017 petitions, awarded them joint legal custody of their child born in 2008, with sole residential custody to the father. The Second Department modified, on the facts and in the exercise of discretion, by awarding shared residential custody and remitting to Family Court “for a new determination, to be made with all convenient speed, setting forth a new, more liberal schedule of parenting time for the mother during the summer recess.” The Appellate Division held that the award of sole residential custody to the father “does not have a sound and substantial basis in the record,” finding that the parties, who separated in 2012, had “enjoyed relatively equal parenting time with the child for most of her life” and that the testimony “raised significant questions about the father’s willingness and ability to foster the child’s relationship with the mother.”

## **Disclosure - Non-Party – Subpoena and EBT – Granted**

In Gross v. Hazan-Gross, 2022 Westlaw 243140 (1st Dept. Jan. 27, 2022), non-party Langman appealed from an August 2021 Supreme Court order, which granted the wife’s motion to compel him to produce documents pursuant to a June 2019 subpoena and to appear for an examination before trial. The First Department affirmed, holding that the wife was entitled to know “how and why it was determined that [the husband’s] partnership interest would be smaller than he had predicted and to probe whether this development had anything to do with his financial exposure in this action.” The Appellate Division concluded that the wife showed that Langman “would be in a position to have unique knowledge of the relevant negotiations and transactions underlying [the] promise to [the husband] of a partnership interest, and Langman did not show that other \*\*\* corporate representatives would be so placed.”

## **Equitable Distribution** - **Proportions - Business & Commercial Property (50%); Separate Property Claim Denied**

## In Keren v. Keren, 2022 Westlaw 221138 (2d Dept. Jan. 26, 2022), the husband appealed from a January 2019 Supreme Court judgment of divorce which, upon an August 2018 decision after trial of the wife’s 2016 action, awarded the wife 50% of his interest in a car wash business and 50% of his interest in a commercial property owned by the business, in the event the property was ever sold. The Second Department affirmed, first rejecting the husband’s claim that his brother gifted him his interest in the car wash business, upon the ground that the assertion “was not confirmed by any documentary evidence, and the Supreme Court found the defendant’s brother’s testimony to be incredible.” As to the 50% distributions, the Appellate Division found that “both parties were involved with [the business] during this 25-year marriage, and the equal distribution of the defendant’s interest was a provident exercise of \*\*\* discretion.”

## **Family Offense - Assault 3d, Harassment 2d – Found; Temporary Order Duration Not a Factor**

## In Matter of Dayonna W. v. Jhon S., 157 NYS3d 361 (1st Dept. Jan. 18, 2022), respondent appealed from a June 2021 Family Court order which, after a hearing, found that he committed assault 3d and harassment 2d and granted a 2-year stay away order of protection. The First Department affirmed, finding that the elements of assault 3d were satisfied when “respondent grabbed [petitioner’s] right wrist, pushed her, slammed a shopping cart into her right foot cutting it and then pushed her into a wall,” leaving her with “her wrist bruised, sore and tense the next morning,” the cut to her foot “burning,” and with a bruise and cut near her right collar bone, documented by photographs, and supported by an inference that respondent acted “with the intent to cause her physical injury.” As to harassment 2d, the Appellate Division found a course of conduct (PL 240.26[3]) which alarmed or seriously annoyed petitioner, including: his numerous statements that he was going to take her child away from her, including an attempt to remove the child from her vehicle without her permission; screaming obscenities at her; and following her while she was with her child after she repeatedly told him to leave them alone, and then taking a photo of her license plate, while telling her that she was going to see how serious he was; all of which left petitioner feeling unsafe and caused her to temporarily relocate to another address. The First Department concluded that in determining the length of the order of protection, “the court was not required to consider the fact that a temporary order of protection had been in effect for about two years (*see* Family Court Act § 842).”

## **Pendente Lite -** **Temporary Maintenance – No Imputed Income from Gifts, Pandemic Income Decline, Presumptive Guidelines Amount Awarded; Counsel Fees – Spend Down Not Required**

## In Moreira v. Moreira, 156 NYS3d 725 (1st Dept. Jan. 4, 2022), the husband appealed from a January 2021 Supreme Court order, which awarded the wife temporary maintenance of $1,172 per month, temporary child support of $3,683 per month and $25,000 in temporary counsel fees. The First Department affirmed, declining to disturb temporary child support, while noting that Supreme Court awarded the presumptive temporary maintenance guidelines amount based upon the parties’ 2019 tax returns and that its determination to *not* impute income to the wife based upon gifts from her mother was proper, “given the significant drop in [the wife’s] income in 2020 due to the pandemic.” The Appellate Division upheld the counsel fee award, stating that even if the wife had access to funds, “there would be no requirement that she spend down a substantial portion of those assets to qualify for an award of counsel fees.”

## **Procedure - Default Vacatur Motion – Denied – Affirmed**

## In Wilson v. Wilson, 2022 Westlaw 210308 (1st Dept. Jan. 25, 2022), the husband appealed from a December 2020 Supreme Court order, which denied his motion to vacate a judgment of divorce in the wife’s 2014 action, following his failure to appear for trial in August 2017, which resulted in a declaration of default and the holding of an inquest. The First Department affirmed, noting that in April 2017, the husband, who had relocated to NC, chose to represent himself, his counsel withdrew and a trial on the financial issues was scheduled for August 8, 2017. Supreme Court denied his repeated requests for adjournment and on July 24, 2017, directed him to submit a physician’s affidavit stating that his pre-existing medical conditions (dating from June 2016, including seizures) prevented him from appearing at trial. No such affidavit was provided and on August 4, 2017, he submitted a note from a physician’s assistant, stating that he “had been advised to avoid stressors that could trigger seizures, such as travel, pending testing and further evaluation.” The First Department affirmed, noting that: Supreme Court observed the husband participating in proceedings from June 2016 to August 2017; the husband “was not affirmatively told not to travel”; and the NC doctors only began treating the husband after he had repeatedly sought adjournments.

## **Legislative - Income Cap, Poverty Guidelines and Self-Support Reserve Increases**

## **Effective March 1, 2022**, the child support and maintenance income caps increase to $163,000 and $203,000, respectively, the poverty guidelines amount for a single person increases to $13,590 and the self-support reserve increases to $18,346.50.