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

## **Matrimonial Update**

## **By Bruce J. Wagner**

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

## **Agreements – Maintenance – DRL 248 Standard Not Met**

## In Cherico v. Cherico, 2023 Westlaw 8630022 (3d Dept. Dec. 14, 2023), the former husband (husband) appealed from a January 2023 Supreme Court order, which, without a hearing and following written offers of proof, denied his September 2022 motion to terminate his maintenance obligation ($1,050 per month for 60 months) arising from a May 2021 agreement incorporated into a 2021 judgment of divorce. The parties’ agreement provided that the husband’s obligation could be terminated if the wife established a relationship as defined in DRL 248 (habitually living with someone else and holding herself out to be that person’s spouse). The husband’s motion alleged that the wife: had been living with another man for about 1 year and had purchased a home with him; read a co-parenting book with the other man; directed the parties’ children to refer to him as their stepfather; and was living together with the parties’ children and the other man “as a family unit.” The wife denied that she was holding the other man out as her spouse, and stated that does not refer to him as her husband and does not use his surname. The Third Department affirmed, holding that “evidence of cohabitation and commingling of resources does not establish that the wife is holding the other man out as her spouse,” while noting that the shared residence is owned by the wife and the other man as tenants in common.

## **Agreements - Pension – Ambiguity Not Found; Reformation – Plenary Action Needed**

## In Anderson v. Anderson, 221 AD3d 941 (2d Dept. Nov. 29, 2023), following a matrimonial action commenced in July 2002, the parties were divorced in July 2005, and a DRO was issued in November 2005. The parties’ February 2005 stipulation stated that the former husband (husband) was receiving a disability pension since 2001, but that at his age 62, he will get retirement benefits. The November 2005 DRO provided that the former wife (wife) would receive a marital share of the husband’s pension “at such time as [he] has retired and is actually receiving a regular retirement allowance.” In 2017, the parties learned that the plan administrator could not implement the DRO, because the husband had retired on a disability pension in 2001 and that his disability pension would NOT be replaced by a regular service pension at his age 62. The husband’s 2019 proposed amended DRO provided for distribution of a marital share of his pension to the wife commencing at his age 62, which the wife opposed by motion. The husband appealed from a February 2021 Supreme Court Order, which granted the wife’s motion, to the extent of finding that: there was an ambiguity between the incorporated stipulation and the judgment; the parties had been mistaken as to the status of the husband’s pension, but their intent was for the wife to receive her full marital portion of the husband’s pension upon his receipt thereof; and granting the wife’s proposed amended DRO, which provided for retroactive distribution of her share of the husband’s pension. The Second Department reversed, on the law, denied the wife’s motion and remitted to Supreme Court for entry of an amended DRO. The Appellate Division held that: “Supreme Court should have rejected the [wife’s] contention that the stipulation of settlement was ambiguous”; the wife’s interpretation “would render meaningless the terms \*\*\* providing that distribution of pension benefits to [her] would commence \*\*\* when the [husband] reached the age of 62”; and concluded that the stipulation is therefore “not subject to more than one reasonable interpretation, \*\*\*[and] is not ambiguous.” The Second Department noted that to the extent that Supreme Court found there was a mutual mistake, “reformation was not appropriate.” Given that an incorporated agreement cannot be challenged by motion, the Appellate Division found that the wife “was required to commence a plenary action to reform the stipulation.”

## **Agreements - Prenuptial – Ambiguity – Hearing Needed**

## In Gaudette v. Gaudette, 2023 Westlaw 8939125 (3d Dept. Dec. 28, 2023), the parties were married in Canada in June 1977. The husband appealed from a March 2023 Supreme Court judgment rendered in the wife’s October 2020 divorce action following a December 2022 trial, which, among other things, denied his motion to enforce the parties’ May 1977 Canadian prenuptial agreement upon the ground that the material terms thereof were vague and undefined, thus rendering the agreement void, and distributed marital property. The Third Department modified, on the law, by reversing so much of the judgment as denied the husband’s motion to enforce the prenuptial agreement and as determined equitable distribution, and remitted to Supreme Court for further proceedings. The Appellate Division determined that “upon finding that the language of the prenuptial agreement was ambiguous, Supreme Court skipped these steps [resorting to extrinsic evidence, which may require an evidentiary hearing to attempt to ascertain the parties’ intent] and invalidated the agreement,” which was error, and noted that “striking down a contract as indefinite and in essence meaningless is at best a last resort.” [Ed. note: If you are wondering why NY law was applied to this Canadian prenuptial agreement, the Third Department stated: “Supreme Court considered that the parties had resided in New York for approximately 40 years of their 43-year marriage and applied New York law (citation omitted). Inasmuch as the parties fail to present any argument regarding that determination on appeal, they have abandoned any challenge thereto (citation omitted), and we apply New York law in interpreting the prenuptial agreement.”]

## **Agreements - Set Aside – Duress and Unconscionability**

## In Amoia v. Amoia, 2023 Westlaw 8865592 (4th Dept. Dec. 22, 2023), the husband appealed from an August 2022 Supreme Court order, which determined that the parties’ April 2020 agreement was void and not enforceable. The Fourth Department affirmed, finding that the parties were married in 2007 and have 3 children. The husband met with an attorney in late March 2020 and had an agreement drafted, after learning that the wife had an extramarital affair. In April 2020, the paternal grandmother came to the home and retrieved the children; shortly thereafter, the husband’s brother arrived, as did a notary public. The brother video recorded the 20-minute meeting on a laptop computer, during which the husband presented Plan A (sign the agreement and leave the house immediately) and Plan B (go to war, a contested divorce, everyone sees the pictures of wife and paramour and their intimate messages, coupled with the husband’s claim that the wife could go to jail for her adultery). The Fourth Department affirmed, upholding the set aside upon unconscionability, noting the wife’s lack of representation, her waiver of any interest in the marital residence and its furnishings, a waiver of any interest in a marital business and other real property, and a waiver of a $178,000 stock account. There were provisions for maintenance and child support. The Appellate Division agreed that there was duress, based upon the husband’s “threats of losing custody, the children learning of the wife’s indiscretions, and the publication of private, personal communications and pictures sent by the wife to a male friend, together with the threats of likely criminal prosecution,” such that the husband’s conduct “deprived the wife of the exercise of her free will.”

## **Agreements - Set Aside – Overreaching, Unconscionability; Remit re: Severability**

## In Sleiman v. Sleiman, 2023 Westlaw 8864695 (4th Dept. Dec. 22, 2023), the husband appealed from a December 2021 Supreme Court order, which denied his motion for summary judgment in his DRL 170(6) divorce action seeking incorporation of an agreement and granted the wife’s cross-motion to set aside the agreement. The Fourth Department modified, on the law, by denying the cross-motion to the extent that it seeks to void the entire agreement, and remitting to Supreme Court for a determination of what, if any, provisions of the agreement may survive pursuant to the severability clause. The Appellate Division agreed that significant portions of the agreement were properly set aside upon the grounds of unconscionability and overreaching, while noting that the husband was represented by counsel and the wife was not. Namely, the Fourth Department held that Supreme Court’s determination was properly based upon the following factors: there was not full disclosure of the husband’s finances; the husband’s business was not evaluated, yet the agreement required the wife to relinquish her share in almost all of the marital property, including the business; the agreement provided for no child support (2 children) or maintenance, and stated that if the wife was to become engaged or remarry, the husband would automatically have full custody of the children.

**Child Support – CSSA – Equally Shared Physical Custody**

In Matter of Treglia v. Varano, 2023 Westlaw 8838897 (3d Dept. Dec. 28, 2023), both parties appealed from a July 2022 Family Court order, denying their objections to a Support Magistrate order which, after a hearing upon the father’s August 2020 petition, modified a 2017 judgment of divorce (father to pay mother $641.86 weekly toward support of 2 children born in 2006 and 2010), by directing the mother to pay the father $150 weekly based upon a determination that he was the custodial parent, while declining to impute income to the mother. The Third Department modified, on the law, by granting the mother’s objections and remitting for calculation of the father’s child support obligation and of any arrears of the parties. A January 2023 Support Magistrate Order terminated the mother’s child support obligation and stated that the mother’s arrears prior to May 31, 2022 remain in effect. The Appellate Division held that Family Court “erred in denying the mother’s objections,” because a review of the record, including the parties’ February 2014 matrimonial stipulation, a subsequent interim Family Court order, and the hearing testimony all established that “out of a 14-day period, each party had seven overnights with the children” and that “the amount of deviations from an exact 50/50 schedule was minor.” The Third Department concluded given the Support Magistrate’s determination “that the mother’s adjusted gross income was lower than that of the father, the father is the noncustodial parent and is responsible for paying child support to the mother.” On the issue of imputed income, the Appellate Division deferred to the Support Magistrate’s credibility determinations, which it found to be “supported by the evidence,” such that “Family Court did not err when it denied the father’s objections.”

## **Child Support - CSSA – Over $154,000, Limited to $217,800; Childcare – Limited to Average Amount Incurred**

## In Matter of Chung v. Adetayo, 221 AD3d 999 (2d Dept. Nov. 29, 2023), the father appealed from a December 2022 Family Court order denying his objections to a July 2022 Support Magistrate Order which, upon the mother’s April 2021 petition, among other things, set his child support obligation for the parties’ child born in 2018 at $5,342 per month, computed on all the parties’ combined parental income over the then-$154,000 income cap, and directed him to pay his share of child care expenses, computed at $1,310.40 per month. The Second Department modified, on the law, on the facts and in the exercise of discretion, by granting the father’s objections to the extent of reducing his child support obligation to $2,406.69 per month and lowering his child care contribution to $856 per month. The Appellate Division held that “the Support Magistrate improvidently exercised her discretion in calculating child support on the parties’ total combined income in excess of the statutory cap.” The Court determined that “the child’s needs will be met, and her lifestyle maintained, by limiting the combined parental income in excess of the statutory cap to $217,800.” The Second Department found: “While the mother testified at the hearing, and indicated in her financial disclosure affidavit, that she paid $1,680 per month in child care expenses, the documentary evidence introduced by the mother at the hearing demonstrated that, on average, the mother incurred $1,097 per month in child care expenses [,]” such that the father’s pro rata share is $856 per month.

## **Child Support – Imputed Income -** **Expenses on SNW, Averaging Reported Income; Counsel Fees – After Trial – Granted; Equitable Distribution - Receiver Appointment and Sale of Residence Upheld; Exclusive Use and Occupancy – After Trial – Granted; Procedure - Limiting Trial Days – Upheld, Pro Se Litigant Held to Same Standards**

## In Bloom v. Hilpert, 2023 Westlaw 8939118 (1st Dept. Dec. 28, 2023), the husband appealed from a December 2022 Supreme Court judgment which, following a 36-day trial, among other things: (1) imputed income to the parties and directed him to pay the wife $5,558.42 monthly in child support; (2) awarded the wife exclusive occupancy of the parties’ home in East Hampton until the younger child reaches age 18 or sale of the home, she to bear the carrying charges; (3) ordered that a residence in Kings County be placed in a receiver’s control and sold, with the proceeds to be distributed among the husband, wife and the husband’s irrevocable trust for the children’s benefit; and (4) awarded the wife $80,579.84 in counsel fees. The First Department affirmed, holding: (1) Supreme Court properly “rejected both parties’ claims regarding their financial situation and based its imputed income calculation for the wife on her expenses in her 2019 Statement of Net Worth and calculated the husband’s income based on averaging seven years of tax returns as his income admittedly fluctuated over the years”; (2) “[i]t was not an improvident exercise of discretion \*\*\* to award the wife the exclusive use and occupancy of the parties’ home in East Hampton”; (3) “it was not error for the court to have appointed a receiver to manage [the Kings County property] and to effectuate its sale,” noting that “the husband admitted he used tenant security deposits for personal use, \*\*\* and that the parties have an acrimonious relationship”; and (4) the counsel fee award was proper, given that “the husband engaged in dilatory tactics and behavior, threatened the wife, her counsel, witnesses and the court, repeatedly asked for adjournments, and otherwise behaved in a manner that, at a minimum, delayed the proceedings. The Appellate Division rejected the husband’s claim that he was deprived of his right to a fair trial, noting that: “after 33 days of trial, and numerous delays, verbal outbursts and threats by the husband, the court’s determination that it would only allow three more trial days was not an improvident exercise of its discretion”; and a pro se litigant “acquires no greater rights than any other litigant” and is “held to the same standards of proof as those who are represented by counsel.”

## **Child Support -** **Modification – No Diligent Employment Efforts, Started Own Business - Denied; Counsel Fees – Granted**

## In Matter of Bonanno v. Bonanno, 2023 Westlaw 8792426 (2d Dept. Dec. 20, 2023), the father appealed from an August 2022 Family Court order, denying his objections to June 2022 Support Magistrate orders which, after a hearing, dismissed his April 2021 petition for downward modification of child support set by a May 2013 judgment and incorporated December 2012 stipulation, and awarded $9,160 in counsel fees to the mother. The Second Department affirmed, noting that the father left his job as a financial advisor at a bank in 2019 to start his own business and holding “[w]hile a parent is entitled to improve his vocation, his children should not be expected to subsidize his decision.” The Court concluded that: “the father failed to demonstrate that he made diligent efforts to replace his lost income”; and the Support Magistrate “properly considered the substantial assets that the father failed to declare on his financial disclosure affidavit, as well as his expenditures on items such as a $50,000 boat in the months preceding the filing of his petition.” The Appellate Division upheld the counsel fee award to the mother as a provident exercise of the Support Magistrate’s discretion, given the “totality of circumstances.”

## **Counsel Fees - Denied – Failure to Substantially Comply with 60-day Billing Rule**

## In Bracey v. Bracey, 2023 Westlaw 8440799 (2d Dept. Dec. 6, 2023), the former attorney for the wife appealed from a February 2020 Supreme Court order which, in the husband’s September 2017 action for divorce and following the attorney’s May 2019 withdrawal upon consent, denied his September 2019 motion seeking counsel fees of $12,865.72 from the husband, upon the ground that the attorney failed to substantially comply with the 60-day billing requirements of 22 NYCRR 1400.2. The Second Department affirmed, holding that the attorney’s submission of one invoice dated June 1, 2019, seeking payment of $12,865.72 for services rendered between December 3, 2017 and May 30, 2019, did not demonstrate substantial compliance with the rule, such that the attorney “is precluded from recovering legal fees from \*\*\* [the] client (citations omitted), or from the other party (citation omitted).”

## **Counsel Fees - Reversed – Wife Not Charged by Legal Aid; Equitable Distribution - Egregious Fault – 100% of Known Marital Property to Wife; Maintenance - Imputed Income; Nondurational Award Affirmed**

## In Mohamed v. Abuhamra, 2023 Westlaw 8865579 (4th Dept. Dec. 22, 2023), the husband appealed from a July 2022 Supreme Court judgment which, among other things: (1) awarded counsel fees on her behalf to Legal Aid, who represented her free of charge; (2) distributed 100% of the known marital property to the wife based upon egregious fault; and (3) awarded the wife nondurational maintenance after imputing income to him. The Fourth Department vacated the counsel fee award, holding that Supreme Court “lacked authority to award attorneys’ fees to Legal Aid inasmuch as the wife did not *pay* for any legal services aside from the $45 retainer fee and did not owe any additional fees to Legal Aid.” The Appellate Division upheld the equitable distribution award of 100% of the known assets to the wife, noting that in “egregious cases which shock the conscience of the court (citations omitted), the court may consider one party’s fault in fashioning a distribution award.” The Court noted Supreme Court’s decision stating: “[i]n response to this divorce action being filed, [the] husband hid bank accounts, transferred funds and emptied safe deposit boxes”; and the husband “schemed with his brother and a friend to under report [his] financial status and income.” The Fourth Department found that “the husband made it impossible for the court to determine the value of his businesses and as well as the true amount of marital assets.” As to maintenance, the Appellate Division held that Supreme Court properly relied upon “the last concrete measure of [the husband’s] income [as] set forth on his 2008 income tax return” and affirmed the award of nondurational maintenance [amount unspecified].

## **Counsel Fees - Reversed – Waived by Stipulation; Custody - Mother – Primary Caregiver and Wage Earner; Father’s Marihuana Use, Lack of Financial Stability, Health Issues, Food Choices for Child, Permitting Child to Play Violent Video Games; Requiring Mother to Relocate Back as Condition – Error**

## In Daryl N. v. Amy O., 2023 Westlaw 8458693 (3d Dept. Dec. 7, 2023), both parties appealed from: (1) a September 2021 Supreme Court order which, in the father’s May 2020 divorce action, awarded primary physical custody of the parties’ child born in 2015 to the mother, conditioned upon her residing within and enrolling the child in a named school district in Delaware County, from which she had relocated in August 2020 to Putnam County (1 hour, 45 minutes away), and further directed the mother to pay $10,000 in counsel fees to the father’s attorney pursuant to DRL 237; and (2) an October 2021 judgment of divorce, which incorporated the parties’ May 2021 written stipulation and the aforesaid custody and counsel fee order. The Third Department dismissed the cross appeals from the order, as required by entry of the divorce judgment, holding that “review of the judgment includes any issues in relation to that order,” and modified the judgment, on the law, by reversing: (a) the directive that the mother relocate to and register the child in the named school district, and given the passage of time, remitting to Supreme Court for further proceedings to determine a schedule of time for the father and child; and (b) the counsel fee award to the father. The Appellate Division disagreed with the father and the AFC that the custody award to the mother was error, finding that “from the child’s birth until she relocated, the mother worked remotely from home, was the primary wage earner and caregiver for the child,” while noting that the father primarily cared for the child pursuant to a March 2021 consent temporary custody order.” The Third Department determined that Supreme Court’s finding that the father had “shown poor judgment” was properly based upon the mother’s testimony that: “the father chronically smokes marihuana, lacks financial stability and fails to care for his own health”; and “the father allows the child excessive sweets and to play violent, age-inappropriate video games on his iPad and iPhone.” The Court agreed with the mother that requiring her to return to Delaware County and enroll the child in the named school district “lacks a sound and substantial basis in the record,” based upon trial testimony from the child’s teacher that “the child did not have any special needs or require any special accommodations,” and concluded that there would be no “detrimental impact on the child’s ability to progress in any other school district.” The Appellate Division reversed the counsel fee award to the father, noting that the parties’ May 2021 written stipulation provided that “each party shall be responsible for the payment of his and her respective attorney fees,” thus precluding Supreme Court’s use of DRL 237 as a basis therefor.

## **Enforcement - Fugitive Disentitlement – Appeal Dismissed**

## In Matter of Thurston v. Bombard, 2023 Westlaw 8866494 (4th Dept. Dec. 22, 2023), the father appealed from a May 2022 Family Court order which, upon a finding of willful violation of a child support order, committed him to 3 months in jail and set a purge amount of $90,000. The Fourth Department dismissed the appeal, with leave to move to reinstate the appeal upon the posting of $90,000 undertaking in Family Court within 60 days of service of a copy of the Appellate Division order with notice of entry. The Appellate Division found that the father “moved to Florida without ever serving his term of imprisonment or purging the contempt finding \*\*\* [and] is now the subject of a bench warrant in this State, but has refused to return.” The Court concluded that “the fugitive disentitlement theory applies to this appeal,” given that by his absence, the father “is evading the very order from which he seeks appellate relief and has willfully made himself unavailable to obey the mandate of Family Court in the event of an affirmance. (Internal brackets omitted).”

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

## In Matter of Khalia R.R. v. Evans D., 2023 Westlaw 8721040 (1st Dept. Dec. 19, 2023), a sentence of weekend incarceration for 6 months with a purge amount of $7,000 was upheld, upon the father’s failure to present credible evidence of both an inability to pay support due to a medical condition, and a diligent search for employment. The First Department noted that the father’s financial disclosure affidavit “reflected substantial expenses for rent for two apartments, pet care, and dry cleaning that belied his claim that he was without funds to pay support.” To the same effect is Matter of Wanda R.F. v. Marc A.C., 2023 Westlaw 8939163 (1st Dept. Dec. 28, 2023) [Sentence of weekend incarceration for 6 months with a purge amount of $20,000, upheld, upon the father’s failure to “establish that he engaged in diligent efforts to obtain employment and failed to present competent medical proof of his present inability to work,” while noting that the father “did not present sufficient medical evidence to support his claim that he was presently unable to work at all because of medical impairments.”]

## **Equitable Distribution - Sale of Residence Upheld - Wife’s Failure to Seek Employment as a Factor**

## In Binnmyr v. Binnmyr, 2023 Westlaw 8939133 (1st Dept. Dec. 28, 2023), the wife appealed from a September 2022 Supreme Court order which, among other things, directed the sale of the parties’ NYC apartment, with the parties to share equally in any net proceeds and a credit given to the husband for carrying costs he paid since May 2022. The First Department affirmed, noting that the equitable distribution determination “was made after a trial where the Referee was able to assess the credibility of the witnesses and their proffered evidence over the course of 18 days.” The Appellate Division noted: the apartment was “originally purchased as an investment property and that [the] wife moved there while the children were attending school in Manhattan”; “[i]n the nine years the wife has lived in New York, she never obtained employment or established any other connection to the city besides the subject apartment”; “the wife’s desire to remain in her current apartment is understandable, [but] her claim that its sale would render her homeless is without basis”; and the wife “admitted during the hearing to having over a million dollars in liquid assets.” The Court concluded that it was proper for Supreme Court to direct the wife “to pay the carrying costs for the apartment pending the sale,” observing that the case “has been pending for seven and a half years, during which time [the] husband has been responsible for all taxes and fees associated with the property” and “[i]n the meantime, the wife never progressed to securing even a part-time job.”

## **Family Offense - Disorderly Conduct, Harassment 2d – Found; 7-Month Order**

## In Matter of Alisa H. v. Ayana B., 199 NYS3d 65 (1st Dept. Dec. 7, 2023), respondent appealed from a May 2022 Family Court order which, following a hearing, found that petitioner committed disorderly conduct and harassment 2d and issued a 7-month order of protection. The First Department affirmed, holding that harassment 2d (PL 240.26[3]) was established by petitioner’s testimony that “at various times between 2015 and 2020, respondent would come to petitioner’s apartment, sometimes late at night and sometimes with a group of friends, to bang and kick on the door while screaming profanities and threatening to harm her,” which “frightened and disturbed her,” and noting that respondent’s intent to cause these effects can be inferred from her actions and the surrounding circumstances. The Appellate Division held that disorderly conduct was proved by petitioner’s testimony that: during her family cookout in 2018, “respondent appeared uninvited with a group of women and spent the rest of the event cursing at petitioner and making threats” (PL 240.20[1]); and “between 2019 and 2020, respondent screamed obscenities and insults at petitioner while in a public place,” thus satisfying the elements of intending to cause, or recklessly creating a risk of causing, “public inconvenience, annoyance or alarm.” (PL 240.20[3]).

## **Family Offense - Harassment 2d – Found; 1-Year Order**

## In Matter of Sharice N.G. v. Perry B., 2023 Westlaw 8598638 (1st Dept. Dec. 12, 2023), the father appealed from a February 2023 Family Court order which, after a hearing, found that he committed harassment 2d [PL 240.26[3]) and issued a 1-year order of protection. The First Department affirmed, holding that the mother’s testimony “supports the finding that [the father] engaged in a course of conduct, by repeatedly threatening to put [the mother] and her new partner in a body bag, which served no legitimate purpose, with the intent of seriously annoying or alarming her” and that the father’s “intent to commit the \*\*\* offense \*\*\* is fairly inferable from the surrounding circumstances.”

## In Matter of Inez A. v. David A., 2023 Westlaw 8814741 (1st Dept. Dec. 21, 2023), respondent appealed from a September 2022 Family Court order which, after a hearing, determined that he committed harassment 2d and directed him to stay away from petitioner for 1 year. The First Department affirmed, holding that “sending threatening text messages and repeatedly calling the police to conduct wellness checks on petitioner despite his knowledge that the checks were unnecessary, served no legitimate purpose and established a course of conduct that was undertaken with the intent of seriously annoying or alarming petitioner,” PL 240.26(3), with respondent’s intent being “fairly inferable from the surrounding circumstances.”

## **Family Offense - Harassment 2d – Found; Aggravated Harassment 2d and Menacing 2d – Not Found**

## In Matter of Raymond H.B. v. Kenneth E.M., 221 AD3d 523 (1st Dept. Nov. 28, 2023), respondent appealed from an April 2023 Family Court order which, following a hearing, determined that he committed harassment 2d, aggravated harassment 2d and menacing 2d, directed him to stay away from petitioner and not communicate with him until October 18, 2024. The First Department modified, on the law and the facts, to vacate the findings of aggravated harassment 2d and menacing 2d, and otherwise affirmed. The Appellate Division determined that petitioner established harassment 2d (Penal Law 240.26[3]) by proving that “respondent sent emails, some with a video file annexed, to petitioner and petitioner’s mother, threatening to release sexually graphic images of petitioner unless he received the apology he believed was owed.” The Court found that respondent did not deny sending the communications, which “served no legitimate purposes and only alarmed or seriously annoyed petitioner.” The First Department noted that it made no difference that petitioner had himself originally posted the sensitive images on a members-only internet site, concluding that “respondent’s intent to harass, annoy or alarm petitioner may be inferred from his threats.” As to aggravated harassment 2d, the same was not proved, in the absence of “evidence that respondent contacted him by telephone, touched him, made a threat to his physical safety or property or that of a member of his family or household, ore was previously convicted of the crime of harassment in the first degree within 10 years before the petition was filed against him,” citing Penal Law 240.30. Regarding menacing 2d, the Appellate Division held that “the evidence failed to establish that respondent placed or attempted to place petitioner in reasonable fear of physical injury \*\*\* [Penal Law 120.14(1) and (2)], or that respondent violated an order of protection of which he had actual knowledge,” citing Penal Law 120.14(3).

## **Family Offense - Intimate Relationship; Reckless Endangerment 2d – Found; 2-Year Order**

## In Matter of Martinez v. Toussaint, 2023 Westlaw 8440831 (2d Dept. Dec. 6, 2023), respondent appealed from a September 2022 Family Court order which, after a hearing, found that she had committed reckless endangerment 2d against petitioner and granted a 2-year stay away order of protection. The Second Department affirmed, finding that: in 2020, the parties “engaged in unprotected sex on two occasions”; “[a]fter the second encounter, [respondent] informed petitioner that she was HIV-positive”; and “[he] was thereafter diagnosed with HIV.” The Appellate Division held that the parties had an intimate relationship within the meaning of FCA 812(1)(e) and affirmed the finding of reckless endangerment, noting that respondent “did not introduce any evidence at the hearing to refute petitioner’s testimony \*\*\*.”

## **Maintenance - Downward Durational Deviation; Guidelines Amount Upheld, Imputed Income – Labor Statistics**

## In Breen v. Breen, 2023 Westlaw 8814143 (3d Dept. Dec. 21, 2023), the husband appealed from a September 2021 Supreme Court judgment which after a 10-day trial, among other things, directed him to pay the wife maintenance for 10 years. The parties were married in 1984, have 2 emancipated children and separated in March 2017, following which the husband commenced the divorce action. The Third Department affirmed, noting that by the end of the trial, both parties were unemployed. Supreme Court imputed $15,000 in annual income to the wife, based upon her most recent income tax return, considering that she had been a homemaker since the birth of the older child in 1991, her teaching certification had long since lapsed, and that she had held sporadic part-time jobs. The husband had engaged in the private practice of law from 1987-2014 and then became state-employed, initially at $90,000 and then earning $106,503 by June 2019, when he accepted a job with another state entity at an annual salary of $150,000, from which position he “concedes he was terminated for cause \*\*\* during the pendency of the trial.” Supreme Court noted the husband’s retirement age, and rather than impute his state employment earnings to him, used the NYS Dept. of Labor statistics to impute $99,281, the median wage for an attorney in the Capital Region, as income to him. The Appellate Division held that Supreme Court properly exercised its discretion by using said statistics and “correctly calculated the husband’s spousal maintenance obligation based on the statutory formula [amount unspecified].” The guidelines suggested a duration between 11.9 and 17 years for this approximately 34-year marriage, and the Third Department concluded that Supreme Court considered the appropriate factors, DRL 236(B)(6)(e)(1)(a-o), in its direction of a 10-year term for maintenance.

## **Pendente Lite - Prohibit de-Koshering Homes; DRL 234 Exclusion of Paramours Vacated**

## In Allen v. Allen, 2023 Westlaw 8814833 (1st Dept Dec. 21, 2023), the husband appealed from a December 2022 Supreme Court order, which directed him not to de-Kosher the family homes and prohibited the parties from having romantic partners in the residences. The First Department modified, on the facts, by vacating the prohibition of paramours and otherwise affirmed. The Appellate Division held that Supreme Court “did not run afoul of the Constitution by ordering the husband to maintain the 20-year status quo and not de-Kosher the parties’ homes during the pendency of the action” and “the husband is not being impermissibly required to practice a particular religion or adhere to a particular religion in the home or being precluded from expressing himself and living freely.” The Court concluded that Supreme Court erred in its paramour prohibition, given that “nothing in the record demonstrates that the presence of the husband’s romantic partner at one of the marital residences in any way impacted [the] \*\*\* wife’s safety,” such that the DRL 234 exclusion standard was not met, while noting that the wife’s “discomfort is an insufficient basis to exclude an otherwise non-problem causing party, particularly where children are not involved.”

## **Procedure - Denial of Adjournment or Request to Appear by Phone – Upheld**

## In Matter of Hanrahand v. Hanrahand, 2023 Westlaw 8609021 (2d Dept. Dec. 13, 2023), the father appealed from a June 2022 Family Court order of commitment, which confirmed an April 2022 Support Magistrate order of disposition entered upon his default in appearance at an April 6, 2022 hearing, following a denial of his request for an adjournment or to appear by phone. Earlier in June 2022, the Support Magistrate denied the father’s order to show cause to vacate his default, upon the grounds that the father failed to serve the same and the motion was meritless. The Second Department affirmed, noting that review from an order entered upon default is limited to matters which were the subject of contest, and holding that “the Family Court did not improvidently exercise its discretion in denying the father’s request for an adjournment or for leave to appear in court telephonically.”

**New Official Family Court Forms**

## Pursuant to Administrative Order 394 of 2023 (AO/394/2023), signed December 28, 2023 and designed to implement the amendments to CPLR Rule 2106 effective January 1, 2024, as previously reported, which allow any person to “self-swear” an affirmation for use in an action or proceeding, 78 Family Court forms were rescinded and replaced by 78 new forms.  All the new forms are available at [Family Court Forms | NYCOURTS.GOV](https://ww2.nycourts.gov/forms/familycourt/index.shtml)