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

## **Matrimonial Update**

## **By Bruce J. Wagner**

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

## **Agreements - Not Acknowledged – Unenforceable; Procedure – Statement of Material Undisputed Facts [22 NYCRR 202.8-g(a)]**

##  In Cole v. Hoover, 2023 Westlaw 3914034 (4th Dept. June 9, 2023), the former wife (wife) appealed from a December 2021 Supreme Court order, which denied her motion for summary judgment upon her cause of action, alleging that the parties’ May 2018 oral stipulation incorporated into their judgment of divorce was invalid, because it was not acknowledged as required by DRL 236(B)(3). The Fourth Department reversed, on the law, granted the wife’s motion for summary judgment and declared the stipulation to be invalid and unenforceable, upon the ground that the same was not acknowledged. The Appellate Division rejected Supreme Court’s finding that the wife ratified the stipulation, noting that the Court of Appeals implicitly rejected the same reasoning in Matisoff v. Dobi, 90 NY2d 127, 135-136 (1997). The Court concluded that the wife’s “failure to submit a statement of material undisputed facts in support of her motion, as then required by \*\*\* 22 NYCRR 202.8-g(a) \*\*\* did not compel the court to deny her motion (citations omitted).”

## **Child Support - CSSA – Imputed Income – Cash Distributions from Business - Dependency Claims - Over Cap ($148,000); Equitable Distribution - Proportions – Business (20%); Valuation – Business**

##  In Miller v. Miller, 216 AD3d 1154 (2d Dept. May 31, 2023), the husband appealed from a September 2019 judgment rendered upon a June 2019 decision after trial of his 2016 action, which, among other things: (1) valued his medical services company at $2,885,100 and awarded the wife 20% thereof; (2) directed him to pay $5,000 per month in child support, which exceeded the then $148,000 cap; and (3) failed to direct that he could claim any of the parties’ unemancipated children as dependents. The Second Department modified, on the law, by directing that the husband could claim all the parties’ unemancipated children as dependents, and otherwise affirmed. The Appellate Division held that: (1) Supreme Court properly valued the medical services company at $2,885,100 in accordance with its credibility findings and the report of the court-appointed neutral expert, and providently awarded the wife 20% thereof, given the 22-year length of the marriage as of the date of commencement, and the wife’s sacrifices associated with advancing the husband’s education and career and in caring for the parties’ 8 children; and (2) Supreme Court properly awarded child support on income over the then $148,000 income cap “primarily due to the parties’ considerable income and the needs of the children,” finding further that the imputation of $80,000 in annual income to the wife was appropriate, noting that the wife’s 2017 income tax return reported $45,436 from her business, but her bookkeeper testified that the wife’s 2017 distributions totaled nearly $65,000 and the wife admitted that she used cash from the business to pay personal expenses.

## **Child Support - Imputed Income – Termination from Prior Employment; Evidence – Judicial Notice – Website – Error; Maintenance - Durational**

##  In Anyanwu v. Anyanwu, 216 AD3d 1128 (2d Dept. May 31, 2023), the husband appealed from a November 2020 Supreme Court judgment which, upon a June 2020 decision following trial of the wife’s January 2017 action, imputed income to him of $92,942, awarded the wife maintenance of $423.50 per month for 7 years and child support of $1,876.44 per month. The Second Department affirmed, holding that Supreme Court properly imputed income to the husband, based upon “the undisputed evidence of his educational background and his vague denial of recollection as to whether the accusations underlying his termination from his previous full-time position had merit” and his “own admission to earning more than $96,000 in 2017.” The Appellate Division made no other findings regarding its reasons for upholding the maintenance and child support awards. The Court noted that the husband was correct in his assertion that the trial court “should not have, sua sponte, taken judicial notice of information regarding the [husband’s] income on a certain website.”

## **Custody *- Lincoln* Hearing Denial (Age 16) – Reversed**

##  In Matter of Samantha WW. Malek KK., 2023 Westlaw 3872128 (3d Dept. June 8, 2023), the mother appealed from a January 2022 Family Court order, which granted the father’s motion at the close of her proof, to dismiss her modification petition filed in 2020 and which sought primary physical custody. A stipulated 2017 order provided for joint legal custody of the parties’ son born on 2005, with primary physical custody to the father. The Attorney for the Child opposed the motion to dismiss and requested a *Lincoln* hearing; Family Court declined to conduct the same. The Third Department reversed, on the law, and remitted to Family Court for further proceedings to be commenced within 45 days, holding that “Family Court abused its discretion in denying the attorney for the child’s request for a *Lincoln* hearing,” noting that “[a]t the time of the hearing, the child was six days shy of being 16 years old and the mother’s primary argument in support of her petition was that the child preferred her to reside with her in Florida.” The Appellate Division concluded that “a Lincoln hearing is called for under these circumstances.”

## **Custody -** **Modification – Denied – Acrimony No Worse; Violation – Not Found – No Unequivocal Mandate**

##  In Matter of Brookover v. Harris, 2023 Westlaw 3913437 (4th Dept. June 9, 2023), the father appealed from a June 2022 Family Court order, which denied his petitions seeking to modify a prior order (sole custody to mother), and seeking a determination that the mother violated the prior order. The Fourth Department affirmed, holding that Family Court properly found that the father failed to establish changed circumstances warranting modification, and “although the record reflects that there is significant acrimony between the parties, there does not appear to have been a change in that respect after the prior custody order was entered.” As to the alleged violation, the Appellate Division held that Family Court “properly determined that the father did not meet his burden inasmuch as the provision of the prior order \*\*\* was unambiguous and did not express an unequivocal mandate.”

## **Custody - Modification – Joint to Sole – Educational Neglect, Injuries to Children, Ouster from Home, Unilateral School Change, Wishes of Children**

##  In Matter of Ciara H., 2023 Westlaw 4110316 (1st Dept. June 22, 2023), the mother appealed from a July 2021 Family Court order which, after a hearing, granted the father’s petition to modify the parties’ judgment of divorce (joint legal, physical to mother), to award him sole legal and primary physical custody of the children. The First Department affirmed, noting that the parties stipulated that there had been a change in circumstances and holding that “the totality of the circumstances supports the \*\*\* change in custody \*\*\* to sole legal and physical custody to the father, with parenting time to the mother on weekends and alternating holidays, [and] was in the children’s best interests.” The Appellate Division found that: “in October 2018, [the mother] became increasingly stressed, culminating in an incident where she shouted at the children and threw glass and ceramic items, resulting in cuts to the children, and she demanded that the children pack their things and go stay with their father”; “there was a possibility that the older child would not be promoted to the next grade, yet the mother did not meaningfully engage with her teachers to monitor the child’s progress”; “[t]he mother also unilaterally changed that child’s school without informing the father”; and [t]he father \*\*\* provided a stable home environment for the children and met their emotional and educational needs, and the older child’s academic performance improved in his care.” The Court concluded by observing that “the children consistently expressed their desire to reside with the father during the week. Given their ages [unspecified], their preferences are entitled to great weight.”

## **Custody - Modification – Relocation – Denied (Bronx to Dutchess)**

##  In Matter of T.D. v. L.M.D., 2023 Westlaw 3958256 (1st Dept. June 13, 2023), the mother appealed from an October 2022 Family Court order which, following a hearing, denied her petition to modify a prior order (joint legal, nearly equal custody) to permit her to relocate with the parties’ child from Bronx County to Dutchess County. The First Department affirmed, holding that the evidence showed: (1) that the increase in profit margins for the mother’s business “was modest at best, while her \*\*\* rents were comparable”; (2) the educational benefit to the child, if any, would be minimal; (3) while the mother had identified 2 Dutchess County private schools, she had “no realistic plan for covering the [$40,000] cost of tuition”; and (4) “presented no evidence that the local public school in Dutchess County would be a better fit for the child academically.” The Appellate Division concluded that while the child, through his attorney, expressed a preference for relocation, Family Court “properly concluded that any benefits of relocation would not outweigh the harm that would ensue should the child’s relationship with his father be disrupted.”

## **Custody - Sole – Domestic Violence**

##  In Matter of Warda NN. v. Muhammad OO., 2023 Westlaw 3872101 (3d Dept. June 8, 2023), the father appealed from a February 2022 Family Court order which, after a hearing upon the mother’s custody and family offense petitions, awarded the mother sole legal custody and physical custody of the parties’ 2 children born on 2012 and 2015. The Appellate Division noted that the parties “entered into an arranged marriage in their native country of Pakistan in 2009 and remarried in Brooklyn in 2011.” In December 2018, the mother and children traveled to Pakistan so that she could care for her ailing mother. The mother did not return to Brooklyn and “fled the marriage and moved to Albany with the children.” The father did not see the children during the 2 years following the mother’s move to Albany. The Third Department affirmed, noting the mother’s extensive and credible testimony as to domestic violence, which included forced sexual intercourse in the presence of the parties’ first child (as to whom the father expressed displeasure because she was female) “for the purpose of producing a son.” The Appellate Division recounted another incident when “the father grew angry that the mother was behind in her food preparations for a family party, and he beat her in front of the family and burned her with a hot cooking utensil”; the “children \*\*\* witnessed this incident”; and the mother “was not allowed to seek medical attention for the burn but instead was told to put toothpaste on it.” The mother testified that she was the sole caregiver of the children throughout the marriage and the father “did not treat the children with affection but only shouted at them.” The Third Department concluded that Family Court’s custody award was in the children’s best interests and that Family Court did, as required by law, DRL 240(1)(a), “consider the effect of domestic violence when the allegations \*\*\* are proven by a preponderance of the evidence.”

## **Disclosure - Surveillance Videos – Pre- and Post Deposition**

##  In Pizzo v. Lustig, 2023 Westlaw 3329027 (2d Dept. May 10, 2023), a personal injury action commenced in April 2018, Plaintiff served a demand for surveillance materials pursuant to CPLR 3101(i) on January 11, 2019. A January 28, 2019 Supreme Court order required surveillance tapes to be exchanged within 30 days thereof. In mid-February 2019, Defendant conducted video surveillance of Plaintiff. A September 2019 Supreme Court order directed responses by all parties to all outstanding discovery demands by October 28, 2019. Plaintiff’s deposition commenced on November 20, 2019 and was continued and concluded on March 4, 2020. The February 2019 video surveillance of Plaintiff was neither disclosed or otherwise raised, prior to or during either of Plaintiff’s deposition sessions. On March 4, 2020, 2 minutes after the completion of Plaintiff’s deposition, Defendant obtained further surveillance video of Plaintiff. Defendant obtained additional video surveillance of Plaintiff in June, July, and December 2020, and attempted, unsuccessfully, to gather additional footage of Plaintiff on 3 additional dates in December 2020. In total, Defendant obtained 8 segments of video surveillance of Plaintiff: 1 prior to the deposition and 7 after the deposition was completed. On March 17, 2021, Defendant disclosed all the surveillance videos to Plaintiff. Plaintiff moved to preclude all the videos, arguing that Defendant: willfully failed to provide disclosure thereof until long after Plaintiff’s January 2019 demand therefor, 2 years earlier; violated Supreme Court’s January and September 2019 orders, at least as to the first video made in February 2019; and, as to the same February 2019 video, failed to disclose the same until after the Plaintiff’s November 2019 and March 2020 deposition sessions. In an Order dated December 10, 2021, Supreme Court denied the preclusion motion in its entirety, finding that “plaintiff failed to establish that the alleged late disclosure of the surveillance material was willful or contumacious or that the plaintiff was prejudiced in any way.” The Second Department modified, on the law, by granting so much of Plaintiff’s motion as sought to preclude the mid-February 2019 surveillance materials, and otherwise affirmed, holding that “defendant’s noncompliance with the plaintiff’s discovery notice and two court orders, over an extended period of time, was willful and strategic with regard to the mid-February of 2019 surveillance video,” which warranted preclusion of the surveillance not disclosed prior to plaintiff’s deposition, citing Tai Tran v New Rochelle Hospital, 99 NY2d 383, 389-390 (2003). The Appellate Division noted, among other things, that: CPLR 3101(i) “provides no fixed deadline for the disclosure of post-deposition surveillance video footage”; defendant’s March 2021 disclosure of all surveillance videos occurred prior to the filing of a note of issue; and “plaintiff failed to establish prejudice from the timing of the defendant’s disclosure, as discovery in the action \*\*\* had not yet closed.” The Second Department rejected plaintiff’s argument that defendant was under a duty to disclose each video after the same was made, rather than waiting until March 2021, stating: “While continuing disclosure is required for discovery generally, the imposition of such a piecemeal requirement upon surveillance materials would be impractical and defeat the very purpose of post-deposition sub rosa surveillance of parties.” The Court further observed: “Surveillance videos, when authentic, non-manipulated, and admissible, add an important truth-finding element to litigations, and the determination of truthful claims or defenses is the ultimate and singularly important responsibility of the triers of fact.” The Appellate Division noted in conclusion that it was not “suggest[ing] that post-deposition surveillance material may never be precluded,” but only that “circumstances warranting preclusion are not present here.”

## **Enforcement -** **Contempt – Purge Amount Satisfied by Jail Sentence**

##  In T.H. v. M.B., 2023 Westlaw 3731263 (Sup. Ct. N.Y. Co., Waterman-Marshall, J., May 17, 2023), a March 30, 2023 order held the wife in contempt for willful non-compliance with orders directing her to pay temporary maintenance and child support, and arrears were set at $49,529. Supreme Court set a purge amount of 50% or $24,264.50 due by April 28, 2023. The wife paid only $3,500 and was committed for 3 weeks unless she paid the purge balance of $20,764.50. Supreme Court modified the sentence to 19 days, which the wife served in full. The Court found that the wife satisfied the purge balance of $20,764.50 by serving the entire sentence, such that it would be unjust to enter a money judgment therefor. The Court granted a money judgment for the other 50% still due, in the sum of $24,264.50.

## **Enforcement - Willful Violation – No Inability to Work; SSD Application Not Determinative**

##  In Matter of Benson v. Sherman, 2023 Westlaw 4002706 (3d Dept. June 15, 2023), the father appealed from an August 2022 Family Court order which, following a June 2022 confirmation hearing held following his default before the Support Magistrate, found that he: (1) willfully violated a 2020 support order which required him to pay $40 per month toward the support of the parties’ child born in 2009; (2) owed $468.12 in arrears; (3) had not paid support since September 2021; and (4) and sentenced him to 6 months in jail. The Third Department affirmed, holding that while there was medical evidence that the father was in pain and unable to perform manual labor following spinal surgery and a 1-month hospitalization from late October to late November 2021, the record is “devoid of proof that the father was only capable of obtaining employment involving physical labor, lacked other options in which to generate income, or attempted to find work accommodating his health limitations.” The Appellate Division concluded that an application for SSD benefits “does not preclude Family Court from determining that he was able to work in some capacity,” while noting “the support obligation of $40 a month was minimal and no payments were made during this period.”

## **Equitable Distribution - Proportions (60%/40%) – Childless, Later Marriage, Valuation Date – Stock Options, Wasteful Dissipation; Maintenance - Durational**

##  In Lorne v. Lorne, 2023 Westlaw 3742967 (1st Dept. June 1, 2023), both parties appealed from, among other things, so much of a May 2021 Judgment of Divorce as: (1) awarded the wife maintenance of $7,000 per month for 6 years; (2) determined that the husband’s stock options should be valued as of the date of the commencement of the action; (3) divided marital property 60% to the husband and 40% to the wife; and (4) awarded the wife 40% credits for 3 alleged instances of wasteful dissipation of marital property. The First Department: (1) affirmed the maintenance award, holding that Supreme Court properly considered the statutory factors and the parties’ pre-divorce standard of living, rejecting “the wife’s argument that she is entitled to significantly more maintenance simply based on the husband’s income”; (2) affirmed the date of commencement valuation of the husband’s stock options, holding that application of the “active asset” rule was proper, in that the husband is a board member and chair of the audit committee of the company in question, attended meetings, kept abreast of the industry and acted as a conduit for information with audit partners; (3) affirmed the 60%/40% distribution of marital property, noting that “[t]he parties met in their fifties and did not have children together” and while she “largely managed the parties’ properties, the wife did not work outside the home,” and further observing that while the divorce action was pending, “the wife sent letters disparaging the husband to his employer and other professional contacts” and the husband’s “highest earnings years occurred in the three years preceding commencement of the action when the parties had effectively set up separate households in New York and Connecticut”; and (4) held that as to the wife’s dissipation claims, Supreme Court erred by giving the wife a 40% credit for a $420,000 loan he made, given that the loan was made from the husband’s post-commencement earnings, and determined that Supreme Court further erred by granting the wife a 40% credit for $534,814 in loans the husband made to his daughter, “years before the commencement of his action.” The Appellate Division did uphold Supreme Court’s finding that the wife should receive a 40% credit for the husband’s use of $90,000 in marital funds for post-commencement rent for his apartment, given that the wife was not otherwise compensated therefor in the distribution of marital property. The First Department modified, however, determining that the husband’s use of $90,000 was “effectively an advance on equitable distribution,” such that “the wife’s credit should have been calculated as $60,000, not $36,000.” [Ed. Note: Supreme Court simply multiplied $90,000 by 40% to arrive at $36,000. Rather, Supreme Court should have asked itself the questions: (a) “How does one determine the value of the marital property from which the husband received a 60% advance?” Answer: $90,000 / .60 = $150,000; and (b) “What is the wife’s 40% share of the same result?” Answer: $150,000 x .40 = $60,000.]

## **Evidence - Credibility – Imputed Income; National Bureau of Labor Statistics Data**

##  In Matter of Harry T. v. Lana K., 2023 Westlaw 4003091 (1st Dept. June 15, 2023), the mother appealed from a July 2020 Family Court order denying her objections to a November 2019 Support Magistrate order, which following a hearing, found that her testimony regarding her reported income was not credible, found that the father’s testimony was credible, and discounted the testimony of the mother’s therapist. The First Department affirmed, noting that the Magistrate’s credibility findings “are entitled to great deference.” The Appellate Division held the Support Magistrate properly imputed income to the mother “based on her earning potential as a dentist and on her other assets” and that “use of the National Bureau of Labor and Statistics to determine the median income for a dentist was not an improvident exercise of discretion, as there were no credible records of the mother’s income.”

## **Pendente Lite - Add-On Expenses – Decision Making, Prohibition on Contacting Providers, No Hearing Required**

##  In Ader v. Ader, 2023 Westlaw 3828099 (1st Dept. June 6, 2023), the father appealed from a January 2023 Supreme Court order which: (1) granted the motion of the attorney for the children to enforce the order requiring the father to pay for add-ons and to refrain from interfering with, harassing, or terminating the services of the children's third-party providers; (2) granted so much of the mother's motion as sought to prohibit the father from having any contact with the children's current or prospective providers except to pay invoices; (3) awarded the mother sole interim decision-making for the children's add-on expenses; and (4) directed the father to pay or reimburse those expenses within 10 days of submission, subject to reallocation at trial. The First Department affirmed, holding that “[t]he court's determinations regarding payments due and owing to the children's current or prospective third-party providers had a sound and substantial basis in the record,” finding that “the father continually interfered with the children's third-party providers, such as tutors, by refusing to timely pay their fees or refusing to pay them at all.” The Appellate Division determined: “there was a sound and substantial basis in the record for the court's award to the mother of sole interim decision-making for the children's add-on expenses and for the court's directive that the father refrain from directly contacting or harassing current or potential third-party providers. The father had tried to interfere with the children's tutors by sending them emails apparently designed to intimidate them, to the children's detriment.” The First Department concluded that Supreme Court did not err “in declining to hold a full evidentiary hearing before making these determinations,” noting that undisputed evidence that “less than two days after being ordered not to harass, intimidate, or discontinue the children's providers, the father sent emails to some of those providers with no discernable purpose other than to intimidate them.”

## **Procedure - Courtroom Closure – Reversed**

##  In Paulson v. Paulson, 2023 Westlaw 4065558 (1st Dept. June 20, 2023), the wife appealed from a January 2023 Supreme Court order, which granted the husband’s motion to close the courtroom for oral argument upon motions to dismiss the complaint. The First Department reversed, on the law, and denied the husband’s motion for closure, finding that Supreme Court “did not provide the public and the press adequate notice of the \*\*\* closure request” and noting that because the Court instructed the parties to file their submissions thereupon by email, the same were not reflected on “the publicly maintained docket entries,” as required (citations omitted). Judiciary Law §4 mandates that “[t]he sittings of every court within this state shall be public, and every citizen may freely attend the same \*\*\* except that in all proceedings and trials in cases for divorce, seduction, rape, assault with intent to commit rape, criminal sexual act, bastardy or filiation, the court may, in its discretion, exclude therefrom all persons who are not directly interested therein, excepting jurors, witnesses and officers of the Court.” The Appellate Division held that Supreme Court “improperly read an exception into” the statute, namely, proceedings that could entail arguments that implicate documents filed under seal, an “approach \*\*\* rejected by the Court of Appeals,” citing Matter of Capital Newspapers Div. of Hearst Corp. v. Moynihan, 71 NY2d 263, 272 (1988). The Court concluded by: (a) rejecting the husband’s argument that the presumption of public access does not apply because the proceedings “are pretrial or because they are scheduled at the court’s discretion,” finding no support therefor in the language of the statute; and (b) determining that Supreme Court “improperly ordered courtroom closure on the basis of speculative harm to the parties’ daughters.”

## **Legislation -** **Affirmation by Any Person**

##  Passed by both Assembly and Senate as of May 31, 2023 and **if signed**, this legislation **would amend** CPLR Rule 2106 **effective January 1, 2024,** to allow an affirmation by any person, subscribed and affirmed to be true under the penalties of perjury, to be used in a civil action in NY in lieu of, and with the same force and effect as, an affidavit. A.05772/S.05162.