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

## **Matrimonial Update**

## **By Bruce J. Wagner**

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

## **Agreements - Set Aside – Denied – No Coercion, Duress or Unconscionability**

## In Johnson v. Ranger, 2023 Westlaw 3486541 (2d Dept. May 17, 2023), the husband appealed from a February 2018 judgment of divorce which, upon an April 2017 order rendered in his July 2013 divorce action, denied his January 2017 motion to vacate the parties’ September 2016 stipulation of settlement, and, further, incorporated the same into the judgment. The Second Department affirmed, holding that the husband failed to: (a) establish duress or coercion, which requires a showing that “threats of an unlawful act compelled his \*\*\* performance of an act [from] which he \*\*\* had the legal right to abstain,” by his “claim that he felt pressured to enter into the stipulation”; and (b) prove that the stipulation was unconscionable, “simply because it might have been improvident or one-sided,” where the agreement “provided the [husband] with meaningful bargained-for benefits, including the [wife’s] waiver of her entitlement to any portion of \*\*\* [his] pension.”

## **Child Support - Family Court Limited Jurisdiction – Existing Supreme Court Support Order**

## In Matter of Dawson v. Iskhakov, 2023 Westlaw 3486585 (2d Dept. May 17, 2023), the mother appealed from a September 2022 Family Court order denying her objections to a July 2022 Support Magistrate order which, without a hearing, dismissed so much of her June 2021 petition seeking child support upon the ground of lack of subject matter jurisdiction. The parties consented to an April 2017 judgment of divorce, which required each party to pay child support for the subject child to the maternal grandmother. The Second Department affirmed, noting that FCA 461(a) permits Family Court to make a child support order “[i]n the absence of an order of the supreme court or of another court of competent jurisdiction.” Where, as is here the case, either type of a child support order has already been rendered, the Family Court may only entertain petitions to enforce or modify the same. FCA 461(b). The Appellate Division concluded that since the mother’s petition sought to establish child support, Family Court had no jurisdiction thereof, and rejected the mother’s contention that the Support Magistrate could have “corrected \*\*\* the petition under CPLR 103 or 2001, so as to gain subject matter jurisdiction \*\*\*.”

## **Child Support - Imputed Income – Minimum Wage; Insufficient Medical Proof of Disability**

## In Matter of Lincor v. Crowell, 2023 Westlaw 3607026 (2d Dept. May 24, 2023), the father appealed from a March 2022 Family Court order, denying his objections to a January 2022 Support Magistrate order which, after a hearing upon his modification petition (deemed to be an objection to a September 2021 COLA order, $530 per month), directed him to pay child support of $86 per week ($373 per month). The father’s modification petition alleged serious illnesses which rendered him disabled and that he could only afford $25 per month. The Second Department affirmed, holding that: Family Court properly found that the father “failed to provide competent medical evidence at the hearing to show that his alleged medical conditions prevented him from working”; and “the Support Magistrate providently exercised her discretion in determining to impute annual income to the father based upon his ability to work full time for minimum wage.”

## **Counsel and Expert Fees - After Trial – Denied – Distributive Award, Litigation Conduct;** **Equitable Distribution - Business Valuation – Buy-Out Offer and Party Testimony, No Expert Opinion; Proportions – Business (50%); Separate Property Claim Denied; Wasteful Dissipation – Not Found; Maintenance - Denied – Non-Guidelines Case – Distributive Award**

## In Parker v. Parker, 2023 Westlaw 3236134 (1st Dept. May 4, 2023), both parties appealed, to the extent aggrieved, by an October 2021 Supreme Court order which: (1) determined that certain business entities of the husband had no value as of the date of commencement of the action and made no distribution thereof to the wife; (2) credited the wife with $2.440 million representing 30% of one business and $818,693 representing 40% of a second business; (3) declined to credit the wife for alleged wasteful dissipation of marital property; (4) declined to award the wife maintenance; (5) declined to find that a certain apartment was the wife’s separate property and ordered the same to be sold with an equal division of proceeds; and (6) declined to award counsel fees to the wife, but declined the husband’s request to find her conduct to be frivolous so as to award Part 130 sanctions against her. The First Department affirmed all the foregoing determinations except item (2) above, and modified, on the law and the facts, to increase the wife’s share of the two businesses to 50%. The Appellate Division held that: (1) given the wife’s failure to present any expert testimony from her retained expert as to the value of the subject business, Supreme Court properly found the same to have no value; (2) for the same reason, Supreme Court’s properly found that one of the businesses should be valued according to a buy-out offer of $8.135 million near the date of commencement and that the other should be valued at $2 million in accordance with the husband’s testimony, but increased the wife’s share to 50% based upon the 17-year duration of the marriage, the wife’s management of the parties’ households and being primary caretaker of the children, and her status as title holder of the 2 subject businesses, reflecting the parties’ intent to jointly own the same, which were acquired by marital funds; (3) Supreme Court properly rejected the wife’s wasteful dissipation claims, noting that the parties’ investments in unsuccessful business interests “are not subject to scrutiny in the absence of any evidence that [the husband] acted recklessly or in bad faith” and that the funds allegedly spent on the husband’s new partner and their children “were not detailed with any precision”; (4) maintenance was properly denied upon consideration of the statutory factors [in this action commenced in 2015], “the considerable equitable distribution award at [the wife’s] disposal,” noting that the availability to the parties of the means to live a lavish standard of living came to end in 2012, 3 years prior to the commencement of the action; (5) the apartment in question, although titled in the wife’s sole name, was purchased during the marriage and thus presumed to be marital property, despite the wife’s contention that the same was intended to be a gift to her, noting that there was no written agreement in compliance with DRL 236(B)(3) to support her claim; and (6) Supreme Court properly directed the wife to pay her own counsel fees “in view of her distributive award, and the unreasonable positions she adopted during the litigation, which delayed the proceedings and incurred additional counsel fees,” but found that her conduct was not sanctionable pursuant to 22 NYCRR Part 130.

## **Custody - Domestic Violence; Interference with Parental Relationship**

## In Matter of Brandon QQ. v. Shelby QQ., 2023 Westlaw 3235307 (3d Dept. May 4, 2023), the father appealed from a March 2021 Family Court order which, following a hearing upon the parties’ September 2020 petitions, each seeking sole legal and physical custody of the parties’ child born in January 2020, granted the parties joint legal custody, with primary custody to the father. The Third Department affirmed, holding that Family Court correctly credited the mother’s testimony that “her mental health was severely affected by the father’s physical, mental and emotional abuse” and “properly considered such domestic violence in its best interests analysis,” as required by DRL 240(1)(a). The Appellate Division noted that the father denied the mother access to the child for 2 months following the parties’ separation and “provided no explanation as to how video calls or photographs would present any harm to the child,” concluding that “[s]uch intentional interference with the mother’s relationship with the child is ‘so inconsistent with the best interest of the child[]as to, per se, raise a strong probability that the [father] is unfit to act as a custodial parent.”

## **Custody - Forensic Evaluation – Questionnaire – No Right to Consult with Counsel**

## In Primero v. Lee, 2023 Westlaw 3607048 (2d Dept. May 24, 2023), the wife appealed from an August 2022 Supreme Court order, rendered in her October 2021 action, denying her motion to: (1) enjoin the court appointed forensic evaluator from requiring her to submit written answers to a parenting survey, or to allow her to consult with counsel regarding the same and responses thereto prior to submitting her answers to the evaluator; and (2) preclude the parties from seeking the production of the written survey responses in disclosure proceedings. The Second Department affirmed, holding that the wife was not deprived of the right to counsel, while noting that “where counsel has been permitted to be present for a client’s forensic examination in \*\*\* a termination of parental rights proceeding (citation omitted), or in \*\*\* a preretention psychiatric examination (citation omitted) \*\*\* ‘there is no right to the participation or assistance of counsel’ and counsel ‘who interferes in any way with the conduct of such examination may rightly be excluded.’”

## **Custody – Modification – School Dispute**

## In Matter of David BB. v. Danielle CC., 2023 Westlaw 3355643 (3d Dept. May 11, 2023), the mother appealed from an April 2022 Family Court order which, after a hearing, granted the father’s Fall 2021 modification petition, to the extent of awarding joint legal and physical custody of the parties’ child born in 2015, and directing that the child shall attend school in the father’s (Whitney Point, Broome County) school district, while continuing the schedule directed by a December 2020 consent order (joint legal, primary to mother, but silent on school location). At the time of the December 2020 order, the mother was living in Cortland County and the child was attending school in the father’s Broome County district. The father’s modification petition was prompted by the mother’s August 2021 enrollment of the child in the Cortland City School District. The Third Department affirmed, finding that the mother’s enrollment decision and the parties’ inability to agree upon the choice of school, constituted the requisite change of circumstances warranting a best interests review. The Appellate Division noted that the child had been attending pre-K in Whitney Point for 2 years before the Fall 2021 transfer to Cortland for kindergarten, which caused the child to have to wake up at 4:50 a.m. on the father’s days, so that he could drive the child the 30 minutes to the mother’s residence, return to Broome County, and still get to work on time; in contrast, the child could be awakened at 6:45 a.m. and could take the school bus to the Whitney Point school on the father’s days, because he had someone to get the child on and off the school bus. In addition to considering the sleep disruption, Family Court credited the father’s testimony that the child had friends and familial support at the Whitney Point school, but was being bullied at the Cortland school. The testimony showed that the mother “switched the child’s school primarily for logistics purposes rather than any serious concern about the quality of education she was receiving in Whitney Point.”

## **Custody - Modification – Sole to Mother; Transgender and Nonbinary Issues,** **Anger Management and Mental Health Counseling for Father**

## Matter of Laura E. v. John D., 2023 Westlaw 3355656 (3d Dept. May 11, 2023), the father appealed from a February 2022 Family Court order, which, following a fact-finding hearing and a Lincoln hearing upon the mother’s September 2021 petition, modified a 2011 consent order, which provided for shared legal and physical custody of a child born in 2009, by granting the mother sole legal and primary physical custody, with time to the father as agreed, the mother retaining discretion as to whether supervision was required. The father was directed to complete anger management and mental health counseling. The Third Department modified, on the law, by reversing the provisions pertaining to the father’s time, and by specifying that the father shall have independent access to the child’s medical and educational records, and remitted to Family Court for further proceedings regarding time to the father, pending which proceedings the father shall continue to have a minimum of 30 minutes of Skype/FaceTime/video time with the child at least twice per week, as provided by an order denying his motion for a stay pending appeal. (2022 NY Slip Op 6516[U], Pritzker, J., April 26, 2022). The Appellate Division found that a change in circumstances was shown by the deterioration in the parties’ communication and by the breakdown of the relationship between the father and the child, who had refused to visit the father for 9 months prior to the filing of the mother’s petition. The Third Department noted that “[t]he subject child identifies as male and uses the gender-neutral pronouns they/them.” The Appellate Division determined that: “the father made numerous troubling admissions, including that he got into ‘many, many physical altercations’ with the [child’s older] brother [who turned 18 and as to whom the appeal is moot]”; and “[t]he evidence established that the father was quick to lose his temper, and his aggressive tendencies caused the child to fear spending time alone with him.” The Court found that the child’s gender identity, chosen name and preferred pronouns “were also a point of major contention between the parties.” The father contended that “addressing the child by their chosen name or preferred pronouns was contrary to his Catholic faith.” The child’s counselor testified that: “the child often reported distress at the father’s refusal to respect the child’s chosen name and preferred pronouns”; and “a study showed that suicide rates among transgender and gender nonbinary people are halved if the individual feels that their pronouns are respected in their daily lives.” In this case, the child was hospitalized twice in 2021 for suicidal ideation. The Third Department concluded that Family Court’s determination was supported by a sound and substantial basis in the record, but “improperly delegated its authority to the mother to determine what, if any, parenting time the father should have.” The Appellate Division remitted to Family Court “to determine whether parenting time is appropriate or whether it is detrimental to the child’s welfare” and to “consider the type of parenting time warranted by the record evidence.” The Court concluded that Family Court’s directions that the father complete anger management and mental health counseling were proper.

## **Custody - UCCJEA – NY Inconvenient Forum; Stay of NY Proceeding**

## In Matter of Waters v. Yacopino, 2023 Westlaw 3607006 (2d Dept. May 24, 2023), the father appealed from a March 2022 Family Court order, which granted the mother’s motion pursuant to DRL 76-f to dismiss, on inconvenient forum grounds, his May 2021 petition for enforcement of his access to the subject child pursuant to a November 2013 order, where the mother had relocated to Texas with the child in May 2020. The father had consented to a February 2020 order of protection in a neglect proceeding, requiring him to stay away from the child, except for supervised parental access. The Second Department reversed, on the law, reinstated the petition, and remitted to Family Court for further proceedings pursuant to DRL 76-f(3), including the entry of an order staying all proceedings, upon condition that a custody proceeding is promptly commenced in Texas.

## **Divorce - No Subject Matter Jurisdiction – FL Marriage not Valid; Religious Doctrine Abstention**

## In Bernstein v. Benchemoun, 2023 Westlaw 3486325 (2d Dept. May 17, 2023), the wife appealed from a January 2021 Supreme Court order which, after a hearing upon the husband’s motion, dismissed her June 2018 action for divorce upon the ground of lack of subject matter jurisdiction, finding that the parties’ February 2013 religious marriage ceremony, during which they signed a ketubah, was not valid under Florida law due to lack of a marriage license. The parties thereafter came to NY, where they executed a second ketubah before a rabbi. The Second Department affirmed, holding that “the legality of a marriage is to be determined by the law of the place where it is celebrated,” noting that Florida law requires a license for a marriage to be valid and that the officiant “must require that the parties to the marriage produce a marriage license.” The Appellate Division observed that while a marriage is not void in NY for failure to obtain a license if the marriage is solemnized (DRL 25), “the rabbi who [witnessed] \*\*\* the second ketubah \*\*\* testified that he never solemnized a marriage, and could not have \*\*\* since the parties were already married under Jewish law.” The Court concluded that “[a] finding that there was a solemnized marriage would require an analysis of religious doctrine, which could offend the First Amendment of the United States Constitution.”

## **Family Offense - Assault 3d, Harassment 2d – Found; Conform Petition to Proof**

## In Matter of Madochee F. v. Dieudonne M., 2023 Westlaw 3310621 (1st Dept. May 9, 2023), the father appealed from an August 2021 Family Court order which, after a hearing at which it conformed the petition to the proof, found that he committed assault 3d and harassment 2d, and granted the mother a 2-year order of protection. The First Department affirmed, holding that the father was not denied due process when Family Court granted the mother’s request to conform her petition to the proof, “as he had a full and fair opportunity to contest the mother’s testimony.” The Appellate Division found that harassment 2d was established through the mother’s testimony regarding 3 separate incidents in which the father slapped her, pushed her to the ground, kicked her and hit her with a dust pan, noting that proof of the father’s intent “is fairly inferable from his actions.” The Court concluded that the mother’s testimony that she was in pain and that her face and leg were swollen after a June 2020 incident was “sufficient to establish \*\*\* assault in the third degree” and the “physical injury” element thereof, even though she did not seek medical treatment therefor.

## **Family Offense - Disorderly Conduct – Not Found – No Public Alarm; Harassment 2d – Not Found – Self-Defense**

## In Matter of Geraldine R. v. Haile P., 2023 Westlaw 3183789 (1st Dept. May 2, 2023), the mother appealed from a September 2022 Family Court order which, after a hearing, dismissed her family offense petition alleging that the father committed disorderly conduct and harassment 2d. The First Department affirmed, finding that as to disorderly conduct, the mother asserted that “the father followed her, yelled at her and physically assaulted her in her apartment while the parties’ child was in another room,” but “offered no evidence that any public disturbance was intended or caused,” as required by Penal Law 240.20. Regarding harassment 2d, the Appellate Division cited Family Court’s finding that “the credible evidence established that it was the mother who initiated physical contact, resulting in her injuries, and the father’s conduct was an isolated incident, rooted in self-defense, rather than a course of conduct intended to harass, annoy or alarm the mother,” within the meaning of Penal Law 240.26.

## **Paternity - Equitable Estoppel – Denied; Substituted Judgment by AFC**

## In Matter of Darrell R.R. v. Donaisha SS., 2023 Westlaw 3235320 (3d Dept. May 4, 2023), the mother appealed from a March 2022 Family Court order, which upon the putative father’s November 2020 paternity petition, ordered genetic marker testing for the parties and a child born to the mother in 2017. The mother married another person in March 2018. Noting that no appeal as of right lies from such a non-dispositional order, FCA 1112(a), the Third Department treated the mother’s notice of appeal as a motion for permission to appeal and granted it. The Appellate Division affirmed, holding that the testimony of the mother regarding her husband’s daily interaction with, and emotional and financial support of, the child was conclusory, and finding that the husband’s testimony was “lacking in specific details sufficient to show a significant relationship between him and the child.” The Third Department concluded that “there is no indication that \*\*\* genetic marker testing would be contrary to the best interests of the child.” The Court concluded that the mother’s claim that the AFC improperly substituted judgment for the child “is unpreserved, in the absence of a motion to remove the attorney for the child.”

## **Pendente Lite – Counsel Fees – Custody – 22 NYCRR 202.16(k)(7)**

## In Ader v. Ader, 2023 Westlaw 3696418 (1st Dept. May 30, 2023), the wife appealed from a January 2023 Supreme Court order, which awarded her temporary custody-related counsel fees totaling $650,000. The First Department affirmed, noting its prior order [205 AD3d 637 (1st Dept. 2022)] and finding that Supreme Court “has again carefully considered the invoices and issues as related to various motions, the custody trial, and related litigation, as demonstrated by its award, which is subject to reallocation at the end of the case.” The Appellate Division rejected the wife’s argument that the order appealed from fails to comply with 22 NYCRR 202.16(k)(7), holding that the order outlines Supreme Court’s “considerations and the equities of the case.” The Court concluded by recognizing that the assigned Justice “oversaw more than 20 motions, a 15-day custody trial, and numerous court appearances,” and upheld the award, finding an “absence of an abuse of discretion.”

## **Pendente Lite -** **Counsel Fees, 22 NYCRR 202.16(k)(2), 1400.2 and 1400.3; Non-Payment – Contempt – No Hearing Required**

## In Plotkin v. Esposito-Plotkin, 2023 Westlaw 3215307 (2d Dept. May 3, 2023), the husband appealed from: (1) a January 2020 Supreme Court order which, in the wife’s December 2018 divorce action, directed him to pay $50,000 in temporary counsel fees to the wife upon her October 2019 motion; and (2) from a September 2020 order of the same court, which, without a hearing, granted the wife’s June 2020 motion to hold the husband in criminal contempt for non-payment thereof, to the extent of finding him to be in civil contempt. The parties were married in 2011, had 3 children, and signed a prenuptial agreement, at which time the wife’s net worth was about $350,000 and the husband’s net worth was approximately $11.5 million. The Second Department affirmed both orders, holding that Supreme Court “properly considered financial assistance the [husband] received from his parents in deciding whether he was the monied spouse” and that the husband “had the resources to pay far more than the [wife] incurred in counsel fees, and he had a net worth that was exponentially greater than that of the [wife] at the outset of the marriage.” The Appellate Division rejected the husband’s contention that the wife did not comply with 22 NYCRR 202.16(k), because she submitted an 8-month-old statement of net worth with her motion for counsel fees, noting that the wife submitted a February 2019 stipulation which provided, among other things, for the husband’s payment of $20,000 in counsel fees and the majority of the expenses for the wife and the 3 children, such that the wife adequately disclosed her financial circumstances, and, further, included “appropriate evidence” of her counsel’s substantial compliance with the 60-day billing requirements of 22 NYCRR 1400.2 and 1400.3. The Court concluded by finding that the husband “failed to raise a material factual issue regarding his alleged inability to pay” the $50,000 counsel fee award, while noting that the husband “had access to significant financial resources through his parents, who paid the majority of his counsel fees,” such that the husband “was not entitled to an evidentiary hearing before being held in civil contempt.”