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

## **Matrimonial Update**

## **By Bruce J. Wagner**

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

## **Attorney & Client - Account Stated – Not Duplicative of Contract Claim; Summary Judgment**

## In Aronson, Mayefsky & Sloan, LLP v. Praeger, 2024 Westlaw 2138638 (1st Dept. May 14, 2024), the client appealed from an August 2023 Supreme Court order, which: granted the law firms’ motion for summary judgment on their claims for legal fees upon the basis of an account stated; dismissed the client’s counterclaims; and denied the client’s cross-motion seeking summary judgment dismissal of the account stated claims. The First Department affirmed, finding that pursuant to January 2019 and 2022 retainer agreements: the client agreed to pay for legal services; monthly bills were rendered; the client paid through September 2022, without expressing dissatisfaction with the work or claiming an inability to pay; and there were agreed reductions of fees from time to time, which were confirmed in writing. The legal representation continued through the end of January 2023. The Appellate Division held that it wanted to make clear “that an account stated is an independent cause of action that can be asserted simultaneously with a breach of contract claim and that an account stated claim should not be dismissed as duplicative of a breach of contract claim.” The First Department concluded that Supreme Court “properly granted summary judgment to plaintiffs on their account stated claims.”

## **Child Support - CSSA–Over Cap, Further Imputation of Income Denied; Counsel Fees - After Trial – Denied – No Rule Compliance; Equitable Distribution - Business–Separate Property Appreciation, 20% Award Upheld; Maintenance -Durational–Awarded on Appeal**

## In Rigas v. Rigas, 2024 Westlaw 2307453 (2d Dept. May 22, 2024), the parties were married in 1999 and the wife appealed from an October 2019 Supreme Court Judgment which, in her 2011 action for divorce upon a December 2018 decision after trial: (1) awarded her 20% of the marital appreciation in value of the husband’s business; (2) awarded her child support of only $8,307.31 per month for the parties’ 3 children; (3) awarded her no maintenance; and (4) awarded her no counsel fees. The Second Department: (1) upheld the award to the wife of 20% of the marital appreciation of the husband’s separate property business as “a provident exercise of discretion in light of the length of the marriage, the [wife’s] lack of direct contributions \*\*\*, and the indirect contributions that the [wife] provided in her role as a stay-at-home mother and homemaker”; (2) upheld the child support award, noting that Supreme Court attributed $371,000 in gross income to the husband, “rather than the much higher sum that the [wife] proposed,” and rejected her contention that “the court should have imputed income to the [husband] in an amount equal to the children’s tuition expenses and other expenses allegedly paid by the [husband’s] corporation, [given that] the court separately ordered the [husband] to pay the full cost of the children’s schooling, healthcare, and childcare expenses \*\*\*, obviating the need to further impute income to the [husband] for those costs.” The Appellate Division noted that Supreme Court “appropriately considered the financial resources of the custodial and noncustodial parent and the standard of living the children would have enjoyed if the parties had remained together when using the [husband’s] entire income, which was well in excess of the applicable statutory cap \*\*\*; (3) modified, on the facts and in the exercise of discretion, by awarding the wife maintenance of $8,000 per month for 24 months from the date of the judgment of divorce, to terminate sooner upon the death of either party or the wife’s remarriage, holding that “Supreme Court improvidently exercised its discretion in declining to award the [wife] postjudgment maintenance,” noting that the wife “had no work experience, as she and the [husband] jointly decided that she would not work but would instead be a stay-at-home mother and homemaker,” but “has a college degree.” The Second Department considered the length of the marriage, the marital standard of living, the wife’s lost earning capacity, and her good health and ability to become self-supporting in the future in determining its modified maintenance award; and (4) upheld the denial of counsel fees based upon noncompliance with 22 NYCRR Part 1400, noting that: the wife’s counsel fee application “revealed that her trial counsel charged rates that exceeded those set forth in the retainer agreement,” with no evidence of a signed amendment thereto; “counsel billed the [wife] for appellate work, which the retainer agreement expressly excluded”; “because the invoices were heavily redacted and provided only vague descriptions of the work performed, there is no way to determine from the [wife’s] submissions whether other line items were for appellate work”; and “trial counsel did not provide itemized bills ‘at least every 60 days’ on numerous occasions,” as required by 22 NYCRR 1400.3(9).

## **Child Support - CSSA –Over Cap ($163,000)–Reversed; Counsel Fees - Award to Monied Spouse Reversed on Appeal**

## In Munsterman v. Munsterman, 2024 Westlaw 2307456 (2d Dept. May 22, 2024), the parties have one child and were divorced in July 2018, and the former wife (wife) appealed from a December 2022 Supreme Court order, which, upon the husband’s May 2021 motion and the parties’ June 2022 stipulation permitting the issues to be decided upon written submissions, directed her to pay the former husband (husband) child support of $1,322.87 per month, including all income above the CSSA cap, and counsel fees of $60,000. The parties’ May 2018 incorporated stipulation required the husband to pay the wife child support of $2,335.61 per month, which included all income exceeding the statutory cap. In August 2020, the husband moved for temporary custody and the parties agreed to suspend his child support obligation arising from the judgment of divorce and incorporated stipulation. The Second Department modified, on the law, on the facts and in the exercise of discretion, by limiting the child support obligation to the $163,000 cap and reducing the wife’s obligation to $715.84 per month, holding that Supreme Court erred by basing its decision to exceed the income cap upon the parties’ May 2018 incorporated stipulation, which “did not provide an appropriate rationale” therefor. The Appellate Division concluded that “the record does not demonstrate that the child is not living in the lifestyle he would have enjoyed had the household remained intact” and found that “it is appropriate to apply the statutory percentage to the statutory cap of $163,000.” The Second Department further modified by reversing the counsel fee award to the husband, considering that: “the parties settled [the husband’s custody] motion”; “the issues raised by the [wife] as to child support were not devoid of merit”; the [wife’s] conduct in the litigation did not constitute dilatory tactics”; and the wife “was the less-monied spouse, and the award of counsel fees had the effect of exhausting all of her available resources.”

## **Counsel Fees - After Trial – Denied – Movant Failed to File Financial Disclosure; Equitable Distribution - Separate Property – Home Downpayment, Remit for Mortgage Release; Maintenance - Imputed Income, Proper to Award Despite Payee’s Lack of Financial Disclosure**

## In Monroe v. Monroe, 2024 Westlaw 2102463 (4th Dept. May 10, 2024), the husband appealed from a November 2022 Judgment of Divorce which, following trial of his 2021 divorce action: (1) awarded the wife a $125,000 separate property credit for inherited funds she use to fund the purchase of the marital residence: (2) directed him to pay his portion of the mortgage balance within 60 days of entry of judgment; (3) failed to direct the wife to take measures to remove him from the mortgage upon payment of his share thereof; and (4) awarded the wife maintenance and equitable distribution notwithstanding her failure to file financial documentation. The Fourth Department: (1) upheld the separate property credit to the wife, noting that the husband failed to preserve this contention for review, inasmuch as he “conceded at trial and in his proposed findings of fact that [the wife] was entitled to the separate [property] credit”; (2) upheld Supreme Court’s direction that the husband pay his share of the mortgage balance, but (3) agreed with the husband that Supreme Court “erred in failing to direct defendant to take measures to remove plaintiff’s name from the mortgage upon his payment of his share of the mortgage balance,” modified the judgment by vacating the terms which addressed the mortgage, and remitted to Supreme Court for further proceedings; and (4) rejected the husband’s argument that Supreme Court erred by awarding maintenance and equitable distribution to the wife, given the lack of financial documentation, finding that Supreme Court “took note of defendant’s failure to comply with her obligation to file such documentation when it declined to award her attorney’s fees and costs and imputed income to her despite her lack of employment” and that “the relevant facts related to the parties’ financial circumstances were not disputed.”

## **Counsel Fees -** **After Trial–Denied–Circumstances of the Case; Equitable Distribution - Marital Residence–Purchase Option, Separate Property Credit Awarded; Separate Property – Premarital Acquisition**

## In Jones v. Jones, 2024 Westlaw 2307392 (2d Dept. May 22, 2024), the parties were married in August 1987 and the husband appealed from a January 2020 Supreme Court judgment which, in his June 2015 divorce action and upon a November 2018 decision after trial: (1) failed to award him a separate property credit regarding the marital residence; (2) failed to equitably distribute the marital residence; (3) directed the sale of the marital residence without providing him a purchase option; (4) awarded the wife a credit for funds used to purchase an annuity in his name prior to the marriage; and (5) failed to award him counsel fees. The Second Department modified, on the law and in the exercise of discretion, by: (1) awarding the husband a $50,000 separate property credit for the purchase of the marital residence, which he acquired prior to the marriage and encumbered with a $90,000 mortgage in June 1987. About 20 years later, in April 2007, after the mortgage was satisfied, the husband added the wife’s name to the deed. The Appellate Division held that Supreme Court should have used the date of marriage appraisal of the residence ($140,000), subtracted the date of marriage mortgage balance, which the parties did not dispute was $90,000, and arrived at the aforesaid $50,000 credit to the husband; (2) equally distributing the appraised date of trial value of the residence ($350,000) after subtracting the husband’s $50,000 separate property credit, “given the 28-year duration of the marriage, the age and health of the parties, and the court’s determination that the marriage was a ‘joint enterprise’ where the parties ‘pooled their interests for their mutual benefit,’ \*\*\*”; (3) giving the husband an option to purchase the wife’s 50% interest in the marital residence for $150,000 within 4 months following service of the Appellate Division Order with notice of entry, and failing that, directing that the residence shall be sold pursuant to the judgment of divorce; (4) deleting the $10,000 credit to the wife for her premarital purchase of an annuity for the husband, given that this asset, acquired before the marriage, is the husband’s separate property not subject to distribution, citing DRL 236(B)(1)(d)(1). The Second Department upheld the denial of counsel fees to the husband as a provident exercise of discretion, “considering the overall financial circumstances of the parties and the circumstances of the case as a whole,” citing DRL 237(c).

## **Counsel Fees - After Trial – Granted; Equitable Distribution - Separate Property - Credit for Expenses Denied, Separate Property Found; Maintenance - Retroactive to Date of Judgment - Temporary Award Greater, Credit Given**

## In Habib v. Habib, 2024 Westlaw 2165670 (2d Dept. May 15, 2024), the husband appealed from a September 2019 judgment of divorce which, upon a June 2019 decision following trial of the wife’s May 2011 divorce action: (1) awarded the wife maintenance of $1,500 per month retroactive to the date of the parties’ stipulation dividing certain real property; (2) awarded the wife $25,000 in counsel fees; and (3) failed to award him credits for certain pendente lite payments and alleged separate property contributions toward certain real property. The wife cross-appealed from so much of the judgment as deemed certain bank accounts to be marital property to be equally divided. The Second Department: (1) modified, on the law and the facts, holding that the amount of maintenance was appropriate, given the ages and health of the parties, the duration of the marriage (1973), the parties’ income and property and present and future earning capacities, the distribution of property and marital standard of living, but given that the permanent award is not in excess of the temporary award ($2,919 per month), directing that the maintenance award be retroactive to the date of entry of the judgment of divorce; (2) upheld the counsel fee award as being provident, “considering the equities and circumstances of this case, including the parties’ respective financial conditions and their conduct”; (3) held that “Supreme Court properly declined to credit the [husband] for his purported separate property contributions to improvements, maintenance, and repairs made to the parties’ \*\*\* real property prior to the execution of the stipulation \*\*\*, since [he] failed to demonstrate that the funds expended were his separate property.” As to the wife’s cross appeal, the Appellate Division held that Supreme Court properly determined that 4 of the 5 bank accounts in question were marital property, given that she “failed to overcome the presumption that the funds in those accounts were marital property” and correctly valued those accounts as of the date of commencement of the action. However, the Second Department agreed with the wife that Supreme Court erred in finding that the 5th account was marital property, “since she met her burden of overcoming the presumption that the funds in that account were marital property \*\*\*.”

## **Counsel Fees - Willful Violation**

## In Matter of Martucci v. Nerone, 2024 Westlaw 1895980 (2d Dept. May 1, 2024), the father appealed from an August 2022 Family Court order, which, following an affirmed willful violation determination (223 AD3d 668 [2d Dept. Jan. 10, 2024]), granted the mother’s motion for counsel fees pursuant to FCA 438(b) to the extent of $6,667.60. The Second Department affirmed, holding that the fees awarded were “reasonable under all of the circumstances, and the Family Court properly considered all of the relevant factors.

## **Custody - AFC Motion to Suspend Father’s Communications; Supervised Visits**

## In Matter of N.L. v. J.H., 2024 Westlaw 2138556 (1st Dept. May 14, 2024), the father appealed from a December 2022 Family Court order, which granted the AFC’s motion to suspend the father’s communications with the child, pending the conclusion of a Child Advocacy Center investigation and directed that a mental health professional supervise the father’s visits with the child after the conclusion of the investigation. The First Department affirmed, noting that “since around 2018, the father, in violation of court orders, coached the child to report that the mother’s boyfriend had sexually abused her in the mother’s presence, and in further violation of court orders, continued to take the child to various medical professionals, thus subjecting her numerous invasive interviews and examinations.”

## **Custody - Modification – Equally Shared to Very Limited – Reversed; Violation – Not Willful – Justification**

## In Matter of Steven OO. v. Amber PP., 2024 Westlaw 1914568 (3d Dept. May 2, 2024), the mother appealed from a November 2022 Family Court order which, after a hearing, granted the father’s March 2022 petition to modify a 2017 order (joint legal, equally shared), to the extent that her time with the parties’ children (born in 2011 and 2014) was reduced to one weekly 2-hour dinner visit and one 7-hour bi-weekly visit, both to occur outside her home. The mother’s January 2022 violation petition alleged that the father was not allowing her the time with the children as per the 2017 order. Family Court found that the father had violated the order but did not impose a penalty therefor. There was an order of protection which required the maternal grandfather to stay away from the parties’ older child, as a condition of a plea to a reduced charge of endangering the welfare of a child, in satisfaction of a charged sex offense. The father alleged that the mother continued to allow her father to have contact with the older child, in violation of the order of protection. The Third Department determined that “evidence of the mother’s failure to recognize the harm posed by the grandfather established the requisite change of circumstances warranting an inquiry into whether modification of the existing custody order would serve the best interests of the children.” The Appellate Division found that Family Court properly directed that the mother’s time with the children should be restricted to occur in a public place, due to unsafe and unsanitary home conditions which the mother “was actively engaged” in improving, but concluded that “there is simply no basis for drastically reducing the mother’s parenting time from 50/50 to a weekly two-hour dinner and a bi-weekly seven-hour outing.” The Court modified and remitted to Family Court for further proceedings to determine an appropriate schedule for the mother, while also noting that the maternal grandfather passed away during the pendency of the appeal. The Third Department declined to disturb Family Court’s determination not to impose a sanction for the father’s violation of the 2017 order, noting that “his conduct was aimed at protecting the children from the danger posed by the grandfather” and that “Family Court implicitly found that the father’s violation was not willful.”

## **Custody –** **Modification – Joint Custody Continued; Separation of Siblings Upheld; Child’s Wishes**

## In Matter of Carla UU. Cameron UU., 2024 Westlaw 2194158 (3d Dept. May 16, 2024), the mother appealed from an August 2023 Family Court order which, following fact-finding and *Lincoln* hearings: (1) dismissed her May 2022 petition seeking to modify the custody provisions of a March 2020 divorce judgment (joint legal, primary to mother, 50-mile radius clause) so as to award her sole legal custody of the parties’ 3 children born in 2009, 2016 and 2018, and continued joint legal custody; and (2) granted the father’s August 2022 modification petition, to the extent of awarding him primary custody of the oldest child and set a schedule that allows the 3 children to have time together. The Third Department affirmed, rejecting the mother’s contention that joint custody was no longer feasible, and finding that “the mother and father had disagreements on occasion and the father sometimes spoke to the mother in a negative manner,” but they “are able to constructively communicate regarding the children.” The Appellate Division upheld the sibling separation, noting that the mother’s move placing the children in a different school district constituted changed circumstances, following which the oldest child’s grades dropped; he was no longer active in sports and extracurricular activities, and was taken away from “the strong friendships and connections [established] in his former school district.” The Court concluded that as supported by the AFC, the “oldest child’s expressed desire \*\*\* to reside with the father so that he may attend his former school district ‘is entitled to great weight given [his] age.’”

## **Custody - Modification – Medical Decision-Making – Granted; Education Decision-Making – Denied**

## In Matter of Mahoney v. Hughes, 2024 Westlaw 2165754 (2d Dept. May 15, 2024), the mother appealed from a February 2023 Family Court order which, after a hearing, granted the father’s motion to modify the parties’ March 2022 so-ordered custody stipulation, so as to award him final decision-making authority over the educational and medical needs of the parties’ child born in October 2018. The Second Department modified, on the facts and in the exercise of discretion, by deleting the educational authority, finding that “[t]he record demonstrates that both parents substantially agree \*\*\* with respect to the child’s educational needs and were both receptive to the recommendations made by the child’s teacher.” As to medical decisions, the Appellate Division determined that “the father had a demonstrated ability and an expressed interest in the child’s medical needs,” while “[i]n contrast, the mother refused to sign consent forms to enroll the child in therapy, and she testified that she did not believe the child needed therapy despite the child’s history of anxiety and nightmares.”

## **Custody - Modification–to Father–Child’s Wishes, Financial Stability, Mother’s Housing Issues, Parental Relationship Deteriorated**

## In Matter of Jones v. Brown, 2024 Westlaw 2102815 (4th Dept. May 10, 2024), the mother appealed from a November 2022 Family Court order which, after a hearing, awarded primary physical custody of the subject 2 children to the father. The Fourth Department affirmed, finding that the father established the requisite change of circumstances through testimony showing that the relationship between the parties had deteriorated, that the mother’s housing situation had changed, and that one of the children had expressed a desire to modify the existing custody arrangement. The Appellate Division held that the award was in the children’s best interests, inasmuch as “the record reflects that \*\*\* the father could provide a more stable home environment, as demonstrated by evidence that the mother temporarily became homeless and that one of the children asked to stay with the father during the mother’s parenting time.” The Court concluded that “the desire of the old[er] of the two children \*\*\* ‘is entitled to great weight \*\*\* where \*\*\* [her] age and maturity \*\*\* make [her] input particularly meaningful.’”

## **Custody - Sole – Hostile App Texts, Lack of Cooperation**

## In Matter of Paul D. v. Margarita O., 2024 Westlaw 2001450 (1st Dept. May 7, 2024), the mother appealed from an August 2023 Family Court order which, after a hearing, granted the father sole legal and physical custody of the parties’ child, with visitation to the mother. The First Department affirmed, holding that although the child resided with the mother for the first year of her life, the father has been the primary caregiver since the child was removed from the mother’s care by ACS and has provided the child with a stable home. The Appellate Division noted that the mother’s texts through a parenting app “were frequently hostile and insulting” and the mother “was uncooperative in scheduling pickups and drop-offs and in planning for the child’s needs,” such that “the mother’s behavior precludes joint custody.”

## **Custody - Sole – Summary Judgment**

## In Matter of Palumbo v. Palumbo, 2024 Westlaw 1895962 (2d Dept. May 1, 2024), the father appealed from a January 2023 Family Court order, which granted the mother’s December 2022 motion for summary judgment upon her June 2022 petition seeking sole legal and physical custody of the parties’ 5 children born between 2016 and 2021. The Second Department affirmed, noting that while custody decisions should generally be made after a full evidentiary hearing, “the terms of the father’s probation prohibited him from having any contact with the children as a result of his conviction of sexual abuse in the second degree against the children’s half-sister.” The Appellate Division concluded that “the undisputed facts before the court enabled it, without a hearing, to make a provident determination that it was in the best interests of the children to award sole legal and physical custody to the mother.”

## **Custody - Sole – to Joint on Appeal**

## In Matter of Robinson v. Santiago, 2024 Westlaw 1951820 (4th Dept. May 3, 2024), the father appealed from an August 2022 Family Court order which, after a hearing, awarded the mother sole legal custody of the parties’ child born in 2019 and directed the parties to modify the visitation schedule to accommodate the school year and summer visitation schedule when appropriate. The Fourth Department modified, on the law, by awarding the parties joint legal custody and remitting to Family Court to render a specific and definitive schedule for visitation during the summer and school breaks. The Appellate Division held that the mother was better situated to serve as the primary custodial parent, but found that the parties were able to cooperate regarding raising the child, such that joint custody was appropriate.

## **Custody -** **Sole – Unfounded Sex Abuse Allegations; Court Issuing Subpoenas and Asking Questions – Upheld**

## In Matter of Michelle L. v. Steven M., 2024 Westlaw 1914528 (3d Dept. May 2, 2024), the mother appealed from a December 2022 Family Court order which, after a 4-day fact-finding hearing and a *Lincoln* hearing: (1) granted the father’s petition to modify an August 2018 order (joint legal, equal physical custody) by awarding him sole legal and physical custody of the parties’ child born in 2012; (2) found that the mother had violated a March 2022 temporary order and imposed a 15-day suspended jail sentence, provided that the mother comply with the new order for 12 months; and (3) dismissed 16 petitions filed by the mother. The Third Department affirmed, noting that “the mother’s repeated allegations of sexual abuse against the father over the span of several years \*\*\* were consistently unfounded.” The child’s teacher testified that the child stated that the abuse “must have happened. My mother said it did.” The Appellate Division sustained the violation finding and sentence. The Court further upheld Family Court’s issuance of subpoenas for the testimony of the school resource officer and for production of the child’s DSS, mental health counseling and Pennsylvania court records, noting that Family Court had “informed counsel \*\*\* of her concerns regarding the lack of evidence and testimony offered as to the allegations of sexual abuse” and issued the same on notice to the parties, who did not object thereto. The Third Department concluded that Family Court “appropriately sought clarification when the mother’s testimony was at time confusing or disjointed.”

## **Custody -** **Third Party (Paternal Grandmother) – Denied – No Extraordinary Circumstances**

## In Matter of Trina L. v. Michelene M., 2024 Westlaw 2061458 (1st Dept. May 9, 2024), the paternal grandmother appealed from a June 2023 Family Court order which, after a hearing, dismissed her March 2023 petition for custody of the subject child born in July 2008. The First Department affirmed, holding that the grandmother failed to show extraordinary circumstances, where the child had only been in her home for 3 days at the time she filed her petition, and noting that the child had left the mother’s home to live with the father against her wishes, while the mother’s custody petition was pending. The Appellate Division noted Family Court’s findings that the paternal grandmother: “(1) encouraged and assisted [the child] to run away from the mother’s home to join his father in Pennsylvania; (2) encouraged [the child] to run away from his father’s home and live with the grandmother, despite her awareness that the mother was continuing to seek physical custody of [the child]; and (3) consistently and repeatedly denigrated the mother to [the child] and encouraged him not to accept or respect her parenting.”

## **Custody - Third Party (Sibling) – Denied; UCCJEA Continuing Exclusive Jurisdiction**

## In Matter of Adams v. John, 2024 Westlaw 1951532 (4th Dept. May 3, 2024), the father and mother appealed from a December 2022 Family Court order which granted joint custody of the subject child to the child’s brother and sister-in-law and the father and mother, with physical custody to the brother and sister-in-law. The Fourth Department reversed, on the law, and dismissed the petition, holding that the brother and sister-in-law failed to show the existence of any extraordinary circumstances sufficient to confer standing upon them to seek modification of a prior order granting joint custody to the parents, given that “the mother’s decision to leave the child with petitioners for a little over a month before seeking his return did not amount to the type of prolonged separation that would evidence the mother’s abandonment of the child or her intent to do so.” The Appellate Division rejected the mother’s argument that NY lacked subject matter jurisdiction pursuant to DRL 76-a, given that the father remains a NY resident, such that NY has not lost its continuing exclusive jurisdiction.

## **Enforcement - Contempt – No Hearing Necessary**

## In McCurty v. Roberts, 2024 Westlaw 1952074 (4th Dept. May 3, 2024), the former husband (husband) appealed from a February 2023 Supreme Court order which, without a hearing, granted the former wife’s (wife’s) motion to hold him in contempt of the maintenance provisions of the parties’ judgment of divorce. The Fourth Department affirmed, holding that the husband “failed to raise an issue of fact on his defense, i.e., his inability to pay the maintenance obligation” and “simply stated in his affidavit that permitting the award of full maintenance for the three-year period would be ‘unaffordable.’” The Appellate Division determined that such “vague and conclusory allegations of … inability to pay \*\*\* are not acceptable.”

## **Pendente Lite - Child Support, Counsel & Expert Fees – Upheld; Credit Card Usage – Modified**

## In Wolinsky v. Berkowitz, 208 NYS3d 202 (1st Dept. May 2, 2024), the husband appealed from an April 2023 Supreme Court order which granted the wife: temporary child support of $10,000 per month; $2,000 in monthly usage of the husband’s credit card for certain expenses; $150,000 in temporary counsel fees; and $10,000 in temporary expert witness fees. The First Department modified, by deleting the credit card usage, holding that the award was duplicative, in that the expenses covered thereby were already considered in the child support award, and otherwise affirmed. The Appellate Division rejected the husband’s argument that the wife was not entitled to pendente lite relief during the time they resided together (October 2022 to March 2023), holding that living in the same household does not preclude such relief “where there is evidence that the award is necessary to maintain the needs of the children during litigation.” The Court held that as the less monied spouse, the wife is not required to “spend down a substantial portion of her assets to qualify for an award of attorneys’ fees.”

## **Pendente Lite - Exclusive Use and Occupancy – Granted**

## In Morris-Perry v. Morris-Perry, 208 NYS3d 205 (1st Dept. May 2, 2024), the husband appealed from an August 2023 Supreme Court order, which awarded the wife temporary exclusive use and occupancy of the marital residence pursuant to DRL 234. The First Department affirmed, noting “an unquestioned history of protective orders issued for the wife’s and children’s benefit as against defendant husband, most recently emanating from the criminal court following the husband's arrest at the home. Personal safety is implicated if supported by orders of protection or evidence of police involvement (citations omitted)”; and “the resulting level of domestic strife further underpins the court’s order to ensure the personal safety of the parties (citations omitted).”

## **Procedure - Failure to Appear in Person – Dismissal Upheld**

## In Matter of Hotaki v. Liriano, 2024 Westlaw 2307123 (2d Dept. May 22, 2024), the father appealed from an April 2023 Family Court order which, upon the father’s failure to appear in person for a fact-finding hearing, dismissed his petition to enforce a July 2018 order, without prejudice. The Second Department dismissed the appeal, except for its review of the denial of the adjournment application by the father’s attorney, and affirmed insofar as reviewed. The Appellate Division held that “Family Court properly determined that the father’s failure to appear in person at the fact-finding hearing as required constituted a default” and “did not improvidently exercise its discretion in denying the father’s attorney’s application for an adjournment” thereof.

## **LEGISLATIVE ITEM**

## **Child Support – Amendments to Conform to Federal Law**

## Previously reported in the April 2024 Update, this legislation, the enactment of which is expected by reason of federal mandate (see 45 CFR 302.56, effective January 19, 2017, published in 81 FR 93562 on December 20, 2016), has passed both houses. See A09505, passed by the Assembly on April 4, 2024 and S09015, passed by the Senate on May 22, 2024.