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

## **Matrimonial Update**

## **By Bruce J. Wagner**

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

## **Child Support - CSSA – Income Cap ($400,000); Counsel & Expert Fees – After Trial; Equitable Distribution – Business, Cash in Safes, Proportions (35%), Post-Commencement Valuation Date; Reduction of Mortgage Principal**

##  In Lieberman-Massoni v. Massoni, 2023 Westlaw 2778332 (2d Dept. Apr. 5, 2023), both parties appealed from a December 2018 Supreme Court judgment which, upon an October 2018 decision after trial of the wife’s February 2012 divorce action: (1) valued the husband’s business interests as of June 2017 and awarded the wife a 35% share thereof; (2) awarded the husband a credit representing 50% of his reduction of mortgage principal; (3) awarded the wife $5,000 representing 50% of the cash in one safe, but failed to award her any portion of $10,000 in another safe; (4) set a $400,000 combined parental cap upon the application of the CSSA; and (5) by a separate April 2019 Order from which only the husband appealed, awarded the wife 70% of her counsel and expert fees, in the sums of $716,931.50 and $72,110, respectively. The Second Department affirmed all Supreme Court’s determinations, except the directive regarding the safes, which it modified, by awarding the wife $5,000 representing 50% of the cash in the second safe. The parties were married in August 1997 and have 2 children. The action came before Supreme Court for trial in 2014, during which proceedings the husband maintained that his business was “horrendous.” However, about 2 weeks after the trial, the husband’s corporate employer sold one of its divisions for a significant sum, which yielded a distribution of more than $8 million to the husband. Supreme Court granted the wife’s motion to reopen the trial, and a second trial was held in September 2017. The Second Department held that Supreme Court properly valued the husband’s business interests as of the start of the second trial in June 2017 and correctly awarded the wife a 35% share thereof, noting her “substantial indirect contributions to the [husband’s] business, including caring for the parties’ children and maintaining the parties’ residence in New York while the [husband] worked for the majority of the time in Los Angeles \*\*\*.” The Appellate Division upheld Supreme Court’s determinations regarding the credit to the husband for reduction of mortgage principal, the 50% award to the wife of the $10,000 in cash in the first safe, the imposition of a $400,000 CSSA cap, and the award of 70% of the wife’s counsel and expert witness fees. The amounts of the counsel and expert fee awards were set forth in the Second Department’s decision in the husband’s separate appeal from an April 2019 order, decided the same date. 2023 Westlaw 2778339.

## **Child Support - Violation – Willful – Incarceration with Purge Amount – Upheld**

##  In Matter of Adriana K. v. Grzegorz K., 2023 Westlaw 2976070 (1st Dept. Apr. 18, 2023), the father appealed from a January 2022 Family Court Order, which sentenced him to a term of 3 months’ incarceration for a willful violation of a support order and set the purge amount at $15,000. The First Department affirmed, holding that Family Court was not required to hold a second hearing before issuing its order, and had the discretion to impose the 3-month sentence along with the purge amount, citing FCA 454(3)(a). To the same effect is Matter of O’Keeffe v O’Keeffe, 2023 Westlaw 2994936 (2d Dept. Apr. 19, 2023) [90 days’ incarceration and a $15,000 purge amount confirmed].

## **Custody - AFC – Substituted Judgment; Modification – Domestic Violence, Pornographic Images; Supervised Visitation “as Agreed” Reversed; Evidence – Text Messages**

##  In Matter of Thompson v. Thompson, 2023 Westlaw 3160145 (4th Dept. Apr. 28, 2023), the mother appealed from a July 2021 Family Court order which, after a hearing, awarded the father sole legal and primary physical custody of the subject children, with supervised visitation to her “as the parties mutually agree.” The Fourth Department modified on the law, by vacating the provision for supervised visitation as agreed and remitting to Family Court to direct visitation in the best interests of the children. The Appellate Division rejected the mother’s argument that the AFC improperly substituted judgment for the children, holding that the AFC “was entitled to do so because the record establishes the mother engaged in a pattern of alienating the children from the father. The Court further found that the award of custody to the father was proper, given that the mother supervised visitation was appropriate because “the mother frequently disparaged the father to the children;” and “exposed the children to domestic violence (citations omitted), unwittingly allowed pornographic images of herself and her partner to be sent to the children’s mobile devices, and failed to maintain a stable home environment for a period of several years.” The Fourth Department rejected the mother’s contention that Family Court erred by receiving into evidence screenshots between the mother and two of the children, given that “the identity of the senders and receivers of the messages was sufficiently authenticated by the content” thereof, “as well as by the maternal grandmother’s testimony that she observed one of the subject children using his phone at the time the text messages were sent.”

## **Custody - Modification – Joint Continued; Modification of Decision-Making Reversed**

##  In Matter of Cook v. Perez, 2023 Westlaw 3083093 (2d Dept. Apr. 26, 2023), the mother appealed from a March 2022 Family Court Order which, after a hearing: (1) granted the father’s February 2020 petition to the extent of modifying the parties’ 2016 judgment of divorce so as to award him final decision-making authority over major medical matters pertaining to the parties’ children born in 2006 and 2014; and (2) denied the father’s January 2021 petition seeking to modify the judgment of divorce so as to award him sole legal and residential custody, thus continuing joint legal custody. The Second Department modified, on the facts and the exercise of discretion, by denying the father’s February 2020 petition seeking modification of decision-making, and otherwise affirmed. The Appellate Division held that “the father failed to demonstrate a change in circumstances since the judgment of divorce such that an award of final decision-making authority regarding major medical decisions to the father \*\*\* was required to protect the best interests of the children.” The mother also filed a petition seeking to modify a December 2019 order on the issue of parental access; the Appellate Division concluded that the mother “affirmatively represented during the proceedings that she was not seeking to modify custody,” such that “Family Court did not err in continuing joint legal custody and in failing to, sua sponte, award her sole custody \*\*\*.”

## **Custody - Modification – Joint Reversed, Physical to Mother – Domestic Violence, Mental Illness**

##  In Crofoot v. Crofoot, 2023 Westlaw 3159731 (4th Dept. Apr. 28, 2023), the mother and the AFC appealed from a November 2021 Supreme Court Judgment which, among other things, awarded the parties joint legal custody of the subject children, with primary physical custody to the father. The Fourth Department modified, on the law, by: vacating the custody award, the provisions for school attendance, the residency schedule, and child support; awarding sole legal and physical custody to the mother with visitation to the father, and directing that the children’s school attendance be in the mother’s district; and remitting to Supreme Court for further proceedings. The Appellate Division held that “the obvious hostility” between the parents makes joint custody inappropriate, noting that the court-ordered psychological evaluation stated that “neither parent appear[ed] able to sufficiently distance themselves from their mutual enmity and embitterment in order to fully act in ways \*\*\* reflective of the children’s needs.” The Court further observed that Supreme Court “failed to give adequate weight to the father’s extensive history of domestic violence or his continued minimization of his actions and denial of the nature and extent of his mental illness.”

## **Family Offense - Disorderly Conduct – Found**

##  In Matter of Rosa G. v. Hipolito D., 2023 Westlaw 3063270 (1st Dept. Apr. 25, 2023), the former husband (husband) appealed from an August 2022 Family Court order which, after a hearing, found that he committed disorderly conduct and granted a 1-year order of protection in favor of his former wife (wife). The First Department affirmed, holding that Family Court properly found that the husband committed disorderly conduct as defined by Penal Law 240.26(3) [“a course of conduct which served no legitimate purpose, with intent of annoying or alarming petitioner”], based upon the wife’s credible testimony that “she was afraid of respondent because they lived in the same apartment and he would threaten to kill her whenever they argued.” The Appellate Division concluded that the husband’s intent to annoy or alarm the wife may be inferred from his threats.

## **Family Offense - Harassment 2d – Found; Disorderly Conduct, Aggravated Harassment 2d – Not Found**

##  In Matter of Ohler v. Bartkovich, 2023 Westlaw 3161144 (4th Dept. Apr. 28, 2023), respondent appealed from a June 2022 Family Court order granting petitioner an order of protection, upon findings that he committed disorderly conduct, harassment 2d and aggravated harassment 2d against her. The Fourth Department affirmed, but vacated the findings that respondent committed disorderly conduct and aggravated harassment 2d. The Appellate Division found that “the parties had dated more than a decade earlier, and \*\*\* [a]fter years of not seeing each other, respondent went to petitioner’s house uninvited on October 28, 2021 and rang the doorbell,” stating that petitioner “owed him a conversation.” Petitioner stated that she “did not want to talk to him and repeatedly asked him to leave” and he refused, prompting Petitioner to call the police, who arrived after Respondent left. Respondent returned 6 weeks later, uninvited, and demanded to speak to Petitioner, who asked him to leave at least a dozen times; Respondent ignored those requests and entered her garage where she was standing. The police arrived and arrested Respondent for trespass. The Court concluded that harassment 2d was established, given that Respondent engaged “in a course of conduct or repeatedly commit[ed] acts that seriously annoyed petitioner while having the intent to harass, annoy or alarm petitioner,” citing Penal Law 240.26(3), but that Petitioner did not prove the elements of disorderly conduct, Penal Law 240.20, and aggravated harassment 2d, Penal Law 240.30(1).