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

## **Matrimonial Update**

## **By Bruce J. Wagner**

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

## **Child Support - Consent Order – Not Voluntary – Objections Granted**

##  In Matter of Barrows v. Ryan, 2024 Westlaw 1749607 (2d Dept. Apr. 24, 2024), the mother appealed from an August 2023 Family Court order, denying her objections to a November 2022 Support Magistrate order directing the father to pay her $492 monthly child support plus 35% of add-on expenses. The Second Department reversed, on the law, holding that “it cannot be said that the mother’s consent to the order of support was given knowingly,” noting that “the mother stated that she believed that the father’s income was higher than what he represented” during the appearance before the Support Magistrate. The Appellate Division found that “the Support Magistrate erroneously indicated that the mother would bear the burden of proving the father’s income during a hearing” and “[t]he Support Magistrate’s brief allocution did not correct this error (*see* Family Ct Act §§ 424-a, 413[1][k]).”

## **Child Support - CSSA – Income Cap ($163,000)**

##  In Matter of Goldstein v. Lika, 2024 Westlaw 1749668 (2d Dept. Apr. 24, 2024), the mother appealed from a May 2023 Family Court order, denying her objections to a May 2022 Support Magistrate Order which, after a hearing following a change in custody (equally shared with a waiver of child support, to the mother primarily), directed the father to pay her basic child support of only $86 weekly for the parties’ 2 children, limited to the first $163,000 of combined parental income. The Second Department affirmed, holding that “the Support Magistrate adequately set forth the factors she considered in reaching her determination, including the children’s living expenses and the relative resources of the parties,” while noting that the “income of the mother, the custodial parent, grossly exceeded the imputed income [$62,428.60] of the father” and “the record does not demonstrate that the children are not living in accordance with the lifestyle they would have enjoyed had the household remained intact.”

## **Child Support - Judicial Estoppel – Dismissal for Lack of Paternity Acknowledgement or Order - Reversed**

##  In Matter of Joseph v. Granderson, 2024 Westlaw 1545667 (2d Dept. Apr. 10, 2024), the mother appealed from a June 2023 Family Court order, denying her objections to a May 2023 Support Magistrate Order which, without a hearing, dismissed her petition seeking support for a child born in 2015 for lack of subject matter jurisdiction, because the parties were never married and there was no acknowledgment of parentage or order of filiation. The Second Department reversed, on the law, granted the mother’s objections, reinstated her petition, and remitted for further proceedings thereupon. The mother submitted a birth certificate listing Granderson as the father of the child who bore his surname, along with a DNA report showing a 99.99% probability of paternity of the child, and a custody stipulation and order identifying Granderson as the father and granting him time with the child at least once per week. The Appellate Division held that Family Court in a support proceeding “has the inherent authority to ascertain whether a respondent is a child’s parent,” and should have precluded Granderson “from raising the issue of paternity,” because he “successfully obtained an order awarding him parental access with the child based on his assertion that he was a parent to the child” and “is judicially estopped from taking the inconsistent position that he is not a parent to the child for the purpose of child support.”

## **Child Support - Modification – Changed Circumstances, 15% - Denied; Insufficient Employment Efforts, Lack of Medical Proof**

##  In Matter of Darling v. Darling, 2024 Westlaw 1559105 (3d Dept. Apr. 11, 2024), the father appealed from a December 2022 Family Court order denying his objections to a Support Magistrate order, which, following a hearing, dismissed his May and July 2022 petitions seeking to modify a September 2021 stipulated order, which had reduced his obligation to support the parties’ child born in 2004. The father’s May 2022 petition alleged changed circumstances following a lay-off from a subsequently obtained job; his amended July 2022 petition alleged a “temporary medical emergency” which rendered him unable to work for an extended period. The Support Magistrate found that the father “had failed to demonstrate sufficient efforts at obtaining employment” and “had failed to demonstrate, through competent medical evidence, that he was unable to work or was restricted to only pursuing remote employment due to his injury.” The Third Department affirmed, noting that the September 2021 order “expressly provided that the father was unemployed at the time and receiving unemployment benefits” and “Family Court was required to compare the father’s circumstances as of that date to his circumstances at the time of the petition.” The Appellate Division found that “the father's subsequent loss of employment after the September 2021 stipulated order did not support a change in circumstance, as his unemployed status was essentially the same \*\*\*.” The Court determined that “the record is devoid of any evidence that would definitively establish that there was a 15% decrease in income since that time \*\*\* and supports the Support Magistrate's determination that the father's limited proof of his employment search was insufficient to establish that he had undertaken diligent efforts at obtaining suitable employment commensurate with his skills and abilities.” The Third Department further found that neither “a brief note from [the father’s] medical provider [excusing him] \*\*\* from work for approximately four months as of July 2022 \*\*\* nor any other proof in the record, established that the father’s leg injury prevented him from obtaining any suitable employment based upon his background as an accountant or that his self-imposed limitation in solely pursuing remote work opportunities was medically indicated.”

## **Child Support -** **Modification – Pre-Petition Indigency – Cancellation of Arrears; Overpayment Credit for Age 21 Child**

##  In Matter of Akhtar v. Naeem, 2024 Westlaw 1774239 (3d Dept. Apr. 25, 2024), the father appealed from a January 2023 Family Court order, denying his objections to a Support Magistrate order which granted his petition for modification retroactive only to its July 2022 filing date, while refusing to cancel child support arrears accrued during a 17-month period between September 2017 to January 2019 when his income was below the applicable poverty income guidelines for single person. The Third Department reversed, on the law, granted the father’s objections and remitted to Family Court. The Appellate Division found that “Family Court erred when it declined to recalculate the father’s arrearage because it relied upon the incorrect premise that the father had failed to file a sworn financial disclosure affidavit, and because the submission of his SSI eligibility approval letter was missing multiple pages, and further, because he did not state the total amount of unemployment benefits received.” The Court determined that “none of these omissions in the proof pertained to the father’s financial circumstances during the 17-month period corresponding with his claim of indigency” and that “Family Court erred insofar as it considered these omissions in the record to be relevant in assessing whether the father’s income was below the level of poverty during the time period claimed.” The Third Department concluded that “the father met his burden and sufficiently supported his claim of indigency \*\*\* so as to afford him a viable claim under Family Ct Act § 413(1)(g)” and “contrary to Family Court’s analysis, this is not a matter of arrears being forgiven in contravention of Family Ct Act § 451 but, rather, a circumstance of arrears between September 2017 and January 2019 never having accrued.” The Appellate Division agreed that “Family Court erred in denying him a credit for $977.58, representing the amount of overpayment of child support beyond the parties’ middle child having reached the age of 21 \*\*\*.”

## **Counsel Fees - Child Support**

##  In Matter of Marcus v. Marcus, 2024 Westlaw 1749630 (2d Dept. Apr. 24, 2024), the father appealed from a January 2023 Family Court order, denying his objections to a November 2022 Support Magistrate order, which, in the mother’s proceeding commenced in November 2019 seeking support for the parties’ 3 children, granted her October 2021 motion for counsel fees pursuant to FCA 438, to the extent of awarding her $91,961.39. The parties agreed to impute $200,000 in income to the father for child support purposes. The Second Department affirmed, holding that “under the totality of the circumstances, the award of counsel fees to the mother was appropriate.”

## **Custody - Initial – Relocation to CA Permitted - Abusive, Hostile Behavior, Substance Abuse; Remitted for Apportionment of Travel Costs**

##  In Matter of Aden HH. v. Charish GG., 2024 Westlaw 1446282 (3d Dept. April 4, 2024), the father appealed from an April 2022 Family Court order which, following a hearing, dismissed his petition seeking custody of the parties’ child born in 2017, and granted the mother’s July 2021 petition and awarded joint legal custody, primary to the mother, while permitting the mother to relocate to CA with the child, with specified and expanded time to the father. The parties met in CA and resided together in Tompkins County from 2016 to October 2020 when, “[f]ollowing a dispute between the parties, the mother absconded with the child to California.” The mother also filed a family offense petition and Family Court, upon the filing of the father’s petition, initially ordered that the child not be removed from NY; the mother had already left NY, and following a hearing in November 2020, Family Court permitted the mother to remain in CA with the child pending the proceedings. The Third Department affirmed the custody award and the relocation, noting that the mother testified: “to the father’s unstable behavior in the home, which was precipitated by his substance abuse that persisted until the time the mother absconded”; “the father frequently left illicit substances around the residence in places that were accessible to the child and her half sibling”; “the father exhibited abusive and hostile behavior toward her, \*\*\* and threatened to engage in self-harm”; “she had no support system [in NY] beyond the father and his family”; and “her return to California was precipitated by the presence of the maternal grandfather, the mother’s eldest daughter \*\*\* and other extended family,” some of whom “were employed in the school district that the child would attend and were available to help in caring for the child.” The Appellate Division noted that the mother’s testimony “[c]ontrasted with the credited testimony concerning the instability of the father’s residence in New York \*\*\*.” While not condoning the mother’s relocation without court permission, the Third Department found that “[t]he record firmly supports that the mother had been the primary caretaker for most of the child’s life prior to relocation \*\*\*.” The Appellate Division modified, on the law and the facts, by: providing the father with 5 additional days in California bi-monthly; expanding the father’s summer time from 40 to 47 days and directing that he return the child to CA no later than 5 days before the start of school; and remitted to Family Court to determine “the appropriate amount that the parties should respectively contribute to travel costs,” finding that “the cap for [travel] costs to be borne by the mother \*\*\* is insufficiently supported by the record.”

## **Custody - Initial – Relocation NYC to LI – Sole – Granted; Rebuttal Limitations Upheld**

##  In Matter of Chirag C. v. Jaimie D., 206 NYS3d 604 (1st Dept. Apr. 11, 2024), the father appealed from a May 2023 Supreme Court order which, after a hearing, denied his petition for sole legal and physical custody of the subject child, and granted the mother the same relief, with relocation (NYC to Suffolk County). The First Department affirmed, finding the determination to be in the child’s best interests, where the record “showed that the mother had always been the child's primary caretaker who was responsible for the day-to-day tasks and who was more likely to foster a relationship between the father and child.” The Appellate Division noted that “joint custody was not appropriate in this case,” given that the father “was palpably hostile towards the mother, refused to make any joint decisions concerning the child, and expressed a disdain for the mother’s personality and parenting style.” The Court found that “the mother's motivation for relocating to Long Island permanently was financial, as opposed to a desire to get away from the father or to keep the child away from him,” noting her “family support in Suffolk County” and the ability “to move in with her parents, who agreed to provide free childcare.” The First Department cited the mother’s testimony concerning “the financial pressures she was experiencing in light of the mounting litigation costs, part of which was undoubtedly caused by the father’s lack of financial support and lack of candor about his finances.” The Appellate Division concluded that Supreme Court’s “decision to limit the rebuttal to three lines of inquiry \*\*\* [is] discretion [which] should not be disturbed absent a clear abuse of discretion.”

## **Custody - Sole – Educational and Medical Needs; Primary Caretaker**

##  In Matter of Daniel B. v. Deshauna S., 2024 Westlaw 1723880 (1st Dept. Apr. 23, 2024), the father appealed from a February 2023 Family Court order which, after a hearing, awarded sole legal and physical custody of the subject child to the mother. The First Department affirmed, holding that Family Court “properly considered the fact that the mother had been the child’s primary caregiver for the majority of his life and was capable of providing a more stable environment for the child” and “further demonstrated that she was better suited to meet the child’s educational and medical needs.” The Appellate Division noted that in contrast, “the father repeatedly engaged in behavior, such as not returning the child from visits on time, that called into question his ability to make appropriate decisions regarding the child and promote his relationship with the mother.”

## **Custody - Sole - Relocation Condition (to NYC) Reversed; Stay Pending Appeal Granted**

##  In Matter of Wright v. Burke, 2024 Westlaw 1423682 (2d Dept. Apr. 3, 2024), the mother appealed from a March 2023 Family Court order which, after a hearing upon the parties’ 2021 petitions filed following the mother’s relocation from Brooklyn to Binghamton, awarded her sole legal and physical custody of the parties’ child, upon condition that she return to NYC and enroll the child in Brooklyn within a 20-minute commute of the father’s residence, with an award of sole legal and physical custody to the father if she failed to do so. By Order dated July 28, 2023, the Second Department stayed enforcement of the aforesaid conditions. The Appellate Division reversed, on the facts, and remitted to Family Court to determine a schedule for the father’s time with the child and shared costs of travel. The Court held that based upon “the totality of the circumstances, particularly the past performance of the mother in caring for the child, the child’s academic performance and success at making friends in Binghamton, the child’s need for stability, and the child’s stated wishes, there is a sound and substantial basis in the record for the Family Court’s conclusion that the child’s bests interests are served by awarding the mother sole legal and physical custody \*\*\*.” The Second Department concluded that Family Court’s direction mandating the mother’s return to NYC lacks such a sound and substantial basis in the record.

## **Custody – Violation – Dismissed – CPLR 3013 Specificity, Rights Not Defeated or Impaired**

##  In Matter of Koska v. Koska, 2024 Westlaw 1545661 (2d Dept. Apr. 10, 2024), the father appealed from a September 2021 Family Court Order which, without a hearing, granted the mother’s motion pursuant to CPLR 3211(a)(7) to dismiss his June 2021 violation petition. The parties have 2 children, born in 2003 and 2007. An August 2020 order, rendered in response to allegations that the younger child had injured the older child directed “that the [younger child] should not be left alone with [the older child] when in the care or custody of either party.” The father’s violation petition alleged that he had obtained a recording of the younger child stating “that he was alone with [the older child]” and prepared a transcript of the same. The Second Department affirmed, noting that “a violation petition is subject to the requirements of CPLR 3013, and thus is required to be sufficiently particular as to provide notice to the court and opposing party of the occurrences to be proved and the material elements of each cause of action.” The Appellate Division held that “liberally construing the allegations in the father’s petition and granting him the benefit of every favorable inference, the father’s allegations, even if established at an evidentiary hearing, could not afford a basis for a finding that the mother violated the August 2020 order” and “failed to set forth facts that could support a finding that the mother ‘significantly defeated, impaired, impeded, or prejudiced his rights’ (citations omitted).”

## **Divorce - Marriage – No License – Prior Divorce Action Discontinued**

##  In T.I. v. R.I., 2024 Westlaw 1290631 (Sup. Ct. Kings Co., Sunshine, J., Mar. 20, 2024), Supreme Court found that the parties “participated in a religious solemnization ceremony pursuant to DRL 12 in March 2014 and executed a *ketubah* [religious marriage contract] but never obtained a New York civil marriage license pursuant to DRL 13.” The husband commenced a prior divorce action in 2015, which was discontinued in late 2018 by written stipulation. The husband sought to dismiss the wife’s present action for divorce because he had obtained a determination from a rabbinical court in November 2022 that the parties’ March 2014 religious marriage was invalid, upon grounds including, but not limited to, “the person who conducted the solemnization ceremony was not, although unknown to the parties, authorized to do so by at least some portion of the religious community.” Supreme Court, while declining to make any determination of religious issues, denied the husband’s motion to dismiss the wife’s present divorce action finding, among other things, that “[i]n the prior divorce action, the husband represented under oath that the parties were married in a religious solemnization ceremony in Kings County, New York in March 2014.” R.I. v. T.I., 60 Misc3d 1226(A) (Sup. Ct. 2018). The Court further considered the best interests of the child and the First Department’s recent decision in Spalter v. Spalter, 224 AD3d 419 (1st Dept. Feb. 1, 2024).

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

##  In Matter of Tanya N.C. v. Bryant P., 206 NYS3d 605 (1st Dept. April 11, 2024), the father appealed from a May 2023 Family Court order, denying his objections to a March 2023 Support Magistrate order which, after a hearing, found that he willfully violated a child support order and granted the mother a money judgment. The First Department affirmed, finding: “The father's willful nonpayment of child support was established prima facie through evidence from the Support Collections Unit showing that he was in arrears on his child support payments” and his “admitted failure to pay support as ordered further constituted prima facie evidence of a willful violation and shifted the burden to him of going forward with credible evidence to rebut that finding.” The Court noted that given the father’s refusal “to be vaccinated against COVID-19 because of his religion, his choice to forgo his [hospital] employment \*\*\*, rather than consent to vaccination, constituted a willful violation of the support order.’” The Court noted that the subsequent repeal of the vaccine mandate “is immaterial, as the regulation was in place during the relevant time period and has not been found to be unconstitutional.” The Appellate Division found that there was no basis “for disturbing the finding that the father failed to show that he made reasonable efforts to obtain gainful employment,” given that “he searched online only for positions that required him to be vaccinated, which presented the same impediment to [hospital] employment \*\*\*.”

## **Equitable Distribution - Egregious Fault – Review of Criteria**

##  For a good review of the law pertaining to egregious marital fault, see Gary G. v. Elena AG., 81 Misc3d 1226(A) (Sup. Ct. Kings Co., Sunshine, J., Jan. 3, 2024).

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

##  In Binnmyr v. Binnmyr, 222 AD3d 573 (1st Dept. Dec. 28, 2023) [see NYSBA Family Law Section Update, January 2024], by Order dated April 16, 2024, upon the wife’s motion, the First Department recalled and vacated its December 28, 2023 decision and Order and issued a new decision on the same date. Binnmyr v. Binnmyr, 2024 Westlaw 1633517 (1st Dept. April 16, 2024). The new decision does not alter the substantive aspects of the December 2023 determination, but deletes any reference to the wife’s admission to having over $1M in liquid assets and substitutes the following: “During the trial, the husband entered into evidence an investment bank statement solely in the wife’s name, indicating at that time, a balance of approximately $560,000. When questioned, the wife declined to admit or deny having a million dollars in liquid assets.”

## **Family Offense - Disorderly Conduct, Harassment 2d, Menacing 3d – Found**

##  In Matter of Joe T. v. Danesha T., 2024 Westlaw 1446778 (1st Dept. Apr. 4, 2024), the mother appealed from a June 2022 Family Court order which, after a hearing, found that she committed disorderly conduct, harassment 2d, and menacing 3d. The First Department affirmed, holding that the father’s testimony “that, while at a public fast-food restaurant, respondent grabbed his hair and headbutted him, and swung a broomstick at him, which caused him to have to bend to protect the parties’ child who was upset and crying, supports the determination that respondent committed harassment in the second degree and menacing in the third degree,” (PL 120.15, 240.26[1]), and that the mother’s “intent to harass, annoy or alarm \*\*\* can be inferred from her conduct and surrounding circumstances.” As to disorderly conduct, the father testified that “[the mother], while an order of protection was in place for [his] benefit, came to his apartment at night, pounding on his apartment door and shouting obscenities and making threats against him and the child,” which, “together with [the mother’s] prior acts, supports the determination that [she] committed \*\*\* disorderly conduct,” as defined by PL 240.20(1) and (3).

## **Family Offense - Reckless Endangerment 2d – 6-Month Limited Order Modified to 2-year Stay Away**

##  In Matter of M.H. v. C.S.T., 2024 Westlaw 1662009 (1st Dept. Apr. 18, 2024), petitioner (respondent’s grandmother) appealed from a July 2023 Family Court order which, following a hearing, found that respondent had committed reckless endangerment 2d and granted her a limited, 6-month order of protection directing respondent to “refrain from” certain acts through December 31, 2023. The First Department modified, by issuing an order of protection which requires respondent to vacate petitioner’s apartment and stay away from petitioner for a period of 2 years. The Appellate Division found that the record “amply demonstrates that respondent has conducted himself in a bizarre, offensive and frightening manner toward petitioner” and that Family Court’s decision “to permit respondent to reside at the grandmother’s apartment ignores petitioner’s fragile age of 80 years old and her well-founded fear of respondent.”

## **Pendente Lite - Sale of Residence – Ordered**

##  In J.H. v. C.R., 82 Misc3d 1202(A) (Sup. Ct. Putnam Co., Grossman, J., Mar. 4, 2024), Supreme Court granted the wife’s cross-motion to compel the sale of the marital residence, occupied by the husband, *pendente lite*, despite the prohibition contained in Kahn v. Kahn, 43 NY2d 203 (1978), finding that “the Automatic Orders [DRL 236(B)(2)(b)] have effectively superseded DRL §234” and Kahn, and noting that the Automatic Orders prohibit property sales that are made “without the consent of the other party in writing, or by order of the court,” such that the statute “plainly contemplates the admissibility [Ed. Note: possibility?] of a court directing the sale *pendente lite* of real property jointly held by the spouses.” The Court concluded that the Legislature “was presumably aware of *Kahn v. Kahn* when it enacted the Automatic Orders in 2009 yet did not exempt tenancies by the entirety and indeed placed no restriction on the kinds of estates in real property potentially subject to court-ordered sale pursuant to Section 236B(2)(b)(1).”