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

## **Matrimonial Update**

## **By Bruce J. Wagner**

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

## **Court of Appeals Note:** In Matter of Celinette H.H. v. Michelle R., 2023 Westlaw 6883236 (Oct. 19, 2023), Family Court signed writs of habeas corpus and held a hearing upon inquest on the mother’s applications seeking sole custody of the children and for their immediate return from out of state, following the father’s refusal to return them to the mother following a visit. Family Court denied the mother’s applications for both sole custody and habeas relief, because the mother did not have a pre-existing custody order. The Appellate Division dismissed the mother’s appeal upon motion, for lack of subject matter jurisdiction. The Court of Appeals reversed and remitted to the Appellate Division “for an expeditious determination on the merits of the standing question presented herein and, if warranted, disposition of any other issues the parties may raise.” The Court of Appeals held: “By dismissing the appeal upon a motion, and upon an undeveloped record, without full briefing and without providing all parties the opportunity to appear, the Appellate Division has rendered impossible meaningful appellate review of the weighty issues raised in this case. To the extent that the Appellate Division’s order \*\*\* could be read, as the dissenters read it, to be a determination that the mother lacked standing to seek habeas corpus relief without an order of custody in place, the issue of standing did not impact the subject matter jurisdiction of the Appellate Division.” Judges Rivera, Chief Judge Wilson and Judge Troutman dissented, opining that the Court of Appeals should “reverse and remit to Family Court to reinstate mother’s petition for the writ and adjudicate the issue of custody, without further delay.”

## **Agreements** - **Maintenance – Enforceable, Set Aside Denied; Enforcement - Income Execution and Money Judgment – Both Allowed**

## In Beer v. Beer, 2023 Westlaw 6626902 (1st Dept. Oct. 12, 2023), both parties appealed from an October 2022 Supreme Court order, which denied the husband’s motion to set aside the maintenance provisions of the parties’ September 2019 separation agreement, and denied the wife’s motion for a money judgment for unpaid maintenance. The First Department modified, on the law, granted the wife’s motion for a money judgment and remanded for entry of the same, and otherwise affirmed. The First Department held that Supreme Court correctly determined that the parties’ agreement complied with DRL 236(B)(3) and “given the parties’ 28-year marriage, and the fact that the wife largely did not work for pay, the terms of the agreement requiring that the husband pay the wife 50% of his net after-tax income for a period of 10 years were not so manifestly unjust as to require setting them aside as being substantively unconscionable.” The Appellate Division concluded that Supreme Court “should not have determined that the income execution, awarded to the wife after the husband unilaterally prevented her from receiving a portion of his income, foreclosed entry of a money judgment on maintenance arrears.”

## **Agreements - Not Acknowledged – Unenforceable – Promissory Notes**

## In Barone v. Clopton, 2023 Westlaw 6883804 (1st Dept. Oct. 19, 2023), the husband appealed from a March 2021 Supreme Court judgment, which awarded the wife $76,000 for loans she made to him during the marriage, documented by promissory notes, and $36,200 for third-party loans the wife incurred during the marriage. The First Department reversed, on the law, and vacated both awards, holding that as to the promissory notes between the parties, they were not acknowledged as required by DRL 236(B)(3), and, further, the wife “could not properly have been awarded the sums of those promissory notes or the third-party loans based on those sums having caused [the husband’s] separate property business to appreciate in value because Supreme Court determined that [she] failed to establish a baseline value for the business, and thus, could not sustain any claim to appreciation in the value” thereof.

## **Agreements - Prenuptial – Interpretation – Inflation Index for Maintenance**

## In Lin v. Banko, 219 AD3d 1510 (2d Dept. Sept. 27, 2023), the husband appealed from a March 2021 Supreme Court judgment of divorce, rendered upon a December 2020 decision after trial, which, among other things, awarded the wife maintenance of $6,216.66 per month, to be adjusted annually according to the 2018 CPI for Urban Wage Earners and Clerical Workers. The parties signed a prenuptial agreement in July 2001 and married in August 2001, which set maintenance at $50,000 per year, payable monthly, to be adjusted according to a specified inflation index then published by the US Dept. of Labor. As of the time of trial, the specified inflation index was defunct. The Second Department affirmed, holding that Supreme Court “properly took judicial notice of a functionally identical index published by the same government source to replace the defunct index specified in the prenuptial agreement to give effect to the parties’ intent. The Appellate Division rejected the husband’s contention that the discontinuance of the specified index rendered the maintenance provision to be unenforceable.

## **Agreements - Set Aside – Denied – No Fraud or Nondisclosure; Ratification**

## In Wong v. Wong, 2023 Westlaw 6813659 (1st Dept. Oct. 17, 2023), the former wife (wife) appealed from a November 2022 Supreme Court order, which granted the former husband’s (husband’s) motion to dismiss the complaint in her 2018 post-judgment action, alleging fraud and nondisclosure of assets prior to the execution of their March 2015 stipulation, which resolved the wife’s June 2008 action for divorce. The March 2015 agreement provided the wife with 3 years of maintenance, equitable distribution of marital property, and counsel fees. The First Department noted that following entry of the divorce judgment, the wife brought an action in Taiwan, seeking investigation into, and distribution of, the husband’s assets there. The Taiwan court dismissed the action, “having concluded that the issue was properly brought before the courts of New York.” The Appellate Division affirmed, holding that Supreme Court properly dismissed the wife’s action, finding that “prior to the settlement, the wife was aware of the husband’s bank accounts in Taiwan, as they had been itemized on his net worth statement \*\*\* and nothing prevented the wife from discovery \*\*\* during the settlement negotiations” if the wife’s claim was that the Taiwan account balances were inaccurately listed on the husband’s statement of net worth. The Court determined that as to real property in Taiwan not disclosed on the husband’s net worth statement, the same “were not only held to be nonmarital property by the Taiwan court, but admitted as such by the wife \*\*\* and specifically excluded from equitable distribution by the terms of the agreement.” The First Department found that the husband was “unaware of certain stock accounts \*\*\* set up on his name in Taiwan by his parents, a fact corroborated in the affidavit of his sister,” and this “unrebutted lack of knowledge of the accounts refutes the wife’s allegations of any intent to defraud.” The Appellate Division concluded that “the wife had already ratified the agreement by accepting substantial benefits thereunder before seeking rescission and reformation of the stipulation nearly three years after the divorce.”

## **Agreements - Stipulation – Interpretation – Childcare costs – Error to Add Terms**

## In Franklin v. Franklin, 2023 Westlaw 6394564 (1st Dept. Oct. 3, 2023), the husband appealed from a December 2022 Supreme Court order, which, among other things, granted the wife’s motion for $18,000 in childcare costs. The parties’ August 2021 stipulation provided that the husband would pay the wife $2,000 per month toward child care costs, conditioned upon her employment by a nonrelative and upon her periodic submission to the husband of “paystub[s]” documenting such employment. The Appellate Division found that the wife’s motion was supported by “timesheets purporting to document” her employment, which Supreme Court found to be the “functional equivalent” of the paystubs required by the stipulation. The First Department reversed, on the law, and denied the wife’s motion, citing dictionary definitions of the word “paystub,” and holding that Supreme Court “impermissibly changed the meaning of the parties’ agreement by adding or excising terms under the guise of construction.”

## **Child Support – Agreement – Interpretation – Add-On Expenses – Must Actually Be Incurred**

## In Herman v. Herman, 2023 Westlaw 6853823 (2d Dept. Oct. 18, 2023), the parties were divorced in June 2015, and the father appealed from a July 2021 Supreme Court order which, among other things, granted the mother’s motion for child support add-on expenses of $31,128 and counsel fees. The Second Department modified, on the law, by denying the mother’s motion. The Appellate Division held that the parties’ stipulation of settlement “was unambiguous \*\*\*” and “required the [father] to pay a certain percentage of child support add-on expenses incurred,” but “did not \*\*\* obligate him to pay a set amount of add-on expenses irrespective of whether \*\*\* those expenses were incurred.” The Court reasoned that the word “expenses,” which the father “was obligated to pay as add-ons, is commonly understood as meaning costs that are actually incurred.” The Second Department concluded that given its determination, the counsel fee award must also be vacated.

## **Child Support – CSSA - Imputed Income; Unreimbursed Employee Business Expenses – Not Proved**

## In Qazi v. Qazi, 2023 Westlaw 6452028 (2d Dept. Oct. 4, 2023), the husband appealed from a November 2018 Supreme Court judgment of divorce which, upon a July 2018 decision following a December 2017 trial of the wife’s May 2016 action, imputed $72,000 in annual income to him for child support purposes. The Second Department affirmed, holding that Supreme Court properly imputed the stated income to the husband “based upon [his] own admissions,” and, contrary to his contentions, he “failed to prove his actual, current business expenses, if any” so as to warrant deductions therefor from his income pursuant to DRL 240(1-b)(5)(vii)(A).

## **Child Support – CSSA - Income – Includes Overtime**

## In Matter of Simpson v. Cyrius, 2023 Westlaw 6452001 (2d Dept. Oct. 4, 2023), the father appealed from a December 2022 Family Court Order, denying his objections to a September 2022 Support Magistrate Order, which granted the mother’s petition for child support. The Second Department affirmed, holding that “all income, including overtime income, is included in gross income for child support purposes” and “the Support Magistrate correctly included the father’s overtime income in the calculation of his child support obligation.”

## **Child Support -** **CSSA – Modification – 3 years – Granted; Over Cap; Tutoring and Educational Expenses**

## In Matter of Srivastava v. Dutta, 2023 Westlaw 7007212 (2d Dept. Oct. 25, 2023), an October 2015 Supreme Court Judgment directed the father to pay the mother child support of $878.92 per month. The father appealed from a September 2022 Family Court Order denying his objections to a March 2022 Support Magistrate Order which, after a hearing, granted the mother’s January 2021 petition for upward modification and directed him to pay $1,522.92 per month in child support plus 50% of the child’s educational and tutoring expenses. The Second Department affirmed, holding that more than 3 years had passed following entry of the judgment of divorce, such that Family Court was authorized to consider modification, citing FCA 451(3)(b)(i). The Appellate Division rejected the father’s argument that the Support Magistrate improperly applied the CSSA to combined parental income over the cap and determined that the Magistrate “engaged in a thorough analysis of the parties’ financial situation, including the parties’ considerable income and the child’s needs,” while noting that “the father’s testimony regarding his finances lacked credibility.” The Court concluded that the apportionment of educational and tutoring expenses was proper.

## **Child Support - CSSA - Opt Out – Deviation – Noncompliance**

## In Sayles v. Sayles, 2023 Westlaw 6452033 (2d Dept. Oct. 4, 2023), the wife appealed from a March 2022 Supreme Court order which, in her 2021 divorce action, denied her motion to vacate the child support terms of the parties’ May 2012 separation agreement providing for the husband’s payment of less than the CSSA amount for the parties’ 2 children. The Second Department modified, on the law, by granting the wife’s motion and remitting to Supreme Court for determination of the husband’s child support obligation. The Appellate Division held that the separation agreement did not comply with DRL 240(1-b)(h) “and the record does not demonstrate that the [wife’s] agreement to said provisions was made knowingly.”

## **Counsel Fees - Agreement – Interpretation – Counsel Fees Allowed – Notice of Default Not Required**

## In Matter of Rebore v. Woodby, 2023 Westlaw 7007280 (2d Dept. Oct. 25, 2023), the father appealed from an August 2022 Family Court order denying his objections to a March 2022 Support Magistrate Order, which granted the mother’s motion for counsel fees and awarded $49,691.25, following disposition of: the mother’s petitions to enforce a January 2010 order for the older child, which incorporated a 2008 written agreement, and to establish support for a younger child; and the father’s petition to modify the January 2010 order. The Second Department affirmed, rejecting the father’s argument that the mother was precluded from seeking counsel fees because she failed to provide him with notice of his default in paying child support as required by the 2008 agreement. The Appellate Division held that the failure to provide the default notice did not preclude an award of counsel fees pursuant to FCA 438, noting that “the plain language of [the 2008] agreement does not require the mother to provide the father with notice of his default in order to enforce her right to seek an award of attorney’s fees or otherwise contain a waiver of her right to seek such fees under Family Court Act §438.”

## **Counsel Fees - Enforcement – Hearing Needed; Equitable Distribution - Enforcement – Independent Receiver Needed**

## In Maitland v. Maitland, 2023 Westlaw 6613566 (2d Dept. Oct. 11, 2023), the parties were divorced in December 2019, and the former husband (husband) appealed from Supreme Court’s November 2020 and March 2021 orders which, among other things, denied his motion seeking enforcement of the divorce judgment’s provisions regarding the sale of real property, distribution of rental income and sale proceeds from certain properties, and money judgments therefor, denied his request for counsel fees, and appointed each party as receiver of one of the parcels in question. The Second Department reversed, on the law, and granted enforcement relief to the husband, including money judgments, determined he had a valid claim for counsel fees, and held that Supreme Court should not have appointed each party as a receiver for one of the parcels. The Appellate Division found that “as the [wife] failed to cooperate in the sale of properties, the court should have appointed an independent receiver to effectuate the sales” and remitted for that purpose as well as for entry of money judgments in the husband’s favor. On the issue of counsel fees, the Appellate Division held that Supreme Court erred in denying the husband’s request therefor, citing DRL 237(b) and 238, but given that the parties did not stipulate that the same could be determined on papers, the husband is entitled to a hearing and remitted for the same.

## **Custody - Access to Educational and Medical Records – Denied; Forensic Evaluation Suspended**

## In Matter of Robert S. v. Norma C., 2023 Westlaw 6626898 (1st Dept. Oct. 12, 2023), both parties appealed from a September 2022 Family Court order which, after a hearing, granted the mother sole physical and legal custody of the subject child, with supervised therapeutic visits to the father, and granted the father independent access to the child’s school, medical and extracurricular activity reports. The First Department modified, on the facts and in the exercise of discretion, by deleting the provision granting the father access to the aforesaid records, and otherwise affirmed. The Appellate Division held that “Family Court providently exercised its discretion in suspending the forensic evaluation because it had ample information upon which to reach a decision after a full fact-finding hearing [and] \*\*\* an in-camera interview with the child” noting that there were no “sharp factual disputes where a forensic report could be instrumental in determining the child’s best interests.” (Internal quotation marks omitted). The Court concluded that “it is not in the child’s best interests for his father to have independent access to his records, as the father has had only a limited and sporadic relationship with the child, who adamantly opposes the father’s access to the records.”

## **Custody - Agreement – Modification – No Hearing – Father’s Relocation to Bulgaria; Removal of Passport Restrictions – No Subject Matter Jurisdiction**

## In Velin M. v. Bermet T., 2023 Westlaw 6813596 (1st Dept. Oct. 17, 2023), the father appealed from a July 2022 Supreme Court order, which, without a hearing: (1) granted the mother’s motion to modify the parties’ April 2018 custody agreement (joint legal and physical custody and certain primary decision-making to the father), and awarded her primary physical custody of the subject child and final decision-making on all major decisions; and (2) denied the father’s cross-motion seeking removal of barriers to his travel to the US. The First Department affirmed, holding that “the mother had shown a sufficient change of circumstances to justify a change in custody – namely, the father’s voluntary relocation to Bulgaria \*\*\*” which made the joint legal and physical custody provisions of the April 2018 agreement “no longer feasible,” and “it was no longer in the child’s best interests for the father to continue to have primary decision-making authority on certain major issues.” The Appellate Division held that Supreme Court “was not required to hold an evidentiary hearing to determine the parties’ various motions, as it already had sufficient information to make an informed determination as to the child’s best interests,” having “presided over this matter since 2020 and is fully familiar with the facts and the parties.” The Court concluded that “it is the State Department and not the Court which has the authority to remove restrictions, if any, on his United States passport so that he could return to the United States.”

## **Custody - Modification – Joint to Sole – Acrimony, Pornography Business, Unfounded CPS Reports, Unilateral Baptism; Violation – Willful**

## In Matter of Alexis WW. v. Adam XX., 2023 Westlaw 6883725 (3d Dept. Oct. 19, 2023), the father appealed from a May 2022 Family Court order which granted the mother’s November 2020 violation petitions, to the extent of finding the father in willful violation for failure to return the parties’ child born in 2017, and granted her September 2021 petition to modify a September 2020 consent order (joint legal custody, equal physical custody), by awarding her sole legal and primary physical custody with time to the father on the first 3 weekends of the month from Fridays at 7 pm to Sundays at 7 pm, plus additional school vacation and holiday time. The Third Department affirmed, holding that Family Court properly agreed with the AFC’s position that even if, as the father alleged, he had to quarantine in November 2020 following a coronavirus exposure, “there was no justification to quarantine the child” and that Family Court properly concluded “that the father had exploited public health recommendations \*\*\* to deprive [the mother] of parenting time” and that the mother established a violation by clear and convincing evidence. As to changed circumstances, the Appellate Division held that Family Court properly found that the prior order “would soon become unworkable upon the child entering kindergarten” and the parties’ relationship had become “severely antagonistic \*\*\*, custody exchanges were openly hostile and frequently involved law enforcement.” The Court noted that the father engaged in unilateral decision-making, including “having the child baptized without input from the mother as to the choice of religion.” The Third Department held that the award of sole custody to the mother was appropriate, noting that the father “engaged in conduct intended to alienate the mother from the child, including encouraging the child to refer to his girlfriend as ‘mommy’ and making unfounded hotline reports to [CPS].” The Appellate Division noted that the father’s girlfriend “is self-employed in an online business selling pornographic photographs of herself, some of which involve the father and occur while the child is within their household.”

## **Custody - Modification – Relocation – Granted (TN) – Military Transfer; Transport Costs Apportioned**

## In Matter of Faea OO. V. Isaiah PP*.*, 2023 Westlaw 7028303 (3d Dept. Oct. 26, 2023), the father appealed from a March 2022 Family Court order which, following fact-finding and *Lincoln* hearings, granted the mother’s November 2021 petition to modify a 2020 default order (sole legal to mother, alternating weekends to father) and allowed her to relocate with the parties’ child born in 2013 to Tennessee (TN), with 6 weeks to the father in the summer, plus certain school breaks and other time as agreed, and directed each parent to pay for transporting the child to him or her. The Third Department affirmed, noting that: the mother married her current spouse in August 2020 and they have a 2-year-old child; it was undisputed that the mother has been the child’s primary caregiver throughout the child’s life; the mother’s spouse is in military service and was transferred to Tennessee, thus necessitating the move; the relocation was in the best interests of the child and is accord with the position of the AFC at trial and on appeal. The Court concluded that the allocation of transportation costs was appropriate, considering that the mother agreed to reduce the father’s child support prior to her relocation.

## **Custody - Modification – Supervised Visitation Upheld; Violation – Willful**

## In Matter of Angelica CC. Ronald DD., 2023 Westlaw 6883417 (3d Dept. Oct. 19, 2023), the father appealed from a June 2021 Family Court order, which modified a March 2017 consent order (joint legal, shared physical, and specified exchange times) by limiting the father’s visitation to be supervised by a psychologist and found him to be in willful violation of both the March 2017 order and an April 2020 order. The Third Department affirmed, noting its prior decision [214 AD3d 1091 (3d Dept. 2023), lv. denied, 39 NY3d 915 (2023)], which affirmed orders granting the mother’s prior violation petitions and awarding her counsel fees. The Appellate Division noted that the father refused to obey the March 2017 order by “refusing to bring the child to a scheduled exchange \*\*\* under the guise of protecting the child from COVID-19” and that the record reveals that the father “repeatedly engaged in conduct prohibited by the order for approximately 11 months.” The Court upheld the supervision of visitation based upon its determination on the violation issue, while noting “the father’s increasingly hostile demeanor toward the mother, repeated messages and accusations against her, as well as his unwelcomed romantic advances and threats to call the police to conduct a wellness check on her,” all provide the requisite change of circumstances and sound and substantial basis in the record “to deny the father unsupervised visitation.”

## **Custody - UCCJEA – Continuing Exclusive Jurisdiction (PA) – NY Writ Denied**

## In Matter of Alexandra RR. v. Doris H., 2023 Westlaw 6394632 (1st Dept. Oct. 3, 2023), the mother appealed from a May 2022 Family Court order which, after a hearing, denied her petition for a writ of habeas corpus pertaining to the subject children, who were in their grandmother’s care pursuant to a Pennsylvania (PA) Order. The First Department affirmed, holding that the PA court had continuing exclusive jurisdiction until it determined it no longer has the same, citing DRL 76-a(1) and 77-b(1). The Appellate Division noted that “writs of habeas corpus pertain to the illegal detention of a child by either parent, which is not present herein,” such that “the mother did not have a right to habeas corpus relief,” citing DRL 70(a).

## **Custody - UCCJEA – NY Home State; Relocation from Morocco Not Wrongful Removal**

## In Matter of Geraldine HTB v Guillaume APMJ, 2023 Westlaw 6558919 (1st Dept. Oct. 10, 2023), the father appealed from a December 2022 Family Court order, which found that NY was the home state based upon the child’s residence therein for over 6 months as of the time the mother filed her custody petition. The First Department affirmed, holding that contrary to the father’s argument, the mother’s relocation from Morocco to escape domestic violence was not wrongful removal of the child. The mother had filed for divorce in Morocco, but she did not seek custody in that proceeding. The father filed for reconciliation in Morocco, but that case likewise did not constitute a custody proceeding under the UCCJEA, as his proceeding was not made in substantial conformity with the UCCJEA.

## **Disclosure - CPLR 3126 Penalty – Dismissal**

## In Matter of Dellorusso v. Dellorusso, 2023 Westlaw 6451992 (2d Dept. Oct. 4, 2023), the father appealed from an April 2022 Family Court order denying his objections to a December 2021 Support Magistrate order which, without a hearing, granted the mother’s motion to dismiss the father’s December 2020 petition upon the ground of failure to comply with disclosure demands and court-ordered disclosure. The father’s petition sought downward modification of the child support directed for the parties’ 4 children by a November 2016 judgment of divorce, which incorporated a September 2016 stipulation. The Second Department affirmed, holding that “the record supports a finding that the father willfully failed to respond to discovery demands and comply with court-ordered discovery, justifying the dismissal of his petition.”

## **Enforcement - Willful Violation – Right to Counsel**

## In Hoffman v. Hoffman, 2023 Westlaw 6451999 (2d Dept. Oct. 4, 2023), the husband appealed, by permission, from a May 2022 Supreme Court order of commitment which, *sua sponte,* remanded him to the custody of the county sheriff pending further appearance, unless he paid bail of $40,000. The Second Department reversed the order of commitment, on the law and in the exercise of discretion, and vacated Supreme Court’s May 2022 warrant of arrest. The wife had moved to hold the husband in contempt for non-payment of child support and the husband was 20 minutes late to a May 2022 virtual conference, at which point Supreme Court had already issued a warrant and set bail at $40,000. The husband asked for assigned counsel, and Supreme Court denied that request, stayed enforcement of the warrant for 1 week, and directed the husband to pay $40,000 within the same week. At the appearance held a week later, the husband had not paid and Supreme Court issued the aforesaid order of commitment. The Appellate Division held that “prior to issuing an order of commitment, the Court should have inquired into the [husband’s] current financial circumstances to determine whether he had become eligible for assigned counsel.” The Court concluded: “That the court issued a warrant and set bail at $40,000 in response to what was, in effect, a late appearance is particularly egregious where the potentially indigent defendant claimed he did not have the means to pay his court-ordered child support.

## **Family Offense - Harassment 2d – Not Found – Social Media**

## In Matter of Geremski v Berardi, 219 AD3d 1713 (4th Dept. Sept. 29, 2023), respondent appealed from an August 2022 Family Court order which, after a hearing, found that she committed harassment 2d (Penal Law 240.26[3]) against petitioner and granted him an order of protection against her. The Fourth Department reversed, on the law, and dismissed the family offense petition, holding that petitioner’s testimony, that respondent “posted ‘negative posts and stuff’ on social media about him including, in particular, two posts on Facebook about an unnamed ‘ex’ that he believed referred to him, after which respondent blocked him from viewing her posts.” The Fourth Department concluded that “the evidence presented by petitioner failed to establish by a preponderance of the evidence that respondent engaged in acts constituting harassment in the second degree.”

## **Family Offense - Menacing 2d, Reckless Endangerment 2d (v. Child) – Found; Procedure - Order of Reference [CPLR 4317(a)] – Implied Consent**

## In Matter of Edward C.Y. v Jessica E.H., 196 NYS3d 70 (1st Dept. Oct. 12, 2023), the mother appealed from an October 2022 Family Court order which, after a hearing, found that she committed menacing 2d and reckless endangerment 2d against the parties’ child. The First Department affirmed, noting that the child testified that the mother “while holding a fork about four or five inches from her face, made jabbing motions and threatened to stab her in the eye with it,” and finding that this conduct satisfied the elements of both menacing 2d (Penal Law 120.14[1]) and reckless endangerment 2d (Penal Law 120.20) by a preponderance of the evidence. The Appellate Division found that although the record “does not reflect that [the mother] provided written consent to the order of reference (*see* CPLR 4317[a]), [the mother] implicitly consented to the order of reference by actively participating in the proceeding without challenging the Referee’s jurisdiction.”

## **Maintenance - Modification – Extreme Hardship – Partial Grant; Imputed Income – Credit Card Charges Paid by Current Spouse, Household Expenses, Non-Recurring Expenses, Remitted for Recalculation**

## In Matter of McFarlane v. McFarlane, 2023 Westlaw 6883458 (3d Dept. Oct. 19, 2023), the former husband (husband) appealed from an April 2022 Family Court order, partially denying his objections to a Support Magistrate Order, which found that he had demonstrated an extreme hardship and reduced his maintenance obligation pursuant to a 2016 judgment of divorce and oral stipulation from $3,750 per month to $1,500 per month. The Support Magistrate imputed certain income to the husband but found that the presumptive guidelines amount [not specified] was “too low due to the husband’s possession of both a Wells Fargo IRA and a pension.” The Third Department modified, on the law and the facts, by reversing the award of $1,500 per month in maintenance and remitting “for an expeditious hearing before the Support Magistrate within 90 days to recalculate the amount of income imputed to the husband and the amount of maintenance.” The Appellate Division rejected the husband’s argument that the wife should not receive any maintenance because she is self-supporting. On the issue of imputed income, the Court found no basis to disturb Family Court’s determination that the husband’s “current wife’s payment of his share of the household expenses and her payment of his charges on her American Express credit card” is imputed income to him, citing DRL 240(1-b)(b)(5)(iv)(D). However, the Third Department agreed that “one-time nonrecurring payments should not have been utilized” to impute income, “including the value of [a] Mexican vacation, the ‘probable’ payment of counsel fees, [a] vaccination bonus, the sale of [an] elliptical [and] ATV and \*\*\* vacation pay.” The Court concluded that the Support Magistrate adequately explained the reasons for deviation, including the consideration of marital property previously distributed, namely, the husband’s IRA and pension.

## **Procedure - Default – Failure to Appear by Video as Directed**

## In Matter of Reardon v Krause, 219 AD3d 1710 (4th Dept. Sept. 29, 2023), the mother appealed from a December 2021 Family Court order which, among other things, awarded the father sole custody of the subject child, with supervised visitation to her, upon her default, which consisted of her failure to appear via video for a virtual evidentiary hearing, after being directed to do so and after having been offered the opportunity to appear from a kiosk at the courthouse where her attorney would also be physically present. The Appellate Division found that “[o]n the date of the hearing, \*\*\* the mother did not appear visually, either via videoconference or from a computer in a kiosk in the courthouse; rather, the mother called into the proceeding by telephone \*\*\* [and][a]lthough [she] initially complained of technical difficulties with her cell phone in her attempts to connect to the videoconference, she also conveyed that her preference was to appear at the hearing via telephone only, to which the court responded that it needed to see her in order to assess her credibility.” The court allowed the mother to confer with her counsel, who thereafter reported that the mother was unable to resolve the technical difficulties and requested an adjournment, which Family Court denied. The mother’s attorney then declined to participate in the hearing. The Fourth Department held that the attorney’s election “to stand mute” constituted a default, and determined that its review of the mother’s appeal “is limited to the mother’s contention that the court abused its discretion in denying her attorney’s request for an adjournment.” The Appellate Division concluded that “the record supports the determination that the mother had been adequately warned of the consequences of failing to appear visually at the virtual hearing and was afforded ample time to find access to a computer or other functional device that would permit her to participate via videoconference,” such that Family Court “did not abuse its discretion in denying the mother’s request for an adjournment.”

## **Procedure - Objections to Temporary Order of Support Magistrate**

## In Matter of Peterson v. McCall, 2023 Westlaw 7007219 (2d Dept. Oct. 25, 2023), the father appealed from an August 2022 Family Court order denying the father’s objections to: (1) a May 2022 temporary Support Magistrate Order, which directed him to pay child support of $126 per week; and (2) a June 2022 Support Magistrate Order which, upon the parties’ consent, directed him to pay $100 per week in child support. The Second Department affirmed, holding that Family Court properly denied the father’s objections to both orders because he failed to file proof of service (CPLR 306[a], [d]) showing that his objections were served upon the mother, as required by FCA 439(e). [Editor’s Note: FCA 439(e) provides: “Specific written objections to a *final* order of a support magistrate may be filed by either party \*\*\*.” (Emphasis added). Are objections to non-final orders of a support magistrate permitted? See Matter of Tobing v. May, 168 AD3d 861 (2d Dept. 2019), where the father moved to dismiss the mother’s petitions and the Support Magistrate denied the motion, prompting the father to file objections, which Family Court granted. On the mother’s appeal, the Second Department reversed, holding that “Family Court should have denied the father's objections to the Support Magistrate's nonfinal order.” There are cases stating that “objections from nonfinal orders made by a Support Magistrate are typically not reviewed unless they could lead to irreparable harm.” Matter of Mead v. Smith, 186 AD3d 1890 (3d Dept. 2020)].

## **Procedure -** **Statute of Limitations – Submission of QDROs**

In Wansi v. Wansi, 2023 Westlaw 7028913 (1st Dept. Oct. 26, 2023), the former wife (wife) appealed from a January 2023 Supreme Court Order which denied her motion to vacate a June 2021 QDRO. The First Department affirmed, holding that contrary to the wife’s contention, applications and motions for QDROs “are not barred by the statute of limitations and \*\*\* 22 NYCRR §202.48 is inapplicable because it was merely a mechanism to effectuate payment of [the husband’s] share in [the wife’s] retirement plan,” while finding that the wife “was properly noticed by the proposed QDRO and not[ing] that [the wife] does not argue that the proposed document conflicted with the terms of the divorce judgment or that she was prejudiced by it.”

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

As previously reported in the July 2023 edition of this Update: Passed by both Assembly and Senate as of May 31, 2023 and **signed by the Governor on October 25, 2023**, CPLR Rule 2106 is **amended, effective January 1, 2024,** to allow an affirmation by any person, subscribed and affirmed to be true under the penalties of perjury, to be used in a civil action in NY in lieu of, and with the same force and effect as, an affidavit. A.05772/S.05162, Laws of 2023, Ch. 559.