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

## **Matrimonial Update**

## **By Bruce J. Wagner**

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

## **COURT OF APPEALS NOTE**: In Szypula v. Szypula, 2024 Westlaw 4535800 (Oct. 22, 2024), the husband joined the US Navy in 1987 and the parties were married in 1996. In 1998, the husband left the Navy and worked in the private sector until 2012, when he joined the Foreign Service. The parties “used marital funds to augment the husband’s Foreign Service pension so that it included credit for his pre-marriage military service.” Following trial of a 2019 divorce action, Supreme Court found that the value of the pension related to the husband’s 9 years of premarital Navy service was marital property based upon the use of marital funds to buy back the Navy credits. The Appellate Division reversed, holding that the Navy pension credits were the husband’s separate property, because they were the product of his “sole labors” and were “not due in any way to [the wife’s] indirect contributions.” 211 AD3d 156, 159 (3d Dept. 2022). The Third Department did find that the marital funds used to buy back the Navy credits were subject to equitable distribution and remitted to Supreme Court for a determination. Following remittal, the wife was granted leave to appeal. 40 NY3d 903 (Sept. 19, 2023). The Court of Appeals stated that the issue “is whether the portion of the pension related to the pre-marriage military service is separate or marital property.” The Court of Appeals reversed and remitted to Supreme Court, concluding that the “pension credits at issue here became marital property when [the parties] used marital funds to transform them into pension rights, commingling separate property with marital property,” citing, among other authorities, Fields v. Fields, 15 NY3d 158, 167 (2010).

## **Attorney & Client - Privilege – Not Extended to Attorney-Client’s Parents’ Communications**

## In Molner v. Molner, 218 NYS3d 53 (1st Dept. Oct. 8, 2024), the wife appealed from a January 2024 Supreme Court order, which directed her counsel to comply with the husband’s subpoena duces tecum seeking production of communications between her counsel and her parents. The First Department affirmed, noting: “Communications in the known presence of a third party are generally not privileged[,]” subject to an exception “for one serving as an agent of either attorney or client \*\*\*,” which must indicate “how the purported agent facilitated communications \*\*\*.” The Appellate Division cited Supreme Court’s finding that “the wife is an educated, practicing physician, and neither she nor her parents provided any evidence, including for example an affidavit, demonstrating that the wife’s parents were ‘deemed necessary to enable the attorney-client communication’ to warrant extending attorney-client privilege.” The Court concluded that “the wife’s expectation that all communications involving her parents would remain confidential is unreasonable.”

## **Child Support - CSSA – Equal Custody – No Child Support Award**

## In Cicale v. Cicale, 2024 Westlaw 4364368 (2d Dept. Oct. 2, 2024), the parties were married in April 2013. The wife appealed from a March 2023 Supreme Court judgment which, upon a December 2022 decision following trial of the husband’s February 2022 action, among other things: (1) awarded the husband final decision-making and residential custody of the 2 children and granted the parties equal physical custody; and (2) denied the wife’s counterclaim for child support. The Second Department modified, on the law, on the facts and in the exercise of discretion, by reversing the final-decision making award to the husband and awarding the parties joint residential custody. The Appellate Division held that “the record showed that the [wife] had assumed the responsibility of making the majority of the decisions affecting the children’s education, healthcare, and after-school activities, and there was an insufficient justification in the record to supplant [her] in that role”; the award to the husband of “primary residential custody was not supported by \*\*\* the record[,]” and concluded that “an award of joint residential custody is in the children’s best interests.” On the issue of child support, while recognizing that in an equal physical custody case, “the parent having the higher income \*\*\* is deemed the noncustodial parent for child support purposes,” the Second Department held that “Supreme Court providently exercised its discretion in deviating from the presumptively correct amount of child support [unspecified] in eliminating the [husband’s] basic child support obligation.” The Court noted that Supreme Court “set forth the factors it considered [unspecified] in making this determination” that the basic child support obligation “was unjust and inappropriate.”

## **Child Support - CSSA – Income – Depreciation Deduction Disallowed**

## In Matter of Bantis v. Ferrante, 217 NYS3d 671 (2d Dept. Oct. 2, 2024), the father appealed from a September 2023 Family Court order, denying his objections to a July 2023 Support Magistrate order which, after a hearing upon his 2017 petition, modified his child support obligation pursuant to a February 2015 order from $1,649 per month to only $1,074 per month. The Second Department affirmed, upholding the Support Magistrate’s finding that “the claimed depreciation expenses associated with the father’s investment properties should not be deducted from his [CSSA] income[,]” noting that the same “did not affect disposable income or otherwise impact on [the father’s] ability to pay child support (citation omitted).”

## **Child Support - College Expenses – No Award for Pre-Petition Payments**

## In Matter of Dana F. v. Derek A., 217 NYS3d 557 (1st Dept. Oct. 3, 2024), the father appealed from a March 2023 Family Court order, denying his objections to a November 2022 Support Magistrate order which, after a hearing upon the mother’s modification petition, directed him to contribute $4,000 per semester toward college tuition, and to pay $12,000 in total for the fall 2021, spring 2022 and fall 2022 semesters. The First Department modified, on the law and in the exercise of discretion, by reducing the $12,000 arrears payment to $10,000, and otherwise affirmed. The Appellate Division held that the Support Magistrate properly directed the father to pay 62% of the child’s college tuition, net of scholarships, grants and student loans, “based on the father’s demonstrated ability to pay in light of his payment for his own education in the amount of $8,000.” Noting that the mother filed her petition for modification when the child was halfway through the fall 2021 semester, and that “it is clear from the record that the mother was making tuition payments in accordance with a payment plan[,] the Court concluded that “the court’s award of so much of the retroactive tuition as was paid before the date of the modification petition was improper.”

## **Child Support - Imputed Income – VA “Deemed Disabled,” SSD Twice Denied**

## In Matter of Kaye v. Hall, 2024 Westlaw 4402478 (4th Dept. Oct. 4, 2024), the father appealed from a May 2023 Family Court order dismissing his objections to a Support Magistrate order which, after a hearing upon his petition to modify child support determined by a judgment of divorce, reduced his obligation, but imputed income to him in rendering the determination. The Fourth Department affirmed, holding that “the Support Magistrate did not abuse her discretion by imputing income to the father, who had been unemployed since 2017 despite having a bachelor’s degree in mechanical engineering.” The Appellate Division noted that while “the father had been deemed disabled by the Veterans Administration, that determination was based solely upon the father’s self-reporting” and the VA records note that “there is no official record of such incurrence or aggravation of post-traumatic street disorder in the father’s service treatment records.” The Court further found that “the evidence before the Support Magistrate revealed that the father had twice applied for social security benefits based upon his disability and been denied, most recently in 2021.” The Fourth Department concluded that the father’s claim of inability to work “was not substantiated or corroborated by any medical evidence, and the Support Magistrate was not obliged to accept the father’s unsupported testimony that a medical condition prevented him from working.”

## **Custody - Children’s Wishes; Separation of Siblings; Third Party (Grandmother)**

## In Matter of Lillette T. v. Simone G., 218 NYS3d 60 (1st Dept. Oct. 8, 2024), the mother appealed from a November 2023 Family Court order which, following a hearing and upon a finding of extraordinary circumstances, awarded: (1) primary physical custody and sole legal custody of the younger child to the grandmother; (2) primary physical custody of the older child to the father; and (3) joint legal custody of the older child to the father and grandmother. The First Department affirmed, holding that the grandmother established extraordinary circumstances to warrant an award of custody of both children to her, “following a domestic violence incident involving the mother and the mother’s wife,” while noting that “[b]oth children had lived with the grandmother since they were born, and she provided for all their basic needs, enrolled them in school, and took them to their medical appointments” and further considering “the mother’s insistence on maintaining a relationship with her wife, despite a history of domestic violence, and the mother’s decision to bring the children around the wife in violation of Family Court’s prior orders and the children’s own wishes.” The Appellate Division upheld Family Court’s best interests determinations, namely, that the younger child should “remain with the grandmother, who had been her primary caretaker since birth” and as to the older child, “the father provided her with a stable home \*\*\*.” The Court concluded that “Family Court also gave sufficient weight to the children’s individual wishes in determining what was in their best interests (citation omitted).”

## **Custody - Decision-Making – Choice of School, Primary Residence for School Purposes**

## In Matter of Casas v. Day, 218 NYS3d 177 (4th Dept. Oct. 4, 2024), the mother appealed from a January 2022 Family Court order, which granted the parties joint legal and shared physical custody of the subject child, but awarded the father primary physical residence and sole decision-making authority with respect to choice of school. The Fourth Department affirmed, finding that while “the evidence demonstrated that both parties are caring and competent parents, \*\*\* they live in different school districts \*\*\* [and] prior to the commencement of these proceedings, the mother moved across the state with the child without notifying the father, thereby depriving him of visitation with the child for an extended period of time \*\*\*.” The Appellate Division held: “we cannot conclude that the court erred in designating the father’s residence as the primary residence of the child for school purposes.”

## **Custody – Modification – No Hearing Required; Sanctions ($20,000) Upheld**

## In Joseph v Morsali, 218 NYS3d 315 (1st Dept. Oct. 10, 2024), the father appealed from a September 2023 Supreme Court Order, which denied his motion to modify the parties’ custody agreement and directed him to pay the mother $20,0000 as sanctions, in the form of counsel fees, for frivolous conduct. The First Department affirmed, finding that the father’s argument, that the mother “made false allegations against him in Family Court, was contradicted by \*\*\* [an] order finding that [he] committed harassment in the second degree, which this Court affirmed on appeal (\*\*\*, 225 AD3d 522 [1st Dept 2024]).” The Appellate Division noted that the mother did not interfere with the father’s time with the children and that “[a]ny need to suspend due to extenuating circumstances, such as during the COVID-19 pandemic or while [the mother] was being treated for cancer, did not present a change of circumstances warranting a hearing on the issue of modification \*\*\*.” The Court concluded that Supreme Court “providently determined that [the father’s] application was frivolous and made with the intention of harassing [the mother,]” such that the award of sanctions was “supported by the record and reasonable under the circumstances.”

## **Custody - Sole – Father – AFC Position – Special Needs**

## In Matter of Tyra H. v. Tariq M., 2024 Westlaw 4536736 (1st Dept. Oct. 22, 2024), the mother appealed from an October 2023 Family Court order which, after a hearing, granted the father sole legal and physical custody of the subject child, and denied her petition seeking the same relief. The First Department affirmed, noting: “while the child lived with the father for the past three years or more, the father had been the more proactive parent in meeting the educational and medical needs of the child, who is on the autism spectrum”; he “provided a stable home and maintained employment, and the paternal grandmother was a resource for the father and the child.” The Appellate Division found that the mother: “had a limited role in the child’s education, care and development, and she showed less understanding of the child’s special needs”; “remained unemployed and moved at least three times [during the proceedings] with her now husband, his two sons and their two infant children”; and “it was unclear that [her] living arrangement provided a proper sleeping space for the child.” The Court concluded that Family Court “was entitled to give weight to the [AFC’s] position that custody should be awarded to the father \*\*\*.”

## **Custody - UCCJEA – Inconvenient Forum – Reversed; Stay Pending Appeal**

## In Matter of Mark AA. v. Susan BB., 2024 Westlaw 4507665 (3d Dept. Oct. 17, 2024), the father appealed from a March 2024 Family Court order, which, upon the mother’s motion asserting inconvenient forum grounds, dismissed his October 2023 and January 2024 petitions, which alleged a violation of an August 2021 Family Court order and sought modification thereof, respectively. A 2018 consent order provided that the mother could relocate to Massachusetts with the parties’ child born in 2014. The Third Department stayed Family Court’s order pending appeal (2024 NY Slip Op. 69946[U], 3d Dept., Powers, J., June 18, 2024). The Appellate Division reversed, on the law, and remitted to Family Court, holding that “the record does not demonstrate \*\*\* how the weighing of the relevant factors [DRL 76-f(2)] led to the court’s determination,” while noting that Family Court’s “conference with the Massachusetts Court \*\*\* was essentially a back-and-forth between the judges on issues that included the language of the prior custody orders, the nature of the cases presently before them and the differences between New York and Massachusetts laws governing custody proceedings.” The Third Department found that “[t]he parties were not invited to, and did not, offer any testimony regarding the relative convenience of the two forums” and “Family Court ruled from the bench that Massachusetts was a more appropriate forum \*\*\*.” DRL 75-i provides: “If the parties are not able to participate in the communication, they must be given the opportunity to present facts and legal arguments before a decision on jurisdiction is made.” DRL 76-f(2) requires that before determining the inconvenient forum issue, “the court shall allow the parties to submit information \*\*\*.”

## **Divorce - Dismissal on Domicile, Venue and Forum Non Conveniens Grounds – Denied**

## In Shendelman v. Shendelman, 2024 Westlaw 4438328 (1st Dept. Oct. 8, 2024), the husband appealed from a June 2024 Supreme Court order which, after a hearing, denied his motion to dismiss the wife’s divorce action on jurisdictional, venue and forum non conveniens grounds. The First Department affirmed, holding that “the husband failed to meet his burden of proving that the wife intended to give up her New York domicile when they moved to New Jersey in 2020.” The Appellate Division found that: the parties “continued to maintain their marital home in the Bronx; the wife worked in New York throughout the entire relevant time period; she voted in New York; had a New York driver’s license and registered her car in New York; she renewed her New York gun licenses; and continued to be seen by her medical providers in New York; and the parties’ children continued to attend high school in New York even after the family moved to New Jersey during the COVID-19 pandemic.” The parties agreed that their New Jersey property was purchased for investment purposes and their postnuptial agreement stated that it was governed by NY law and an uncontested matrimonial action had to be brought in NY. Regarding forum non conveniens, the First Department held that “the matter has a substantial nexus with this state.” The Court concluded that “[t]he husband’s improper venue argument is unavailing in view of the parties’ written postnuptial agreement clearly specifying that a matrimonial action was to be filed in New York County.”

## **Enforcement - Child Support – Willful – Reversed – Ineffective Assistance of Counsel**

## In Matter of McCloskey v. Unger, 2024 Westlaw 4549143(2d Dept. Oct. 23, 2024), the father appealed from August 2023 Family Court orders which, following a hearing upon the mother’s January 2020 violation petition: (1) confirmed a July 2024 Support Magistrate Order of Disposition, finding that he willfully violated an October 2019 order directing him to pay the mother $289.30 weekly in child support, and committed him to jail for 6 months unless he paid a $39,678.67 purge amount; and (2) denied his objections to the Support Magistrate Order of Disposition. The Second Department: (1) dismissed the appeal from so much of the order of commitment as sentenced the father to a jail term as academic, as the period of incarceration has expired; and (2) reversed the order of commitment insofar as reviewed, on the law, vacated the Order of Disposition and the order denying the father’s objections thereto, and remitted the matter to Family Court for a new hearing and new determination. The Appellate Division found that: (1) the father contended that “due to his neuropathy, he was unable to work and had to rely on public assistance for income”; (2) “despite having been advised that the father was required to provide a financial disclosure affidavit, tax forms, and certified medical and income records, the father’s counsel failed to procure copies of the father’s medical records or records establishing his entitlement to and receipt of public assistance”; (3) “the father’s counsel failed to call any witnesses to testify regarding the father’s neuropathy, to subpoena the father’s treating physician, or to obtain a medical affidavit from the father’s physician”; and (4) “[t]he Support Magistrate made specific reference to the lack of any credible medical testimony, an incomplete financial disclosure affidavit, and the lack of tax returns in finding that the father failed to refute the mother’s prima facie showing of a willful violation of the child support order.” The Second Department concluded that the father’s counsel failed “to meaningfully represent the father, and thus, the father is entitled to a new hearing \*\*\*.”

## **Enforcement - Contempt – Inability to Pay Found; Maintenance – Modification – Extreme Hardship - Granted**

## In Ullah v. Ullah, 218 NYS3d 333 (1st Dept. Oct. 15, 2024), the wife appealed from a February 2023 Supreme Court order which, after a hearing, among other things, denied her motion to hold the husband in contempt and granted his cross-motion for downward modification of maintenance. The First Department affirmed, holding that: “Supreme Court properly found that the husband would suffer extreme hardship if he were held to the maintenance obligation imposed under the settlement agreement[,]” citing DRL 236(B)(9)(b); he “established that his job loss in 2020 was involuntary and that he had made numerous attempts to seek comparable employment, without success”; and “he not only had minimal job prospects but lacked other assets to satisfy the ongoing maintenance obligation in the parties’ settlement agreement.” The Appellate Division concluded that the trial court’s “determination not to incarcerate the husband for contempt was not an abuse of discretion, as the husband established his defense of inability to comply with the prior maintenance obligations given his poor financial condition.”

## **Family Offense - Harassment 2d – Found**

## In Matter of Carney v. Carney, 2024 Westlaw 4402622 (4th Dept. Oct. 4, 2024), the father appealed from a May 2023 Family Court order of protection issued following a hearing, upon a finding that he committed harassment 2d as defined by PL 240.26(3). The Fourth Department affirmed, finding that the mother’s evidence at the hearing established that the father “held open her car door, thereby preventing her from driving away from him, on at least two occasions, and parked in front of her garage door for up to 30 minutes at a time, thereby preventing her from being able to remove her car, on at least three occasions. An eyewitness testified that respondent parked his car in that manner, blocking petitioner’s movement, almost every other day.” The Appellate Division rejected the father’s contention that his legitimate purpose for so parking was to retrieve his daughters for visitation and that “he was at most merely acting immaturely.” The Court concluded that based upon the father’s conduct and the surrounding circumstances, Family Court “had a reasonable basis to infer that [the father’s] intent was to harass, annoy or alarm [the mother].”

## **Maintenance - Durational – Upward Deviation from Guidelines to Payor’s Age 67**

## In Renzi v. Renzi, 218 NYS3d 179 (4th Dept. Oct. 4, 2024), the husband appealed from an August 2023 Supreme Court order which, upon remittitur (217 AD3d 1336 [4th Dept. 2023]), directed him to pay maintenance to the wife of $5,700 per month until his age 67. The Fourth Department affirmed, holding that Supreme Court did not abuse its discretion in awarding the wife maintenance in excess of the presumptive guideline amount until his age 67, given the trial court’s consideration of “the length of the parties’ marriage, the age and current health of the parties, the parties’ present and future earning potential, and the parties’ standard of living during the marriage,” along with “the wife’s reasonable needs and predivorce standard of living in the context of the other enumerated statutory factors.” The Court rejected the husband’s contention that the trial court should not have found him to be “in good health inasmuch as he has a diagnosis of multiple sclerosis,” noting that “the record establishes that, at the time of the court’s decision, he was able to continue working with no restrictions.”

## **Maintenance - Overpayment Refund**

## In Snyder v. Holeva, 2024 Westlaw 4402731 (4th Dept. Oct. 4, 2024), the parties were divorced in 2019. The judgment and incorporated agreement required the former husband (husband) to pay the former wife (wife) maintenance for 20 months, and an income withholding order (IWO) was issued thereupon, but the husband’s employer did not cease collecting after 20 months. The wife appealed from a November 2023 Supreme Court order, which granted the husband’s motion to terminate the IWO and directed the wife to refund the husband his overpayments of maintenance. The Fourth Department affirmed, holding that while public policy generally bars recoupment of maintenance, there is an exception for overpayments made pursuant to an express agreement, where, as is here the case, “the extra payments were not voluntarily made.” The Appellate Division concluded that “allowing [the wife] to retain the maintenance overpayments made in violation of the wage withholding order would result in a windfall to [her], and the court’s award to [the husband] of the reimbursement of the overpayments does not implicate public policy.”

## **LEGISLATIVE ITEMS**

## As of October 31, 2024, one more of the 6 bills reported in the July 2024 Update have been signed into law, the first (child support, signed September 27, 2024) having been reported in the October 2024 Update. The other 4 bills have not yet been delivered to the Governor as of the afternoon of October 31, 2024. The second item signed so far is:

## **Extreme Risk Orders of Protection – Added to Orders of Protection Registry**

## This legislation was **signed October 9, 2024, and is effective 120 days after enactment, on February 6, 2025**. The bill adds extreme risk orders of protection (EROPs) to the domestic violence registry. Laws of 2024, Chapter 427. A.05873, S.03340.

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