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

## **Matrimonial Update**

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

## **Agreements - Postnuptial – Vacatur – Fraud, Nondisclosure – Denied; Child Support – Modification – Loss of Employment – Denied; Counsel Fees – No Retainer Agreement - Granted**

## In McLennan v. McLennan, 2023 Westlaw 6219225 (1st Dept. Sept. 26, 2023), the husband appealed from a June 2022 Supreme Court order, which granted the wife's motion for child support and other arrears of $168,599.09 and counsel fees of $82,847.32 and denied the husband's cross-motion for a downward modification of child support and to vacate the parties' postnuptial agreement and reopen the judgment of divorce. The First Department held that Supreme Court “properly denied the husband's request to vacate the parties' postnuptial agreement on grounds of fraud. The record does not support the husband's claim that the wife misrepresented her intent to work on the marriage to induce him to enter into the agreement. Nor does the husband's contention that the wife failed to disclose stock interests in her company warrant vacatur of the agreement. Both parties were represented by experienced counsel during its negotiation (citation omitted) and the parties explicitly agreed to waive their interest in the other's employee benefit plans, acknowledged that the other had made fair and reasonable disclosure of their respective assets and general financial status, and ‘voluntarily and expressly waive[d] and relinquishe[d] any right to disclosure of the property or financial circumstances of the other party beyond the disclosure provided.’” The Appellate Division determined that the husband’s cross motion for downward modification of child support “was properly denied without a hearing, as he failed to make a prima facie showing of a substantial, unanticipated change in circumstances” and he did not “demonstrate that he was terminated from his employment through no fault of his own, and that he had diligently sought reemployment commensurate with his earning capacity,” while noting that the husband did not “provide the court with any information as to his current business venture that would shed light on his compensation” and “continued to maintain substantial assets and the means to meet his monthly child support obligations.” The First Department remanded for a recalculation of the arrears owed, because Supreme Court “failed to take into account deposits that the husband had made into the parties’ joint account [$63,660.49] during the relevant period.” The Appellate Division remitted on the issue of counsel fees, because “the amount awarded is unsupported by the documentation in the record” and shall “be adjusted to comport with the figures reflected in the invoices submitted to the court.” The First Department concluded, contrary to the husband’s argument, that “the absence of a postjudgment retainer agreement does not preclude recovery of counsel fees here, where the wife's counsel substantially complied with the requirements of 22 NYCRR 1400.3 and the wife clearly authorized counsel to act on her behalf.”

## **Agreements - Prenuptial – Interpretation – Marital Residence**

## In Schlosser v. Schlosser, 2023 Westlaw 6134365 (2d Dept. Sept. 20, 2023), the parties were married in July 2011 and signed a prenuptial agreement on June 15, 2011. The agreement provided for equal division of marital property, but excluded the marital residence and any debt thereon from equal division. The marital residence terms included the husband’s agreement to contribute $700,000 toward the purchase thereof, and if the price was $700,000 or less, title would be in his sole name; if the price was more than $700,000, title would be joint. If a defined marriage termination event occurred prior to the 5th anniversary, the wife would receive a sum not to exceed $700,000 upon the sale of the residence, or, in the husband’s sole discretion, he may convey title thereof to the wife. The marital residence was purchased for $1,600,000 in December 2011 and the husband contributed $700,000 thereto and financed the balance in his sole name. Title was placed in the wife’s name solely. The husband commenced a divorce action in April 2013, a defined termination event, and the parties signed an October 2014 agreement stating that property would be distributed per the prenuptial agreement. The prenuptial agreement and October 2014 agreement were incorporated into a March 2016 judgment of divorce. In June 2020, the wife stated that she was vacating the residence and listing it for sale. The husband moved to limit the wife’s share to $700,000 and the wife cross-moved for a declaration that the residence was her separate property. Supreme Court granted the husband’s motion and denied the wife’s cross-motion. Upon the wife’s appeal, the Second Department affirmed, holding that “[t]he clear intent of the prenuptial agreement was to limit the [wife’s] share of the marital residence to the sum of $700,000, and to rule otherwise would indeed grant the [wife] a windfall, since the [husband] remains solely responsible for the mortgage \*\*\*.”

## **Custody - Hague Convention – Exceptions to Return of Chil**d

## In Matter of Luisa JJ. v Joseph H., 2023 Westlaw 6150233 (3d Dept. Sept. 21, 2023), the father appealed from a July 2023 Supreme Court order which directed the parties’ child born in 2013 be returned to the mother’s custody in Italy. The parties’ June 2019 separation agreement provided that they would share joint legal and physical custody starting in July 2022, with the child to spend half the year with the father in NY and half the year with the mother in Italy. In November 2022, the parties modified the agreement pursuant to a stipulation filed in Italy, which continued shared custody, with certain extended periods to the father in NY, including December 15 to January 5 each year. The child arrived in NY in December 2022, whereupon the child “disclosed to the father that a minor relative of the mother’s boyfriend, who frequently stayed in the child’s home, had been sexually abusing him for several months.” The father stated that the child “told the mother about the abuse, but she did nothing to stop it.” The father reported the abuse to NY law enforcement, and “during a forensic interview, the child relayed consistent allegations to a child advocate.” The father elected not to return the child to the mother on January 5, 2023. The Italian Court issued an order on January 19, 2023, which placed the child with the father until the next hearing and appointed an expert to evaluate the parties and the child. The Court in Italy refused the father’s request for virtual proceedings and issued an Order on April 6, 2023, which mandated in person evaluations and adjourned the matter to December 12, 2023. In May 2023, the mother commenced a Hague Convention proceeding, alleging that the child was wrongfully retained in NY and seeking the child’s return to Italy. The father asserted 2 Hague Convention exceptions: that the child’s return would expose him to a grave risk of physical or psychological harm or otherwise place him in an intolerable situation; and that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take his views into account. The father commenced a proceeding requesting Supreme Court to exercise temporary emergency jurisdiction pursuant to DRL 76-c. The Appellate Division noted: “Despite the commencement of criminal proceedings against the mother and the boyfriend in Italy for ‘facilitation and failing to prevent [the] sexual abuse’ of the child, the Italian Court issued a July 21, 2023 order directing the child to be returned to Italy by July 30, 2023 for his in-person evaluation \*\*\*.” The father filed an emergency order to show cause to prevent the child from leaving Supreme Court’s jurisdiction until the mother’s Hague proceedings and his request for temporary emergency jurisdiction were determined. On July 28, 2023, Supreme Court, without conducting a hearing or making any findings of fact or conclusions of law, directed that the child be returned to Italy and remain there pending further order of the Italian Court, subject to a provision that the mother “not expose the child to the company of” the boyfriend and/or the offending minor. The father appealed, and the Third Department stayed Supreme Court’s Order pending appeal. The Appellate Division reversed, on the law, and remitted for further proceedings, with instructions to Supreme Court to commence a hearing within 20 days, holding that while the mother established that the father wrongfully retained the child in NY, “it was an abuse of discretion to summarily reject the father’s first [grave risk of harm/intolerable situation] exception” and “the father has raised a genuine issue of fact as to the child’s objection and degree of maturity, and it was therefore a further abuse of discretion to summarily dispense with the father’s second exception.”

## **Custody - Modification – Substance Abuse History – Unsupervised Visitation When Conditions Met**

## In Matter of Maranda WW. v. Michael XX., 2023 Westlaw 5962196 (3d Dept. Sept. 14, 2023), the father appealed from an August 2022 Family Court order which, following a hearing, granted the mother’s July 2021 petition, by modifying a September 2019 consent order (joint legal, primary to father, supervised alternate weekends to mother) to the extent of awarding the mother unsupervised time 2 weekends per month with the parties’ child born in 2017. The September 2019 order provided that the mother’s successful completion of an alcohol and substance abuse treatment program shall be grounds for a modification petition; the mother successfully completed both inpatient and outpatient substance abuse treatment programs. The Third Department affirmed, noting that the mother had satisfied the agreed modification grounds and the record shows that “the mother had been successful in her recovery from her abuse of opioids and alcohol, remaining sober from each substance for over two years and voluntarily continuing to attend counseling at an outpatient clinic” and that “the mother has secured stable housing and employment and that she has regularly visited and communicated with the child.”

## **Custody - To Father – Educational Needs, Foster Relationship with Other Parent, Stability, Work Schedule**

## In Matter of Gabriel A.A. v. Ifeoma V.A., 2023 Westlaw 6219152 (1st Dept. Sept. 26, 2023), the mother appealed from an August 2022 Family Court order which, after a hearing, awarded the parties joint legal custody of the subject children, primary custody to the father and time to the mother on weekends and alternating holidays. The First Department affirmed, holding that Family Court’s award of primary custody to the father was in the children’s best interests, determining that: the father was better able to provide a stable home environment, given that his work and school schedule matched the children’s school schedule, while the mother moved frequently; the father better understood the children’s educational needs, while the mother had changed the children’s school multiple times, often without informing the father; the father would promote the relationship between the mother and the children, as evidenced by his ensuring regular contact with the mother while the children were with him in spring and summer 2020, in contrast to the mother, who cut off all contact with the father once the children were returned to her care in September 2020, forcing the father to obtain a temporary visitation order.

## **Enforcement – Equitable Distribution; Maintenance - Modification – Substantial Change in Circumstances – Denied; Recoupment – Denied**

## In Maria v. Ramadan, 219 AD3d 874 (2d Dept. Aug. 30, 2023), the former husband (husband) appealed from: (1) a July 2019 Supreme Court order which, after a hearing, granted the former wife’s (wife’s) motion to enforce provisions of a July 2018 judgment of divorce pertaining to equitable distribution of the former marital residence and property in Egypt, and denied the husband’s motion for downward modification of maintenance and recoupment; and (2) a September 2019 order of the same Court, which directed the husband to pay the wife certain sums due as directed by the July 2019 Order. The Second Department affirmed so much of the July and September 2019 orders granting the wife’s enforcement relief (without comment), and as to the husband’s motion, upheld the denial of recoupment, holding that Supreme Court properly declined to grant the husband a credit for alleged overpayments of maintenance, noting that he showed no exception to the public policy against such recoupment. The Appellate Division affirmed Supreme Court’s denial of the husband’s motion to modify maintenance, holding that he failed to show any substantial change of circumstances, and, further, his claim that Supreme Court erred in computing the maintenance directed by the Judgment of Divorce was waived, due to his failure to appeal from the Judgment.

## **Evidence - Expert Testimony Preclusion Order – Reversed**

## In Giovinazzo-Varela v. Varela, 219 AD3d 926 (2d Dept. Aug. 30, 2023), the husband appealed from an April 2021 Supreme Court order, which granted the wife’s motion to preclude him from offering the testimony of a vocational expert regarding the wife’s earning capacity. The wife served a CPLR 3101(d) expert witness demand in September 2018, and the husband’s response thereto did not state an intent to retain an expert. More than a year later, the husband advised Supreme Court of his intent to retain a vocational expert and served the wife with a CPLR 3121 examination demand and notice of expert retention in July 2020, along with the expert’s resume´. In March 2021, after the wife filed a note of issue, the husband served the wife with a draft copy of the expert’s September 2020 report. The Second Department reversed, on the law, and denied the wife’s preclusion motion, holding that CPLR 3101(d)(1)(i) “does not require a response at any particular time or mandate that a party be precluded from proffering expert testimony merely because of noncompliance with the statute.” The Appellate Division observed that the husband “served his expert notice prior to a trial date being set, and thus it was not untimely,” and further noted that the notice “identified the expert witness, indicated that he was a vocational expert, and included the expert’s qualifications.” The Second Department concluded that while “the notice did not include the expert’s opinion and grounds for that opinion, that information was in the draft report that was received by the [wife] prior to the trial date being set” and that the husband complied with 22 NYCRR 202.16(g) by disclosing the expert following retention and serving the expert report more than 60 days before trial.

## **Family Offense - Harassment 2d – Found – False ACS and 911 Reports**

## In Matter of Bianca L.C. v. Alan H.D., 2023 Westlaw 6218496 (1st Dept. Sept. 26, 2023), the husband appealed from an April 2022 Family Court order which, following a hearing, determined that he had committed harassment 2d against the wife and granted a 1-year order of protection. The First Department affirmed, finding that the husband “twice reported to [ACS] that [the wife] was abusing one of the children, and on one occasion, he summoned an ambulance and told paramedics that [the wife] required a psychiatric evaluation because she was threatening to poison his food and commit suicide.” The Appellate Division noted that the “testimony and hospital records in evidence also demonstrate that all of [the husband’s] allegations against [the wife] were determined after investigation to be unfounded.” The Court concluded that “[t]his evidence establishes that he engaged in a course of conduct or repeatedly committed acts which alarmed or seriously annoyed petitioner and served no legitimate purpose,” while referencing the wife’s testimony that “she was scared, upset, and needed mental health therapy because of respondent’s actions and the surrounding circumstances that he intended to cause these effects.”

## **Pendente Lite - Counsel Fees – Awarded on Appeal; Stipulation – Legal Terms Enforced, Severed from Unenforceable Terms**

## In Hutchinson v. Hutchinson, 2023 Westlaw 5943914 (2d Dept. Sept. 13, 2023), the wife appealed from a September 2020 Supreme Court order which, in the husband’s May 2018 divorce action, in effect, denied the wife’s August 2019 motion seeking counsel fees and to enforce portions of a February 2018 stipulation of discontinuance, which obligated the husband to pay the mortgage on the marital residence and her counsel fees in the prior divorce action. The Second Department reversed, on the law and in the exercise of discretion, and granted the wife counsel fees of $23,418.28 (50% of the amount due to her attorney), subject to reallocation after trial, and granted the motion to enforce the mortgage payment and counsel fees provisions of the stipulation. The Appellate Division held, “taking into account all of the relative circumstances, including the disparity in the parties’ respective incomes, the extent to which the [husband’s] conduct has resulted in a delay of the proceedings, \*\*\* an award of interim counsel fees to the [wife], as the nonmonied spouse, is warranted.” The Court concluded that the terms of the “stipulation requiring the [husband] to pay the mortgage on the marital residence and counsel fees incurred by the [wife] in the prior divorce action are clear, final, and the product of mutual accord, and must therefore be enforced” and that contrary to Supreme Court’s determination, “the stated terms of the stipulation were not unenforceable on the ground that the stipulation contained additional terms which are undisputedly not enforceable.”