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

## **Matrimonial Update**

## **By Bruce J. Wagner**

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

## **Child Support – CSSA – Imputed Income; Counsel Fees – After Trial – Partial; Equitable Distribution – Separate Property – Business, Credit for Down Payment**

## In Bishop v. Bishop, 2024 Westlaw 4219528 (2d Dept. Sept. 18, 2024), the parties were married in August 2006 and have 3 children. The wife appealed from a November 2020 Supreme Court Judgment which, upon a January 2018 decision following trial of her 2015 action: (1) determined that the husband’s business interest was his separate property; (2) credited him with $35,000 toward a down payment on the marital residence; (3) imputed income to him of only $100,000 per year; and (4) awarded her only $20,000 in counsel fees. The Second Department affirmed, holding that: (1) the husband’s “ownership interest in a certain business, which he obtained prior to the marriage, was his separate property”; (2) Supreme Court properly “exercise[d] its discretion in awarding the [husband] a credit in the sum of $35,000 for his contribution toward the down payment on the marital home made from his separate property”; (3) Supreme Court properly determined the husband’s income based upon the record, finding that his “2015 earnings were $80,000 and imputed to the [husband] an additional $20,000 in annual income based \*\*\* on the parties’ tax records”; and (4) “Supreme Court did not improvidently exercise its discretion in awarding the [wife] attorneys’ fees in the sum of only $20,000, rather than the sum requested of $122,760.”

## **Custody - Bias; Undue Emphasis on Party’s Courtroom Decorum – Reversed**

## In Matter of Joanna PP v. Ohad PP., 2024 Westlaw 4229446 (3d Dept. Sept. 19, 2024), the father and the attorney for the children (AFC) appealed from a December 2022 Family Court order which, following a 3-day fact-finding hearing and a *Lincoln* hearing with the 2 oldest children, granted the mother’s August 2020 petition to modify an August 2019 stipulation incorporated into a Judgment of Divorce (sole custody to the mother of children born in 2014, 2016 and 2018, scheduled time sharing, some joint-decision making), by continuing sole custody to the mother and awarding a week-on-week-off schedule. The father and the AFC each argued “that the court’s decision was marred by bias against the father and that the record \*\*\* demonstrates that the children’s best interests would be served by an award of joint legal custody and primary physical placement to the father.” The Third Department reversed, on the law, and remitted for further proceedings and updated fact-finding, to be scheduled within 20 days of its decision, noting that the father’s conduct “was at times disruptive, and we appreciate the difficulties inherent in addressing his interruptions,” but “we cannot conclude that Family Court’s assessment of the evidence was not disproportionally influenced by the frustration arising from the father’s lack of courtroom decorum” [and] “we will not dedicate undue time to illustrating each instance of the court’s unbalanced approach to the evidence.” The Third Department noted in conclusion that during the pendency of the appeal: (1) Family Court recused itself upon motion; (2) there were “numerous violation and modification petitions [filed], containing serious allegations”; (3) a July 2024 Order was issued by a different Family Court Judge, directing a forensic evaluation; and (4) an August 2024 Order was rendered, which “temporarily prohibits any contact between the father and the children.”

## **Custody - Third Party (Paternal Grandmother) – Deceased Father, Visitation Remitted**

## In Matter of Marilyn Y. v. Carmella Z., 2024 Westlaw 4152043 (3d Dept. Sept. 12, 2024), the mother appealed from an April 2023 Family Court order which, following a hearing, granted the paternal grandmother’s April 2022 petition seeking visitation with the subject child born in 2020, following the father’s October 2021 death, to the extent of awarding the grandmother 5 hours of bi-weekly unsupervised visitation on Saturdays. The Third Department modified, on the law, by reversing the visitation award and remitting to Family Court for further proceedings, concluding that “it was in the child’s best interests to grant the grandmother visitation rights,” but holding that “the current visitation schedule is not in the best interests of the child,” given that the record indicates that “the grandmother has not met with the child since November 2022 – when the child was two years old” and she “has become an unfamiliar person to the child.” The record further indicated numerous tensions between the mother and grandmother following the father’s death, including, but not limited to, “inflammatory comments made during the planning of funeral services and on social media – neither of which the grandmother appeared to be the driver of the acrimony, as she repeatedly attempted to mend her relationship with the mother \*\*\*.”

## **Custody – Third Party – Modification Standards**

## In Matter of Rebecca S. v. Ashley T., 2024 Westlaw 4152133 (3d Dept. Sept. 12, 2024), the mother appealed from a May 2023 Family Court order which, following a hearing, granted the aunt’s April 2022 cross-petition to modify a November 2021 consent order (sole custody to aunt of a child born in 2019, with supervised visitation to the parents, which was “some adjustment” of a September 2020 consent order), “concluding that she had established both a change in circumstances and extraordinary circumstances and that the best interests of the child lie in an order of sole custody to her, with supervised visitation to the parents.” In March 2022, the mother had filed a petition to modify the November 2021 order, to regain custody of the child, asserting that she had complied with all CPS suggestions. At the close of the mother’s case, Family Court granted a joint motion by the father and aunt to dismiss the mother’s petition for failure to establish changed circumstances. The Third Department affirmed, stating: “We affirm, but we begin our analysis by noting the significant and substantial procedural confusion. Although the threshold issue in a custody modification proceeding as between parents is whether a change in circumstances has occurred since entry of the governing order, ‘where, as here, a parent seeks to regain custody from a nonparent . . . , it is well established that, unless a finding of extraordinary circumstances was made in a prior order, the parent is not required to prove a change in circumstances as a threshold matter’ (citations omitted). Here, the consent orders had not included any finding of extraordinary circumstances; the aunt specifically requested that finding be made. The mother therefore bore no obligation to demonstrate a change in circumstances (citation omitted). Nonetheless, the mother has not challenged the dismissal of her petition, and she has therefore abandoned any argument with respect to this issue (citations omitted). The aunt also did not need to demonstrate a change in circumstances upon her cross-petition. Instead, the aunt bore the burden — with respect to both her cross-petition and in opposing the mother's petition — to demonstrate extraordinary circumstances (citations omitted). A nonparent seeking to modify an existing order entered on consent does not bear a two-fold burden (citations omitted).”

## **Custody - Third Party (Paternal Grandmother) – Granted – Mother Nurturing Relationship with Murderer of Child’s Father**

## In Matter of Gerow v. Samuel, 2024 Westlaw 4314573 (4th Dept. Sept. 27, 2024), the mother appealed from a May 2023 Family Court order, which granted custody of the subject child to the grandmother. The Fourth Department affirmed, rejecting “the mother’s contention that the grandmother failed to establish the existence of extraordinary circumstances.” The Appellate Division agreed that “Family Court erred in relying on the fact that the child had been in the custody of the grandmother for an extended period of time” in determining that extraordinary circumstances exist, noting that the child was placed in the grandmother's custody only after an order of protection was issued against the mother regarding the child, and the mother thereafter petitioned to regain custody. The Fourth Department held that Family Court properly found that the “cumulative effect of all issues (citations omitted) other than the extended disruption of custody established that extraordinary circumstances exist,” in that “[t]he evidence established that the mother was an unfit and neglectful parent based on, inter alia, the mother's use of excessive corporal punishment; her disregard of court orders requiring supervision of her access and precluding contact between the child and her boyfriend, who murdered the child's father; her failure to recognize the child's need for counseling or to facilitate such counseling; her failure to take any interest in the child's education; and her conduct in allowing repeated exposure of the child to his father's murderer and in nurturing that relationship (citation omitted).” The Appellate Division concluded that Family Court “properly determined that it was in the best interests of the child for custody to be granted to the grandmother.”

## **Enforcement - Appraiser Access Further to Incorporated Stipulation, Counsel Fees and Sanctions Denied**

## In Ippolito v. Ippolito, 2024 Westlaw 4139238 (2d Dept. Sept. 11, 2024), the parties were divorced by a judgment entered in July 2021, incorporating a 2020 stipulation, which, as here relevant, gave the former wife (wife) occupancy of the former marital residence until February 2028 and required the former husband (husband) to remove the wife’s name from the mortgage by the end of such occupancy by various means, including modification, refinancing, or assumption. The home was worth less than the encumbrances thereupon, which included a home equity loan in the husband’s sole name. The husband moved to permit his bank appraiser to access the residence so that he could negotiate with the bank and otherwise comply with the stipulation. The husband appealed from an October 2022 Supreme Court order which: (1) denied his motion to permit his bank appraiser access to the former marital residence and for counsel fees; and (2) granted the wife’s motion for sanctions pursuant to 22 NYCRR 130-1.1 to the extent of awarding her counsel fees of $1,202.50. The Second Department modified, on the law, on the facts, and in the exercise of discretion, by: (1) granting the motion for appraiser access, rejecting the wife’s argument that the stipulation did not specifically allow appraiser access and holding that Supreme Court erred in denying such access, in that “construing the stipulation in a manner so as to deny him reasonable access to the former marital residence with a bank appraiser renders meaningless those provisions of the stipulation that obligate him to \*\*\* remove the [wife’s] name from the mortgage”; and (2) denying the wife’s cross-motion for sanctions and counsel fees, concluding that neither party was entitled to fees upon the record presented.

## **Family Offense - Harassment 1st and 2d – Not Found; Testimony Outside Petition Not Allowed; Ineffective Counsel Claim Denied**

## In Matter of Boltz v. Geraci, 2024 Westlaw 4229688 (3d Dept. Sept. 19, 2024), the parties were divorced in 2004 and are the parents of 2 adult children. The former wife (wife) remarried and continued to live in New York, while the former husband (husband) moved to Florida. The husband spoke to the wife’s husband by telephone in March 2022, during which conversation he allegedly told her current husband that he needed to "keep [her] in line" or that there would be “serious consequences.” The wife commenced a family offense proceeding in April 2022, alleging that the husband had subjected her to various forms of physical and mental abuse over the years and that his comment during the telephone call placed her in fear of imminent harm. The wife contended that the husband’s comments during the phone call, when viewed in conjunction with his prior behaviors, constituted either harassment in the first degree or harassment in the second degree. Family Court dismissed the wife’s petition and she appealed. The Third Department affirmed and noted that: harassment in the first degree occurs when one person “intentionally and repeatedly harasses another person by . . . engaging in a course of conduct or by repeatedly committing acts which places such person in reasonable fear of physical injury” PL 240.25 and harassment in the second degree occurs when a person, "with intent to harass, annoy or alarm another person[,] . . . threatens to strike or otherwise subjects another person to physical contact, follows a person in or about a public place or places or engages in a course of conduct or repeatedly commits acts which alarm or seriously annoy such other person and which serve no legitimate purpose.” PL 240.26. The wife testified that she had not seen respondent, and did not believe that she had spoken to him on the telephone, since 2014. The Appellate Division found that “Family Court credited [the husband’s] account of limited interactions between him and [the wife] and a March 2022 telephone call in which he did not intend to threaten [the wife] with violence or otherwise do anything improper,” while the Court “only found some portions of [the wife’s] account to be credible and noted that her allegations of [the husband’s] conduct up to 2014 were uncorroborated.” As to the wife’s claim of ineffective counsel, the Third Department found that she “overlooks that the major challenge with her case was not the failure to extensively document behavior that had occurred decades before the filing of her petition, but rather the extraordinarily difficult task of tying that conduct to the March 2022 telephone call and suggest that it was part of an ongoing pattern of harassment.” The Court concluded that the wife’s lawyer “capably participated in the fact-finding hearing and argued a difficult case to the best of his ability” and that the wife was not deprived of meaningful representation.

## **LEGISLATIVE ITEMS**

## As of September 30, 2024, only 1 of 6 bills reported in the July 2024 NYSBA Family Law Section Update have been signed into law. The other 5 bills have not yet been delivered to the Governor as of mid-afternoon on September 30, 2024. Further information will be reported when available. The one item signed so far is:

## **Child Support – Amendments to Conform to Federal Law**

## **Signed into law September 27, 2024, as Chapter 357 of the Laws of 2024. The legislation takes effect immediately, and “shall apply to any action or proceeding pending upon or commenced on or after such effective date.”** Laws of 2024, Ch. 357, §9. Enactment was required by reason of federal mandate (see 45 CFR 302.56, effective January 19, 2017, published in 81 FR 93562 on December 20, 2016). A.09505, S.09015.

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