## **NYSBA FAMILY LAW SECTION UPDATE September 2023**

## **Matrimonial Update**

## **By Bruce J. Wagner**

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

## **Agreements - Modification – Not Acknowledged – Unenforceable; Enforcement - Contempt – Maintenance – Denial Without a Hearing – Reversed; Residence Sale – Properly Denied without Hearing**

##  In Del Vecchio v Del Vecchio, 2023 Westlaw 5064229 (2d Dept. Aug. 9, 2023), the former wife (wife) appealed from an October 2020 Supreme Court Order, which, without a hearing, denied her August 2019 motion: (1) to hold the former husband (husband) in contempt of the parties’ February 2013 divorce judgment pertaining to maintenance and the sale of the marital residence; (2) for an award of maintenance arrears of $52,000 for December 2012 through November 2017; (3) to direct the husband to immediately turn over her personal belongings from the marital residence; and (4) to direct him to immediately list the marital residence for sale, and granted the husband’s cross-motion: (a) to enforce the terms of an alleged February 2013 modification agreement; and (b) for an award of $2,500 in counsel fees pursuant to 22 NYCRR 130-1.1. The Second Department modified, on the law, by: (i) reversing the denial of the wife’s motion to hold the husband in contempt of the judgment pertaining to maintenance and for maintenance arrears of $52,000; (ii) reversing the granting of the husband’s January 2020 cross-motion to enforce the modification agreement and the award of counsel fees pursuant to 22 NYCRR 130-1.1; and (iii) remitting to Supreme Court for a hearing upon the wife’s motion to hold the husband in contempt of the maintenance provisions of the judgment and for maintenance arrears in the amount of $52,000, and upon the husband’s cross-motion to enforce the modification agreement and for counsel fees pursuant to 22 NYCRR 130-1.1. The parties were married in 1998 and have one emancipated child. The judgment and incorporated November 2012 agreement provided that the husband pay the wife $400 per month in maintenance while she was residing in the marital residence or until such time as the marital residence was sold, and that following the sale of the marital residence or the wife’s departure therefrom, the husband shall pay the wife $900 per month. The judgment of divorce directed that maintenance payments were to begin on December 1, 2012, for 60 months and the agreement: permitted both parties to reside in the marital residence; required that the same be listed for sale on March 1, 2013; and provided the parties would share equally in the sales proceeds after payment of costs. As to maintenance, the agreement provided it would continue until, as relevant here, the wife’s cohabitation with a man. The agreement provided that "[o]nly a statement in writing, signed and acknowledged with the same formality as this Agreement," would be effective to modify the same. The wife moved out of the marital residence in March 2013, and the husband has not paid her any maintenance; the marital residence has not been sold. The alleged February 2013 agreement stated that the same is to “guarantee [the plaintiff] and [the defendant] equal sharing of the profit of the home upon its final sale. Furthermore, it also guarantees that upon [the plaintiff's] residing in the residence of a significant other, [the defendant] is no longer obligated to pay [the plaintiff] the court-ordered $900 per month for maintenance.” The Second Department held that Supreme Court erred in granting, without a hearing, the husband’s cross-motion to enforce the terms of the purported modification agreement and in denying, without a hearing, the wife’s motion for maintenance arrears. The Appellate Division noted that the parties’ signatures upon the alleged February 2013 agreement were sworn before a notary, but were not acknowledged as required by the incorporated November 2012 agreement, and reflect that the wife signed the same on March 29, 2011, two years before the date thereof, and the husband allegedly signed the same on February 4, 2014, three years after the wife and one year after the date of the alleged agreement. The Second Department noted further that the alleged modification agreement does not entirely eliminate the maintenance obligation, as it provides only that "upon [the plaintiff] residing in the residence of a significant other," the husband "is no longer obligated" to pay "$900 per month for maintenance," and that the parties disputed whether: the wife resided with a significant other upon her departure from the marital residence in March 2013; the husband owed the wife maintenance for the period prior to her departure from the marital residence; or, as the husband contends, any maintenance he owed for that period was more than offset by the wife’s nonpayment of certain household expenses that were her responsibility under the separation agreement. The Appellate Division reiterated that the language of the alleged modification agreement does not reflect that the wife agreed to waive all maintenance payments in exchange for an increased share in the equity of the marital residence. The Court held that because the husband failed to establish as a matter of law that the wife waived maintenance through her conduct, Supreme Court should not have denied the wife’s request for maintenance arrears without a hearing, and remitted accordingly as stated above. The Second Department concluded that Supreme Court properly denied the wife’s motion to direct the husband to immediately turn over her personal belongings from the marital residence, finding that the incorporated agreement provides that the parties are to “divide between them all articles of personal property at the time of the sale of the marital residence,” and includes no further provision related to the various pieces of personal property identified in the wife’s motion.

## **Child Support - CSSA – Imputed Income – Unemployed Payor; Modification – 3 years – Granted; Over Cap – Granted**

##  In Matter of Yaroshevsky v Yaroshevsky, 2023 Westlaw 5064612 (2d Dept. Aug. 9, 2023), the father appealed from a July 2022 Family Court order, denying his objections to a June 2022 Support Magistrate order which, after a hearing, granted the mother’s June 2021 petition for an upward modification of a June 2018 consent order ($2,366 per month in child support plus $450 per month in child care expenses for the parties’ 2 children), by directing the father to pay child support of $3,750 per month plus child care expenses of $304 per week through February 2022, and then $4,150 per month plus child care of $292 per week commencing March 1, 2022, while denying the father’s petition for downward modification. The Second Department affirmed, holding that Family Court properly modified the June 2018 order based upon the passage of 3 years following entry thereof, citing FCA 451(3)(b)(i) and correctly imputed income to the father during the period of his unemployment, upon its finding that he failed to meet his burden to demonstrate that his employment was terminated through no fault of his own. The Appellate Division upheld Family Court’s determination to apply the CSSA to income over the cap, based upon the Support Magistrate’s “thorough analysis of the parties’ financial situation, including the father’s considerable income, the income disparity between the parties, and the standard of living that the children would have enjoyed had the marriage not been dissolved.” The Court concluded by stating that “[t]he Support Magistrate’s decision to credit the mother’s testimony regarding the amount of child care expenses is entitled to great deference and will not be disturbed.”

## **Child Support - Modification – Loss of Employment – Denied**

##  In Matter of Vilmont v Vilmont, 2023 Westlaw 5064252 (2d Dept. Aug. 9, 2023), the father appealed from an October 2022 Family Court order, denying his objections to a September 2022 Support Magistrate order which, after an August 2022 hearing, denied his February 2022 petition seeking downward modification of an August 2019 order directing him to pay $417 per month toward the support of the parties’ 2 children. The father’s petition alleged that he had been out of work since March 2020, had no income and was not receiving unemployment benefits. The Second Department affirmed, holding that the father: “failed to meet his burden of demonstrating that his employment was terminated through no fault of his own”; and “failed to produce any evidence of his job search and to sufficiently prove that he made other efforts to procure equivalent employment.”

## **Custody - Third Party – Grandparent – Extraordinary Circumstances – Found**

##  In Matter of Tuttle v. Worthington, 2023 Westlaw 5160120 (4th Dept. Aug. 11, 2023), the father, paternal grandparents, and attorney for the child appealed from a May 2022 Family Court order which, after a hearing upon the mother’s petition, modified a 2019 order (joint legal custody to mother, father and paternal grandparents, primary custody to grandparents), to award custody of the parents’ then 8-year-old son to the mother. The Fourth Department reversed, on the law, and remitted to Family Court for further proceedings, holding that Family Court erred in its determination that the grandparents did not establish extraordinary circumstances in defense of the mother’s modification petition, finding that: the subject child “had lived with the grandparents for his entire life in the only home he has ever known”; “the child expressed a strong desire to continue residing with his grandparents and the AFC adheres to that position on appeal”; “the mother and the father both suffered from severe substance abuse problems for years and were unable to care for the child on their own”; “the mother failed to contact the child for a period of 18 months before resuming visitation in January 2018”; “the child’s half-sister also resided with the grandparents and the child developed a sibling relationship with her”; and “the grandparents have taken care of the child for most of his life and provided him with stability.” The Appellate Division concluded that the foregoing facts sufficiently establish extraordinary circumstances within the meaning of Matter of Bennett v. Jeffreys, 40 NY2d 543 (1976).

## **Procedure - Infant Capacity to Appear – Family Offense – Not Found**

##  In Matter of Cohen v. Escabar, 193 NYS3d 320 (2d Dept. Aug. 16, 2023), the respondent appealed from a June 2021 order of protection, which, upon a finding made following a hearing that he committed a family offense, directed him to stay away from petitioner for 2 years. The Second Department reversed, on the law, vacated the finding that respondent committed a family offense and the order of protection, and dismissed the petition, upon the ground that respondent lacked capacity to appear in the proceeding. The petitioner was age 16 at the time she commenced the proceeding against the respondent, her then 17-year-old ex-boyfriend. The Appellate Division held that given respondent’s status as an “infant,” CPLR 105(j) and FCA 119(c), he could in this case only appear by a guardian *ad litem*, a guardian of his property, or by a parent, as provided by CPLR 1201. While respondent’s mother was present in Court, along with respondent’s assigned counsel, Family Court erroneously prohibited her from appearing on her son’s behalf, and the attorney’s representation of respondent “contravened CPLR 321 and 1201.” The Court concluded that respondent’s lack of capacity to appear rendered the proceeding and order of protection void.

## **Procedure - Refusal to Cease Recording Proceeding – Removal of Offending Party Proper**

##  In Spata v. Kelly, 2023 Westlaw 5251670 (2d Dept. Aug. 16, 2023), the former husband (husband) appealed from a July 2021 Supreme Court order which, after a hearing, denied his September 2020 motion for parental access. In December 2020, the husband appeared and informed the Court “that he intended to live-stream the proceedings.” Supreme Court instructed the husband that the only recording of the proceedings would be made by the court reporter. He refused to comply with the Court’s instructions and the proceedings were adjourned. A February 2021 Supreme Court order advised the husband that if he continued to express an intent to record the proceedings, he would be removed from the courtroom and found in default. The parties appeared at the June 2021 adjourned date for the hearing, and when Supreme Court asked the husband if he was recording the proceedings, he asserted his Fifth Amendment right against self-incrimination. Supreme Court directed the husband to leave the courtroom and declared him to be in default pursuant to 22 NYCRR 202.27. The Second Department affirmed, insofar as the order was reviewed, holding: (1) the husband had no right to record the proceedings unless authorized, citing Civil Rights Law 52 and 22 NYCRR 29.1, and those restrictions do not violate the US Constitution; and (2) since the matter is a civil proceeding, the husband’s constitutional right against self-incrimination was not violated, citing El-Dehdan v El-Dehdan, 114 AD3d 4, 19 (2d Dept. 2013), affirmed 26 NY3d 19 (2015).