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

## **Matrimonial Update**

## **By Bruce J. Wagner**

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

## **Custody - Modification – Relocation (FL) Granted – Economic, Family Benefits; Supervised Visitation Reversed**

##  In Matter of Carol Q. v. Charlie R., 2024 Westlaw 3975480 (2d Dept. Aug. 29, 2024), the mother appealed from an April 2023 Family Court order which, after a hearing upon the father’s January 2023 petition seeking to modify a September 2022 consent order (sole custody to father) so as to allow him to relocate to Florida with the parties’ child born in 2020, granted the same, and imposed supervision upon the mother’s visitation in NY and FL and limited her to 2 weekly video calls. The Third Department (3-2 split) upheld the relocation, holding that “there was no dispute that \*\*\* the father had been the child’s primary caretaker for the majority of the child’s life.” The Appellate Division noted: “the father testified to an increase in earnings since he relocated \*\*\* and he was able to work more hours and earn overtime”; “the assistance he receives from the paternal grandmother and his stepfather, who live in close proximity to him in Florida, has greatly improved the resources he has to assist him in caring for the child”; while “the father has siblings who reside in New York, there was no indication that any of them could assist with childcare responsibilities or facilitate the mother’s supervised parenting time”; the father’s “childcare costs had decreased as compared to New York”; and “the mother had not paid any child support and \*\*\* the father was the child’s sole economic provider, with no respite to that obligation on the horizon.” The Third Department modified and remitted “for further proceedings to determine the need for a supervisory condition on the mother’s parenting time,” directing pursuant to Family Court Act 251 “that any determination be made with the benefit of the mother first undergoing a mental health examination,” and holding that Family Court “relied upon its assessment of an undiagnosed mental condition in continuing the supervised parenting time condition” and its “failure to resolve that issue without the benefit of an evaluation rendered its absence an abuse of discretion.”

## **Counsel Fees – After Trial – Granted; Maintenance - Pre-Guidelines – Durational – Affirmed; Health Insurance; Imputed Income**

##  In Diliberto v. Diliberto, 2024 Westlaw 3882234 (2d Dept. Aug. 21, 2024), the wife appealed from a December 2018 Supreme Court judgment which, upon an October 2018 decision following trial of her June 2012 divorce action seeking to dissolve the parties’ March 2000 marriage, among other things: (1) awarded her only $2,000 per month in maintenance for 4 years and failed to make the award retroactive; (2) awarded her only $3,162.50 per month in child support for the 2 children, plus 69% of add-on expenses; (3) awarded her counsel fees of only $75,000; (4) failed to direct the husband to provide health insurance for her; and (5) failed to direct the husband to maintain life insurance to secure the maintenance obligation. The Second Department modified, on the law, on the facts and in the exercise of discretion, by: (1) upholding the maintenance award but making the same retroactive to the June 2012 date of commencement of the action, holding that Supreme Court properly imputed income of $175,000 to the husband and $45,000 to the wife who, while noting that although she primarily cared for the children, she was a certified ophthalmic technician and had a degree in business administration as of the date of the marriage. The wife also earned a law degree in 2015, and did not demonstrate that a May 2017 motor vehicle accident precluded her from either taking the bar exam thereafter or “rendered her unable to earn income of $45,000 or more annually,” and further cited that the wife “participated in trial proceedings in the court’s presence, including by offering testimony.” The Appellate Division remitted to Supreme Court for “a determination as to the amount of maintenance arrears from June 29, 2012, affording the [husband] appropriate credits, if any” and “whether the payment of any arrears due should be made in one sum or periodic sums”; (2) deleting the child support award, holding that Supreme Court in this pre-maintenance guidelines case “incorrectly included the maintenance payments received by the [wife] [in] her income,” and remitted the child support and add-on expense issues to Supreme Court for a new determination and recalculation; and (3) adding a provision requiring the husband to pay the cost of health insurance for the wife “for the same period that [he] is required to pay maintenance” and remitting to Supreme Court “for a calculation of any arrears owed by the [husband] to the [wife] for health insurance costs.” The Second Department upheld the counsel fee award, holding that Supreme Court “properly considered the relevant circumstances and providently exercised its discretion in awarding the [wife] attorneys’ fees in the sum of $75,000.”

## **Counsel Fees – After Trial – Error to Grant Without Hearing or Waiver of Hearing; Custody - Sole – Alienation, Unfounded CPS Reports; No Parental Access Reversed**

##  In Matter of Mackay v. Bencal, 2024 Westlaw 3882306 (2d Dept. Aug. 21, 2024), the mother appealed from a May 2023 Family Court order which, after a 2022 hearing: granted the father sole legal and physical custody of the parties’ child born in 2015; conditioned the mother’s access to the child upon psychotherapy and determination of the father and a named therapist; granted the father’s application for counsel fees to the extent of directing him to submit proof and the mother to submit opposition; and issued a 2-year stay away order of protection in the child’s favor and directed that the mother have no contact with the child pending further order of the Court. The Second Department modified, on the law, on the facts and in the exercise of discretion, by: (1) deleting the condition upon the mother’s access, holding that “it was error for Family Court to condition any future \*\*\* parental access \*\*\* upon the mother’s participation in psychotherapy (citations omitted) and upon the determination of the father and [the named therapist](citation omitted)”; (2) deleting the counsel fee directives, holding that “Family Court improperly granted the father’s application for an award of counsel fees without holding a hearing or without a stipulation between the parties waiving a hearing”; and (3) deleting the no contact provision and reversing a 2-year stay away order of protection in favor of the child, holding that the issuance thereof pursuant to FCA 656 “lacked a sound and substantial basis in the record” and remitted to Family Court to establish an access schedule for the mother, leaving supervised access in place in the interim. The Appellate Division affirmed the award of sole custody in favor of the father, holding that “the parties’ testimony, a report of a forensic evaluator, and four reports to the New York State Central Register \*\*\*, all of which were determined to be ‘unfounded,’ provided a sound and substantial basis for the court’s determination that the mother alienated the child from the father” and that “the father was the parent more able to provide for the child’s stability and to foster a relationship with the noncustodial parent.”

## **Custody - Brooke S.B. Standing; Access Upheld**

##  In Matter of Kerry D. v. Deena D., 2024 Westlaw 3682535 (2d Dept. Aug. 7, 2024), Deena D., the mother of the subject child born in 2008 while Kerry D. was her domestic partner, and the child, separately appealed from an August 2023 Family Court which, upon Deena D.’s consent that Kerry D. had standing to seek custody of and parental access with the child and following a hearing upon Kerry D’s July 2019 petition, found that she had such standing and granted her an access schedule with the child. The Second Department dismissed the appeals from so much of the order as found standing, given that no appeal lies from an order entered upon an appellant’s consent, and affirmed the order insofar as reviewed. The Appellate Division held that Family Court properly awarded Kerry D. parental access, noting Family Court’s finding that “Deena D. interfered with Kerry D.’s relationship with the child.” The Court determined that “the record indicates that Deena D. treated Kerry D. as a nonparent,” and cited both parties’ testimony that “Kerry D. made consistent efforts over the years to spend time with the child and to be involved in her life in one form or another, even in the face of resistance” as well as Family Court’s conclusion “that the child’s wishes appeared as though they were influenced, at least to some degree, by Deena D., and the court’s finding in this regard was supported by the record.”

## **Custody - Final Decision-Making Stipulation; Transportation to Disputed School Ordered**

##  In Barrezueta v. Barrezueta, 2024 Westlaw 3682513 (2d Dept. Aug. 7, 2024), the parties were divorced by a June 2019 judgment, which incorporated a March 2019 stipulation providing that the mother would have final decision-making authority over the child’s education, choice of school, course of study and other major decisions in the child’s life, and that under certain circumstances, the parties were required to transport the child to activities scheduled by the other parent. In September 2020, the parties disagreed over whether the child would attend a supplementary school every Saturday for 3 hours. The father did not object to the child’s attendance on the mother’s Saturdays, but he refused to bring the child on his Saturdays. The mother moved to enforce the judgment and stipulation, seeking a direction that the father transport the child to the school on his Saturdays. The mother appealed from Supreme Court’s April 2021 order denying her motion. The Second Department modified, on the law, by granting the mother’s motion and directing the father to transport the child to the supplemental school during his time with the child. The Appellate Division held that given the parties’ disagreement, “Supreme Court should have” directed the father “to transport the child to the school on the Saturdays on which he had parental access, pursuant to the [mother’s] final authority to make such decisions.”

## **Maintenance - Durational – Imputed Income, Social Security Age**

##  In Albano v. Albano, 2024 Westlaw 3959128 (2d Dept. Aug. 28, 2024), the parties were married in 1982, have 3 emancipated children and the husband formed an HVAC company during the marriage, which was valued at $600,000. The husband appealed from a November 2019 judgment of divorce which, following trial of his November 2016 action, among other things, awarded the wife maintenance of $4,016.67 per month until the earliest of her eligibility for full Social Security benefits at age 66, remarriage or death of either party. The Second Department remitted certain equitable distribution issues and affirmed the maintenance award, holding that “the record, including evidence of the parties’ expenses and lifestyle over the course of the marriage, supports the court’s determination to impute annual income of $221,000 to the [husband]” and that Supreme Court “providently exercised its discretion in imputing income of only $35,000 per year to the [wife].” The Appellate Division found that Supreme Court “arrived at the correct presumptive guideline amount of maintenance up to the statutory cap of $184,000, and declined to award additional maintenance for income exceeding the $184,000 cap.”

## **Pendente Lite - Separately Filed SNW, Retainer and Invoices Filed in Reply – Considered**

##  In Zelenka v. Hertz, 2024 Westlaw 3682504 (2d Dept. Aug. 7, 2024), the husband appealed from a June 2022 Supreme Court order which, in the wife’s June 2021 divorce action, granted her October 2021 motion for temporary maintenance, child support and counsel fees. The Second Department affirmed, holding that contrary to the husband’s contention, “Supreme Court could consider the [wife’s] statement of net worth, which was filed simultaneously with, but separate from [her] moving papers, and her retainer agreement and invoices, which were submitted for the first time in her reply papers, as the [husband] had an opportunity to respond and to submit papers in surreply,” citing CPLR 2001.

## **LEGISLATIVE ITEMS**

## As of September 1, 2024, none of the 6 bills reported in the July 2024 Update have been delivered to the Governor. Further information will be reported in the October 2024 Update if available.