## **NYSBA FAMILY LAW SECTION UPDATE, November 2021**

## **Matrimonial Update**

## **By Bruce J. Wagner**

**Support Magistrate, Schenectady County Family Court**

## **Child Support – CSSA -** **Deviation – Children’s SSD**

## In Matter of Weaver v. Weaver, 2021 Westlaw 4897569 (3d Dept. Oct. 21, 2021), the father appealed from a July 2020 Family Court order, denying his objections to a Support Magistrate order which, among other things, failed to deviate from the CSSA due to the children’s receipt of SSD benefits. The Third Department affirmed, holding: “Where, as here, a child is not receiving the benefit of a parent’s full-time earnings and higher salary level because of illness/disability, the federal government provides a derivative disability award to the child (citation omitted). However, a child’s disability benefit is ‘intended to supplement existing resources, not to displace or reduce a parent’s obligation to support his or her child.’”

## **Child Support - CSSA–Imputed Income–Housing Costs; Minimum Wage**

In Matter of Remsen v. Remsen, 2021 Westlaw 4561330 (2d Dept. Oct. 6, 2021), the mother appealed from a December 2019 Family Court order, denying her objections to an August 2019 Support Magistrate Order which, after a hearing upon her January 2019 petition, imputed $52,148 in annual income to her and directed the father to pay child support of only $848 biweekly through April 2019 for the parties’ two children born in 1998 and 2004 and only $577 biweekly thereafter, and spousal support of only $291.59 biweekly. The Second Department modified, on the facts and in the exercise of discretion, by lowering the imputed income by $5,000 and remitting to Family Court for a new determination. The Appellate Division held that the Support Magistrate properly imputed income to the mother based upon minimum wage, even though she worked only part-time during the marriage, noting that the mother had a college degree, and found that the mother’s assertions that she could not work fulltime due to the need to care for her elderly parents and the younger child, and because of undisclosed health limitations, were conclusory. The Court further concluded that it was proper to impute income to the mother based upon monthly housing costs paid by her brother-in-law. The Second Department deleted the $5,000 in income imputed to the mother based upon past gifts from her parents, since those payments were in exchange for the mother’s management assistance regarding a property that has since been sold.

## **Child Support - CSSA – Income – Averaging is Error**

In Matter of Koutsouras v. Mitson-Koutsouras, 152 NYS3d 331 (2d Dept. Oct. 6, 2021), the wife appealed from a March 2019 Supreme Court judgment rendered following stipulated written submissions in the husband’s 2015 action, which awarded her only $343.56 per week in child support for 2 children born in 2013 and directed her to pay $15,000 in counsel fees to the husband. The parties’ June 2018 stipulation resolved all issues except child support and counsel fees. The Second Department reversed, on the law, on the facts and in the exercise of discretion, and remitted to Supreme Court, leaving the child support award in place as a temporary order. The Appellate Division held that Supreme Court erred by averaging the parties’ incomes for the previous 4 years for CSSA purposes, while noting that the husband is employed by his family and his tax returns showed “substantial downward fluctuations in income,” which should have led Supreme Court to consider imputing income to him. The Second Department determined that the counsel fee award to the husband was improvident, finding that the husband “retained four different law firms during the pendency of the action, and used loans from his family to pay his counsel fees,” while noting that “fault exists on both sides for the extent of the litigation involved here.”

## **Child Support - CSSA – Income – Current v. Tax Return**

## In Matter of Aslam v. Younas, 2021 Westlaw 4763155 (2d Dept. Oct. 13, 2021), the father appealed from a June 2019 Family Court order, denying his objections to an April 2019 Support Magistrate Order, which, after a hearing held between 2016 and October 2018 upon the mother’s 2014 petition, directed him to pay $553 biweekly in basic child support for the parties’ 3 children and set retroactive child support at $70,231. The Second Department affirmed. The father had B.S and M.B.A degrees and was earning $55,000 by the end of the hearing. The Appellate Division held that the Support Magistrate properly based the child support award upon the father’s income as of the end of the hearing, “for the tax year not yet completed,” rather than upon his claimed earnings upon his last tax return.

## **Child Support - CSSA - Over Cap – Failure to Consider Remitted;** **Evidence – Expert Report Precluded as Untimely; Maintenance – Durational – Upward Deviation**

## In Headwell v. Headwell, 2021 Westlaw 4897585 (3d Dept. Oct. 21, 2021), the husband appealed from a March 2020 Supreme Court judgment following trial of the wife’s 2018 divorce action which determined, among other things, child support and maintenance. The parties were married in 1994 and have 3 children born in 1995, 2000 and 2002. Supreme Court rejected the husband’s “far from compelling account \*\*\* as to how his income as a commercial airline pilot would precipitously decline from his historic earnings, instead finding that, between those earnings and rental income from a second home that was to be his separate property, he would have at least $300,000 a year moving forward.” The trial court imputed $58,800 in annual income to the wife, based upon full-time employment at her part-time job, which the Appellate Division viewed as a “reasonable expectation,” given that her childcare responsibility “was easing as their youngest child reached adulthood.” Supreme Court awarded maintenance of $2,800 per month for 9 years, which the Third Department affirmed as an amount sufficiently articulated by statutory factors as “an upward adjustment from the guideline amount [unspecified] for a period within the guideline range.” The Appellate Division held that Supreme Court properly precluded the husband’s expert report on the tax treatment of maintenance under the 2017 enactment as untimely under 22 NYCRR 202.16(g)(2), given that he waited “until a few days before trial” to file the same. The Third Department remitted the issue of child support because “Supreme Court failed to articulate the factors it considered in electing not to include income over the statutory cap … in its final child support award.”

## **Child Support – Modification-Denied–Unemployment; COVID-19 Pandemic; Maintenance – Modification-Extreme Hardship-Denied**

## In Weinig v. Weinig, 2021 Westlaw 4733909 (1st Dept. Oct. 12, 2021), the husband appealed from an April 2021 Supreme Court order which, without a hearing, denied his motion for downward modification of child support and maintenance. The First Department affirmed, holding that the husband failed to raise an issue of fact “as to whether the collapse of the hedge fund, where he worked and which he partially owned, which resulted in his unemployment and allegedly diminished assets, substantially changed his circumstances or caused him extreme hardship.” The Appellate Division noted that the husband’s application and interview for just one position after the hedge fund collapsed “did not show that he was diligently seeking commensurate employment or indeed, any employment.” The Court concluded: “Even in the context of the Covid-19 pandemic and the publicity surrounding the hedge fund collapse, he did not sufficiently demonstrate that he was unable to find employment or that he was facing extreme hardship.”

## **Child Support - Modification – 2010 Amendments – 15%**

## In Matter of Castelli v. Maiuri-Castelli, 2021 Westlaw 4763261 (2d Dept. Oct. 13, 2021), the father appealed from a March 2021 Family Court order, denying his objections to a November 2020 Support Magistrate Order, which, after a hearing, effectively dismissed his February 2020 petition for downward modification of a February 2017 judgment of divorce directing him to pay $768.59 per week in support for the parties’ two children, plus 100% of add-ons and life insurance premiums. A 2019 COLA increased the obligation to $854 per week. The Second Department reversed, on the law, and remitted for a new determination of the father’s petition. The February 2017 judgment was based upon the mother having no income and the father’s income of just over $175,000 as an attorney, although he had been suspended as of July 2015. The evidence at the hearing was that the father’s 2019 income was $58,039 and the mother’s 2019 salary with Nassau County was $44,366. The Support Magistrate adjusted the parties’ pro rata shares for add-ons to 77% and 23% and in dismissing the remainder of the modification petition, determined that the father’s loss of income was “an apparent result of his own voluntary actions.” The Appellate Division held that the mother’s 15% or more increase in income “entitles the father to a new determination of the parties’ respective basic child support obligations, irrespective of whether any decrease in the father’s income may also properly be considered.”

## **Custody - International Travel – Non-Hague Country – Denied**

## In Matter of Naamye Nyarko B. v. Goodwin Edwin C., 152 NYS3d 575 (1st Dept. Oct. 12, 2021), the mother appealed from a February 2019 Family Court order, which permitted the father to travel internationally with the subject children upon 60 days’ written notice to the mother. The First Department reversed, on the facts and in the exercise of discretion, noting that Ghana is not a party to the Hague Convention on Child Abduction and that there is no basis in the record to support a finding that “such unrestricted international travel is in the best interests of the young [ages not specified] children.”

## **Custody - Modification – Changed Circumstances Admitted; Unfounded Abuse Allegations**

## In Matter of Fowler v. Rothman, 2021 Westlaw 4704210 (4th Dept. Oct. 8, 2021), the mother appealed from a November 2018 Family Court order, which modified a judgment of divorce by awarding sole legal and physical custody of the parties’ two children to the father. The Fourth Department affirmed, first noting that the mother waived any argument on the issue of changed circumstances by alleging the same in her own petition, and further observing that the mother made “repeated unsubstantiated allegations that the father abused the children, none of which ultimately resulted in any indicated reports.” The Appellate Division concluded that the record supports Family Court’s conclusion that “the mother interfered with the father’s relationship with the children by making” the aforesaid unfounded allegations and that she failed to prove her contentions of domestic violence by a preponderance of the evidence.

## **Custody - Modification – Education Priority Over Sports**

## In Baraz v. Polyakov, 2021 Westlaw 4888720 (2d Dept. Oct. 20, 2021), the father appealed from a November 2020 Supreme Court order which, after oral argument, granted the mother’s August 2020 motion to modify the stipulation incorporated into the parties’ February 2013 judgment of divorce, so as to prioritize their son’s educational activities over sports, hockey in particular. The Second Department modified, on the facts and in the exercise of discretion, by deleting a provision which limited the child’s participation in sports to local activities, and otherwise affirmed. The stipulation provided that the father would have final decision making over sports and the mother would have the same over education. The parties were unable to agree upon a balancing between sports and education, with increasing frequency as the child grew older. The Appellate Division held that Supreme Court’s order had a sound and substantial basis in the record, but deleted the “local sports activities” limitation, because both parents agreed that the child enjoyed participating in a travel hockey program and such a restriction was therefore not in the child’s best interests.

## **Custody - Modification – Joint Custody Despite Domestic Violence Allegation; Decision Making to Father**

## In Matter of Frank G. v. Crystal C., 152 NYS3d 582 (1st Dept. Oct. 12, 2021), the mother appealed from a July 2020 Family Court order, which granted the father’s petition to the extent of modifying a 2013 order, by providing for joint legal custody, with final decision making to the father over the child’s education, medical care and extracurricular activities. The First Department affirmed, holding that the father established changed circumstances by showing that his visits with the child had increased from two overnights per month to at least two nights per week plus additional daytime visits, and that he had taken a proactive role in the child’s medical and developmental care, taking him to medical and dental appointments and arranging for him to be evaluated upon a teacher’s recommendation. The Appellate Division concluded that the joint custody provision was not precluded by “a history of domestic violence” [unspecified] and that the decision making provision in favor of the father was proper, given that the mother “had been significantly less involved.”

## **Custody – Third Party – Domestic Violence**

## In Matter of Maung v. Farrell, 152 NYS3d 653 (4th Dept. Oct. 8, 2021), the mother appealed from an October 2018 Family Court order, which modified a stipulated prior order by awarding primary physical residence of the subject child to the maternal grandmother. The Fourth Department affirmed, holding that Family Court’s finding of extraordinary circumstances is supported by evidence that “the mother continued to reside and maintain a relationship with her boyfriend, who perpetrated instances of domestic violence against her in the presence of the child.” The Appellate Division concluded that the order appealed from is in the child’s best interests.

## **Custody - Third Party – Former Partner**

## In Matter of Sonya M. v. Tabu N., 2021 Westlaw 4994277 (3d Dept. Oct. 28, 2021), the mother and father, parents of 2 children, a son born in January 2016 and a daughter born in April 2018, appealed from a December 2019 Family Court order which, following a hearing, granted the March 2019 petition of the father’s former partner, Sonya M., upon a finding that she had established extraordinary circumstances, and awarded her sole legal and primary physical custody with supervised time to the mother and father. The Third Department affirmed on the issues of extraordinary circumstances and best interests, noting that both children were born while the father was in a long-term relationship with the former partner (22 years with 4 children) and that in February 2016, when the older child was about 6 weeks old, the mother consented to the father taking primary physical custody of said child and having him reside and be cared for at the residence the father shared with the former partner. In late August or early September 2018, when the younger child was 4-5 months old, the mother moved that child into the same residence, in which she intermittently resided with the father and former partner until she moved out in the winter of 2019. Each time the mother vacated the residence of the father and the former partner, the children remained in the care of the former partner. In March 2019, following a domestic violence incident between the father and the former partner, the former partner moved into a domestic violence shelter with the 2 subject children. In June 2019, the mother and father abducted the younger child from her stroller while she was on a street with the former partner; at the same time, the mother and father were unsuccessful in taking the older child from the former partner. The Appellate Division noted that the father informed the former partner in February 2016, for the first time, that the older child was his son from his relationship with the mother and that “they needed to care for him.” The Court found that the former partner was the primary caretaker for both of the subject children, beginning in February 2016 and late August or early September 2018, respectively, obtained Medicaid insurance for both children and took them to all medical appointments. The Third Department found: “To the degree that they were physically present with the children, [the parents] took little or no parental responsibility for their care, and for the vast majority of the children’s lives, freely relinquished custody of the subject children to the former partner.”

## **Custody - Third Party - Grandparent – Extended Disruption**

## In Matter of Mooney v. Mooney, 2021 Westlaw 4763150 (2d Dept. Oct. 13, 2021), the father appealed from a September 2019 Family Court order, which, after a hearing, granted the maternal grandparents’ July 2017 petition for sole legal and physical custody of the subject child born in 2006, with specified access to the father, and denied his September 2017 petition seeking the same relief. The Second Department affirmed. The father relocated from NY to VA in 2010, leaving the child with the mother, who relinquished care to her parents. The father thereafter picked up and dropped off the child at the maternal grandparents’ home. The Appellate Division held that DRL 72(2)(b) does not preclude a court from finding extraordinary circumstances even if the “extended disruption” of custody lasted less than 24 months. The Court concluded that here, given the fact that the father “voluntarily relinquished care and control of the child after relocating to Virginia in 2010,” the grandparents established standing to seek custody by demonstrating extraordinary circumstances, and found that the custody award was in the child’s best interests.

## **Custody - Transportation to Activities; Wishes of Child (approx. age 12)**

## In R.K. v. R.G., 2021 Westlaw 4558394 (2d Dept. Oct. 6, 2021), the mother appealed from a January 2020 Supreme Court order, which, upon remittal from Appellate Division (169 AD3d 892) set a new access schedule for the father. The parties have one child born in 2007 and their marriage was annulled by a November 2012 judgment. The Second Department modified, on the law and in the exercise of discretion, by adding a provision directing that “the father shall, each Tuesday, take the child to all scheduled baseball practice sessions and other activities in which the child is interested, regardless of whether those activities may have been arranged by the mother.” The Appellate Division noted that Supreme Court made an identical direction to the mother as to Wednesdays, “regardless of whether those activities may have been arranged by the father.” The Court concluded that it was proper to take the child’s wishes into consideration.

## **Custody – Visitation – In Person Suspended – No COVID-19 Vaccine**

## In C.B. v. D.B., 2021 Westlaw 4696606 (Sup. Ct., N.Y. Co., Cooper, J., Oct. 7, 2021), the issue was whether the mother, who has *de facto* custody of the subject child born in 2018, can condition the father’s access with the child (limited and supervised under a May 2021 order), upon the father and his supervisor being vaccinated, or at the very least, submitting to a testing regimen prior to each of the access periods. The father, as noted by Supreme Court, was “unable to offer any reasonable, let alone compelling, reason why he should not be vaccinated or even undergo testing, resisting both simply because he sees it as his ‘right’ to do so.” The Court concluded by directing, in the best interests of the child, that the father’s “in-person parental access with the child is suspended until such time as he complies with the terms of the amended Temporary Restraining Order,” which provided that “he and any approved supervisor either [receive] a first dose of a COVID-19 vaccine or [submit] to a COVID-19 antigen test (AKA ‘rapid test’) within 24 hours of any in-person visit.” The father was permitted to “continue to enjoy liberal virtual and telephone access with the child.”

## **Equitable Distribution -** **Lottery Winnings**

## In Hughes v. Hughes, 2021 Westlaw 4896914 (3d Dept. Oct. 21, 2021), the wife appealed from a July 2020 Supreme Court judgment directing equitable distribution in the husband’s 2018 divorce action which, among other things, awarded the husband 45% of $1.25 million she received as a 1/6 share of a $7.5 million lottery ticket purchased by the wife’s mother. The parties were married in 1991 and the lottery winnings were set forth on a 2014 W-2G form, which the parties reported on their joint 2014 income tax returns as gambling winnings. The wife’s mother filed no gift tax returns related to the lottery winnings she shared equally with the wife and her 4 siblings. The Third Department rejected the wife’s argument that the lottery winnings constituted her separate property gift and affirmed, citing Internal Revenue Code 102(a), which provides that gross income does not include the value of property acquired by gift. The Appellate Division held that by claiming the lottery winnings as income on their joint tax returns, the parties represented that the same were not a gift, and that courts “cannot \*\*\* permit parties to assert positions in legal proceedings that are contrary to declarations made under the penalty of perjury on income tax returns.”

## **Legislative Items**

## **Blindness Impermissible Factor in Custody, Guardianship, Adoption**

## Reported in last month’s Update, this legislation has now been signed. **Effective 90 days after October 8, 2021**, new DRL 75-m and 111-d, FCA 643 and 658 and SSL 393 are added to: prohibit decisions on guardianship, custody, visitation or adoption petitions from being made solely on the basis of a petitioner’s blindness; prohibit DSS from acting upon such petitions or requests solely upon an applicant’s blindness; and prohibits DSS from taking actions solely because an applicant is blind. A.2113/S.4407. Laws of 2021, Chapter 442.

## **Child Support – Disabled Adult Children – Beyond Age 21**

## Also reported last month, the Governor has now signed this bill. **Effective October 8, 2021**, the DRL and the FCA are amended, to establish an obligation for the support of adult children up to age 26, if the person is developmentally disabled as defined in Mental Hygiene Law 1.03(22). A.0898B/S.04467B. Laws of 2021, Chapter 437. There is a new Form 4-3c, Petition for Support of Adult Dependent and a new Form 4-7d, Order on Petition for Support of Adult Dependent, both of which new forms may be found at <http://ww2.nycourts.gov/forms/familycourt/childsupport.shtml>

## **Equitable Distribution – Companion Animals**

Originally reported in the June 2021 Update, A05775/S04248 has now been signed. **Effective October 25, 2021**, DRL 236(B)(5)(d) is amended, to add a new factor 15 for the Court’s consideration when determining an equitable disposition of marital property, stating: “in awarding the possession of a companion animal, the court shall consider the best interest of such animal. ‘Companion animal’, as used in this subparagraph, shall have the same meaning as in subdivision five of section three hundred fifty of the agriculture and markets law.” Laws of 2021, Chapter 509.