## **NYSBA FAMILY LAW SECTION UPDATE, April 2022**

## **Matrimonial Update**

## **By Bruce J. Wagner**

**Support Magistrate, Schenectady & Montgomery County Family Court****s**

## **Adoption - Post-Adoption Visitation Terminated**

In Matter of Jennifer JJ. v. Jessica JJ., 2022 Westlaw 867119 (3d Dept. Mar. 24, 2022), respondent biological mother appealed from a February 2020 Family Court order, which granted the adoptive mother’s June 2019 petitions to modify post-adoption contact agreements [DRL 112-b (4)] incorporated into orders of adoption for a son born in 2014 and a daughter born in 2016, issued following a 2017 surrender of parental rights. The agreements permitted 2 supervised visits per year and the receipt of photographs of the children and an update twice per year (in April and October), if requested from the local social services agency a month in advance (in March and September). The son’s counselor (LCSW) testified that: she had treated the son bi-weekly since 2018; the son has autistic spectrum disorder, ADHD and anxiety disorder; and she “was familiar with the significant behavioral outbursts that he displayed when encountering other changes in his routine.” The adoptive mother testified that: “after visiting the biological mother in December 2017, the son destroyed rooms in the house and was completely out of control for close to a month”; after the July 2018 visit, the son “climb[ed] the walls in [his] classroom, hit his friend, hurt his sister and had difficulties with his behavior for several months.” The Appellate Division found that the December 2018 visit did not occur “because [the biological mother] was incarcerated for assaulting her husband with a knife.” The daughter’s reactions to the visits were found to be less extreme. In contrast, the Third Department noted that “the biological mother testified that the visits went well, that the adoptive mother never advised her of any concerns related to the children’s well-being and that the children had emotional problems prior to the adoption.” The Appellate Division affirmed in a 3-2 split, with Presiding Justice Garry and Justice Lynch dissenting in part, opining that the order regarding the daughter was not supported by the record and noting (footnote 1) that the daughter was removed from the biological mother and placed in the adoptive mother’s care when she was only 3 days old. The dissent further observed that Family Court’s order did not address the photograph and update portion of the order and “the biological mother remains entitled to the benefits of those conditions.”

## **Agreements - Family Court – No Jurisdiction to Modify**

## In Matter of Deborah K. v. Richard K., 160 NYS3d 602 (1st Dept. Mar. 3, 2022), the father appealed from a March 2020 Family Court Order which, among other things, partially granted the mother’s objections to an August 2019 Support Magistrate Order and capped the father’s credit, for payments made pursuant to the parties’ February 2013 incorporated stipulation, to the mortgagee of the former marital apartment at $25,200. The stipulation allowed the father to pay his monthly $2,100 child support obligation to the mortgagee. The Appellate Division determined that “Family Court erred in capping the father’s credit against support arrears at $25,200 per year based on this provision.” There was no similar provision regarding spousal support, but the stipulation “permits the father to also deduct the payment of apartment expenses, including the mortgage, from his spousal support.” The First Department concluded that “Family Court improperly amended the stipulation by imposing an annual maximum credit to which the father is entitled based solely on his child support obligation.” The Appellate Division modified on the facts and the law, to the vacate the cap of $25,200, holding: “A stipulation of settlement which is incorporated but not merged into the parties’ judgment of divorce may be reformed only in a plenary action (citation omitted). Family Court does not have jurisdiction to modify a separation agreement.”

## **Child Support - CSSA – Deviation – Downward, Imputed Income;** **Equitable Distribution – Business Share Increased 5% to 15%; Maintenance – Downward Deviation**

## In Giuliano v. Giuliano, 2022 Westlaw 959403 (3d Dept. Mar. 31, 2022), the wife appealed from a March 2019 judgment following trial of the husband’s 2015 action, which awarded her a 5% share of the value of his business, and child support and maintenance based upon imputed income to her and which deviated downward from the presumptive guidelines amounts. The parties were married in 1993 and have 3 children born in 1994, 1998 and 2007. Supreme Court imputed $58,000 in annual income to the wife, “based upon \*\*\* [her] capability of full-time work, \*\*\* her hourly wage as a nurse and by taking into account a 40-hour work week.” Notably, the wife’s friend, when asked at trial whether the wife made any comment to her to the effect that returning to full-time work would hurt her divorce case, responded, “I believe so.” The Third Department affirmed Supreme Court’s reduction of the presumptive maintenance amount [unspecified] to $450 per month for 3 years, citing Supreme Court’s findings that: “the wife was in good health and was capable of economic independence based on her work as a registered nurse and a yoga instructor”; and “the husband paid most of the college expenses for the middle child, as well as medical costs for the middle and youngest children.” As to the downward deviation from the presumptive CSSA amount [also unspecified], the Appellate Division affirmed, again referring to “the husband’s contributions to the college costs and the medical expenses of the children.” Supreme Court did however err by failing to award retroactive maintenance and child support and the action was remitted for that purpose. The Third Department concluded by increasing the wife’s share of the husband’s business from 5% to 15%, given Supreme Court’s findings that “the wife cared for the children and contributed to the overall household income while the husband worked.”

## **Child Support - CSSA – Deviation – Shared Custody – Reversed**

## In Matter of Livingston County SCU o/b/o Yusko v. Sansocie, 2022 Westlaw 819070 (4th Dept. Mar. 18, 2022), the SCU, on behalf of the father, appealed from a February 2021 Family Court Order which, in a proceeding for upward modification of the mother’s child support obligation, denied its objections to a Support Magistrate Order finding that the mother was entitled to a deviation from the presumptively correct CSSA obligation. The father is the primary custodial parent in a shared custody arrangement. The Support Magistrate determined that, “because the children spent approximately 50% of the parenting time with the mother and because the mother incurred expenses for the children’s ‘food, clothing, shelter, utilities, cell phones, transportation[,] and extracurricular activities’ during the times they were with her, she should be granted a variance from the presumptive support obligation.” The Fourth Department modified, on the law, and remitted to Family Court “for a determination of [the mother’s] support obligation upon an adequate record,” holding that as to children not on public assistance, “[t]he costs of providing suitable housing, clothing and food \*\*\* during custodial periods do not qualify as extraordinary expenses so as to justify a deviation” pursuant to Family Court Act 413(1)(f)(9)(i). The Appellate Division concluded that the Support Magistrate’s order “was merely another way of [improperly] applying the proportional offset method” and that there was no support in the record for the finding that the father’s expenses “were substantially reduced as a result of the mother’s expenditures during extended visitation” within the meaning of Family Court Act 413(1)(f)(9)(ii).

## **Child Support - CSSA – Imputed Income, $250,000 Cap, Overpayment Credit**

## In Castelloe v. Fong, 2022 Westlaw 960668 (1st Dept. Mar. 31, 2022), the wife appealed from a May 2021 Supreme Court order, which confirmed a February 2021 Special Referee report rendered in the wife’s 2011 divorce action, awarding her child support of $3,333.33 per month (income capped at $250,000) and a $291,513.40 overpayment credit to the husband against his future share of add-on expenses, due to *pendente lite* overpayments. The First Department affirmed, holding that Supreme Court properly imputed $250,000 in annual income to the husband, “based on the cash gifts he received from his parents during the three years preceding the hearing, and omitting earlier gifts he used to purchase his current residence and to pay the parties’ legal fees.” The Appellate Division found that the Referee properly rejected the wife’s contention “that additional income should be imputed to [the husband] based on his earning capacity, given the evidence demonstrating that the 60-year-old defendant was terminated from his job before the marriage and had not worked full-time since 2008, three years before the commencement of this divorce action,” while noting that the wife presented no expert testimony to establish the husband’s earning capacity. The First Department concluded that a $250,000 income cap was sufficient to meet the children’s “actual needs” to live an “appropriate lifestyle.” The Court concluded that the credit against future add-ons due to overpayments *pendente lite* was appropriate, despite the wife’s argument that “it will effectively extinguish his child support obligation,” noting that the wife “has sufficient financial resources at her disposal.”

## **Child Support - CSSA – Income – Capital Gains; Counsel Fees – After Trial; Maintenance – Durational – Social Security Age**

## In Rennock v. Rennock, 2022 Westlaw 960872 (1st Dept. Mar. 31, 2022), the husband appealed from a January 2020 judgment which, after trial, awarded the wife maintenance of $2,500 per month, retroactive to date of commencement on August 8, 2012, until her age 66, child support of $2,559 per month and counsel fees of $162,500. The First Department affirmed, holding that the duration of maintenance until the wife’s social security benefit age was proper, as was the amount, which considered the marital standard of living and the size of her distributive award. As to child support, the Appellate Division held that the inclusion of the husband’s capital gains as income for CSSA purposes was a provident exercise of discretion, given his own testimony which established that he regularly traded securities within the account in which the gains were realized, even before the commencement of the action. The Court affirmed the counsel fee award, while noting that: “both parties caused delays and took intransigent positions that prevented settlement”; litigation conduct is not entirely determinative; and “the paramount factor is financial need.”

## **Counsel Fees - After Trial – Denied; Maintenance – Durational – Awarded on Appeal**

## In Louie v. Louie, 2022 Westlaw 959399 (3d Dept. Mar. 31, 2022), the wife appealed from a November 2020 Supreme Court judgment, which, among other things, denied her requests for maintenance and counsel fees in her action commenced in April 2019. The parties were married in 1975, have 1 child born in 1976, and separated in 2007. Supreme Court wholly adopted the findings of fact and conclusions of law submitted by the husband’s counsel, which the Third Department held “cannot constitute the decision of the court [as] mandated by Domestic Relations Law §236(B)(5)(g).” The husband retired in 1999 and has income of $117,000 per year; the wife retired in 2016 and has annual income of $31,582. The presumptive maintenance guidelines amount was $2,139 per month. The Appellate Division modified, on the law, by awarding the wife $2,139 per month in maintenance for 20 years, retroactive to the April 2019 filing date of the divorce action, with arrears to be paid at $500 per month, considering “the lengthy term of the marriage, the significant disparity between the parties’ incomes and the unlikelihood that the wife will be able to close that gap despite her receiving additional assets from the equitable distribution of the marital property, as a majority of the husband’s income is from his separate property.” The Third Department affirmed the denial of counsel fees, holding that while “there is no dispute that the wife was the less-monied spouse,” the wife’s claim therefor was not “properly supported by \*\*\* a copy of the retainer agreement and a detailed affidavit setting forth the charges incurred.”

## **Custody & Visitation - Modification – Joint to Sole – Corporal Punishment, Inadequate Home Schooling, Isolation, Neglect, Wishes of Child (15 y/o)**

## In Matter of Walker v. Sterkowicz-Walker, 2022 Westlaw 946047 (2d Dept. Mar. 30, 2022), the mother appealed a December 2019 Family Court order which, following a hearing upon the father’s January 2017 petition and the mother’s March 2017 cross-petition, modified the parties’ stipulation incorporated into a July 2012 divorce judgment, which provided for joint custody of a child born in 2004 with primary custody to the mother, by awarding sole custody to the father. The stipulation permitted the mother and child to live in certain counties in Colorado, where she moved in 2010. After a hearing upon the father’s 2016 proceeding, a Colorado Court found the mother was “a credible threat to the life and health” of the child and an older now emancipated sibling, and granted the father temporary “care and control” of the children for 1 year, whereupon the child came to live with the father, his wife and young daughter in Kings County. The Second Department affirmed, based upon “evidence that the mother subjected the child to inadequate home-schooling, excessive corporal punishment, isolation, and emotional neglect, as well as the child’s wishes, and the breakdown in the parties’ ability to co-parent.”

## **Custody & Visitation - Modification – Medical Decision-Making – Vaccines**

## In Matter of Soper v. Soper, 2022 Westlaw 945641 (2d Dept. Mar. 30, 2022), the mother appealed from a June 2020 Family Court order which, without a hearing, granted the father’s January 2020 petition to modify the custody provisions of the parties’ July 2019 divorce judgment, which deferred medical decisions for the 3 children to certain pediatricians, by awarding him sole medical decision-making. The father claimed that the mother had obtained medical care from providers other than the stipulated pediatricians, refused to consent to vaccines, and that as a result, the youngest child was prohibited from attending school. The Second Department affirmed, holding that the father’s claims were supported by “uncontroverted evidence.”

## **Custody & Visitation - No AFC Upheld; Father’s Girlfriend Barred from Exchanges**

## In Matter of Santana v. Barnes, 161 NYS3d 896(4th Dept. Mar. 11, 2022), the mother appealed from a December 24, 2020 Family Court order, which awarded her sole custody and set a visitation schedule for the father, barred the father’s girlfriend from being present when the parents exchange the child, and failed to appoint an attorney for the then less than 1-year-old child (AFC). The mother contended on appeal that Family Court should have prohibited the girlfriend from having any contact with the child. The Fourth Department affirmed, holding that “the record establishes that there were verbal and physical altercations between the mother and the girlfriend during the exchanges of the child. However, there is no evidence in the record that the girlfriend had harmed or threatened the child.” The Appellate Division concluded that Family Court’s restriction was adequate. The Fourth Department held that the child was then less than 1 year old “and would be unable to express his wishes to an AFC,” such that Family Court “did not abuse its discretion in not appointing an AFC.”

## **Custody and Visitation - Parental Access – Limited**

## In Matter of Walker-Sterkowicz v. Walker, 2022 Westlaw 946026 (2d Dept. Mar. 30, 2022), the mother appealed from a July 2020 Family Court order, which, upon supplemental findings, limited her parental access to the parties’ child born in 2004 to letters sent by mail or email and to one hour per week by telephone or video. The Second Department affirmed, holding that the testimony of the father and the child’s therapist established “the child’s fear and anxiety surrounding parental access, the social workers’ observation of physical symptoms of that fear and anxiety in the child, and the therapist’s testimony that visitation between the mother and child would be ‘very damaging’ to the child.”

## **Custody and Visitation – Sole – Supervised Visitation, Batterer Program; Family Offense – Harassment 1st and 2d, Sexual Misconduct**

## In Matter of Stephanie R. v. Walter Q., 2022 Westlaw 867117 (3d Dept. Mar. 24, 2022), the father appealed from a July 2018 Family Court order, which, following a hearing, granted the mother’s April 2017 petitions, by awarding her sole custody of the parties’ child born in 2014, with only supervised visitation until he completes the first stage of a batterer’s program, and which found that he committed the family offenses of harassment 1st and 2d and sexual misconduct. The Third Department affirmed, holding that: “the mother proved by a preponderance of the evidence that the father committed acts of domestic violence”; “the mother has been the primary caretaker of the child since birth, notwithstanding her work and school commitments”; and “[t]he father’s commission of acts of domestic violence upon the mother in the presence of the child demonstrates an inability to put the child’s needs first and calls into question his ability to facilitate a relationship between the mother and the child.” As to supervised visitation, the Appellate Division noted: “a few days prior to the issuance of the order appealed from, the father was arrested and charged with criminal contempt in the second degree for violating the order of protection”; the father “was thereafter convicted as charged and sentenced to 10 months in jail” and “[t]he judgment of conviction was affirmed by this Court.” Regarding the family offenses, the Third Department found: “the proof was sufficient to establish, by a fair preponderance of the evidence, that the father twice committed the family offenses of sexual misconduct [Penal Law 130.20; the Appellate Division found “two instances of forcible sexual assault”]”; and that as to harassment 1st and 2d, “the father’s behavior -- “screaming at the mother, insulting her with degrading names, barring her exit from the house or a particular room, intentionally placing the mother and child in fear of imminent physical injury, monitoring her movements and telephone calls and threatening to take the child away from her permanently – established that he ‘engag[ed] in a course of conduct or repeatedly commit[ed] acts which place[d] [the mother] in reasonable fear of physical injury [Penal Law 240.25 \*\*\*] and ‘which alarm[ed] or seriously annoy[ed] [the mother] and which serve[d] no legitimate purpose’ (Penal Law 240.26[3] \*\*\*).”

## **Custody & Visitation – Temporary – COVID-19 Relocation**

## In Freedman v. Freedman, 2022 Westlaw 867903 (1st Dept. Mar. 24, 2022), the husband appealed from a November 2021 Supreme Court order, which denied his motion seeking a directive that the wife return the parties’ children to New York from Westport, CT, pending a custody hearing. Due to the COVID-19 pandemic, the parties and children left the marital residence in NY County to reside with the wife’s family in Westport, but dispute whether the relocation was intended to be temporary, given that the husband returned to Manhattan. NY was determined to be the home state. The First Department affirmed, holding: “We decline to disturb Supreme Court’s order which maintained the status quo pending a hearing on, and resolution of, custody and related issues.”

## **Custody & Visitation - Third Party–Nonbiological, Nonadoptive–Standing**

## In Matter of Fern G. v. Kim J., 161 NYS3d 770(1st Dept. Mar. 15, 2022), respondent appealed from a June 2021 Family Court order which, after a hearing, granted petitioner’s motion for an order of parentage and ruled that she has standing to seek custody and visitation of the subject child. The First Department affirmed, citing Matter of Brooke S.B. v. Elizabeth A.C.C., 28 NY3d 1 (2016), and holding that “clear and convincing evidence presented at the hearing, including numerous social media posts by respondent, private text messages between the parties, and a baby shower invitation designed by respondent in honor of both parties, established that the parties agreed to conceive and raise the subject child as the newest member of their already established family, which already included one child both parties referred to as their son. After the subject child was born, \*\*\* a [church] ‘certificate of dedication’ named both parties as the child’s parents.”

## **Custody - UCCJEA – Forum Non Conveniens**

## In Matter of Adam N. v. Darah D., 2022 Westlaw 838093 (1st Dept. Mar. 22, 2022), the mother appealed from a May 2021 Family Court order, which granted the father’s cross motion to dismiss upon the ground of forum non conveniens, in favor of California, where he and the child have lived since March 2020. The First Department affirmed, finding that Family Court had allowed the parties to make submissions upon the issue and considered all relevant factors, as required by DRL 76-f and 76-f(2)(a-h), respectively. The Appellate Division held that Family Court properly determined “that California, rather than New York, was the more appropriate forum for this matter, a component of which is the parties’ dispute over whether the subject child should live with the father in California, or with respondent mother in Norway.” The First Department noted the mother’s argument that she lived with the child in NY for 8 years, but found that “[t]he child’s relocation to California in March 2020 was per court order” and “because of the child’s living and school situation, and his family and other relationships, the court properly considered that evidence relating to the child’s development and emotional well-being lies primarily in California.”

**Equitable Distribution – Pension - CSRS – No Survivor Annuity in Stipulation**

## In Reukauf v. Kraft, 2022 Westlaw 816979 (4th Dept. Mar. 18, 2022), the former husband (husband) appealed from a November 2019 Supreme Court order (an Amended Court Order Acceptable for Processing [COAP]) which distributed his federal CSRS retirement benefits. No appeal lying as of right from such an order, the Fourth Department treated the notice of appeal as a motion for leave to appeal and granted the same. The Appellate Division rejected the husband’s argument, that Supreme Court erred by using the Majauskas formula, “because the parties’ oral stipulation limited [the wife’s] share to 50% of that part of the pension that accrued during the parties’ marriage.” The Fourth Department concluded that “both parties expressly agreed in the stipulation that [the husband’s] benefits would be distributed ‘[i]n accordance with the *Majauskas* formula’” and that the stipulation was “unambiguous.” The Appellate Division modified the amended COAP, on the law, agreeing with the husband that the award to the wife of 23.86% of a former spouse survivor annuity under 5 USC 8341(h)(1) was error, given that “the court in its decision made no award to [the wife] of a former spouse survivor annuity, which, had it been awarded, would have expressly conflicted with the parties’ agreement.” Given the conflict between the decision and the order, the decision controls. The Fourth Department noted that 23.86% represents the wife’s correct share of the husband’s gross monthly annuity pursuant to Majauskas, and modified the amended COAP to provide that the wife is awarded “23.86% of [the husband’s] gross monthly annuity accrued over all months of service to his employer.”

## **Family Offense - Assault & Attempted Assault 3d; Criminal Mischief 4th; Criminal Obstruction Breathing; Disorderly Conduct; Forcible Touching; Harassment 2d & Aggravated Harassment 2d; Reckless Endangerment 2d; Sexual Misconduct – Found**

## In Matter of Annette R. v. Dakiem D., 2022 Westlaw 960860 (1st Dept. Mar. 31, 2022), respondent appealed from a December 2020 Family Court order, which found that he committed all of the above listed family offenses. The First Department affirmed, holding that: harassment 2d was established by Petitioner’s testimony that “respondent sent her numerous badgering, obscene, and hostile text messages, and presented ample supporting documentation of those text messages” and “by the evidence of acts of respondent, such as dumping juice throughout petitioner's apartment and subjecting her to physical contact, that were clearly intended to harass, annoy, or alarm petitioner (Penal Law §240.26[1], [3]).” Aggravated harassment 2d was “supported by the audio recordings of respondent's repeated telephone calls to petitioner, during which he left angry, obscene, and threatening messages (Penal Law §240.30[2]).” Forcible touching and sexual misconduct were proved by Petitioner’s credible testimony that “respondent forced her to have sex with him and that she went to a women's shelter because she no longer felt safe (Penal Law §§130.52[1] [forcible touching], 130.20[1] [sexual misconduct]).” The family offense of criminal obstruction of breathing was proved by Petitioner’s testimony “that on two separate occasions respondent placed his hands around her throat, making it difficult for her to breathe (Penal Law §121.11[a]).” Criminal mischief 4th was established by Respondent’s admission “to smashing petitioner's cell phone, and his defense, that he bought the phone for her and believed that therefore could do with it as he liked” and by evidence that Respondent “threw a different phone across the street after reading her text messages (Penal Law §145.00[1]).” Petitioner proved reckless endangerment 2d by trial evidence that “respondent's actions, in driving his car into petitioner while she was trying to secure the child in his stroller, created a substantial risk of serious physical injury to petitioner and the child (Penal Law §120.20).” Assault and attempted assault 3d (Penal Law §§120.00[1]; 110.00) were “supported by a fair preponderance of the evidence \*\*\* [in that] petitioner credibly testified that respondent punched her on the chin and choked her and that the choking caused her substantial pain and left her gasping for air. Respondent's intent to commit physical injury can be inferred from his actions and the surrounding circumstances.” As to disorderly conduct, the Appellate Division concluded that respondent’s commission of the same is “supported by the record.”

## **Family Offense - Disorderly Conduct, Harassment 2d – Found, Menacing 3d – Not Found**

## In Matter of Marin v. Banasco, 161 NYS3d 834 (2d Dept. Mar. 16, 2022), the father appealed from an April 2021 Family Court order which, after a hearing upon the mother’s July 2019 family offense petition, found that he committed disorderly conduct, harassment 2d, and menacing 3d and granted a 2-year order of protection. The Second Department modified, on the facts, by deleting the menacing 3d findings, and otherwise affirmed. Family Court found harassment 2d and menacing 3d arising from a June 2019 incident, in the presence of the parties’ child, where the father “smacked the mother’s cell phone out of her hand and threatened to hurt her.” Family Court found disorderly conduct based upon a July 2019 custody exchange, at which the father appeared intoxicated and as a result was excluded from the subject police station. The Appellate Division held that there “was insufficient evidence that the father’s conduct [in June 2019], was intended to place the [mother] in fear of death, imminent serious physical injury, or physical injury, by physical menace,” thus failing to satisfy the elements of menacing 3d (Penal Law 120.15).

## **Pendente Lite - Counsel Fees, Temporary Maintenance – Over the Cap**

## In Lesser v. Lesser, 2022 Westlaw 677348 (1st Dept. Mar. 8, 2022), the wife appealed from an August 2021 Supreme Court order, which directed the husband to pay her $10,500 per month in temporary maintenance and awarded her temporary counsel fees of $25,000. The First Department affirmed, rejecting the wife’s argument that Supreme Court should have awarded her the presumptive amount upon the income cap ($4,800 per month) plus an additional amount taking into account the husband’s income over the cap, which would have resulted in an award of $30,000 per month, or no less than $17,500 per month. The Appellate Division found that Supreme Court’s determination to award $10,500, “which more than doubled the statutory guideline amount,” was “appropriate under the circumstances, given, among other things, that the parties’ children are living with [the husband] full-time and he is paying for their expenses.” The First Department upheld the counsel fee award, noting that the wife’s “contention that the case will be complex and prolonged is based on her \*\*\* unsubstantiated assertions of suspected concealment and dissipation of assets on [the husband’s] part.”

## **Procedure – Default – Vacated on Appeal**

## In Richard v. Buck, 2022 Westlaw 903740 (1st Dept. Mar. 29, 2022), the husband appealed from an April 2021 Supreme Court order, which denied his motion to vacate a judgment of divorce entered following his failure to appear, *pro se*, at an inquest. The First Department reversed, on the law, granted his motion and remanded for further proceedings. The Appellate Division found that “both the wife and supreme court were aware that the husband had been diagnosed with a significant mental health condition, which resulted in episodes during which the husband was demonstrably unable to care for himself or otherwise protect his interests.” The First Department held that “there should have been an inquiry into whether a guardian ad litem was necessary,” citing CPLR 1201, 1203. In the alternative, the Appellate Division found that “the husband sufficiently demonstrated a reasonable excuse for his default and a potentially meritorious defense to the equitable distribution award.”

## **Procedure -** **Venue – COVID-19 Retreat to Seasonal Home**

## In Fisch v. Davidson, 2022 Westlaw 697403 (2d Dept. Mar. 9, 2022), the wife appealed from a December 2020 Supreme Court order, which denied her motion to change the venue of the husband’s August 2020 divorce action from Suffolk County to New York County. The parties primarily resided in New York County and had a seasonal second home in Suffolk County. In March 2020, due to the pandemic, the wife “retreated to the Suffolk County residence along with her pregnant and immunocompromised daughter and began spending more time there in order to assist the daughter during the pregnancy and after the child’s birth.” The issue, as framed by the Court, is “whether sheltering in place in a seasonal home creates a sufficient degree of permanence to establish residency at that location.” The Second Department reversed, on the law, and granted the wife’s motion for a change of venue pursuant to CPLR 510 and 511, finding that the wife planned to stay in Suffolk County only temporarily and holding that she did not “have the bona fide intent to retain [Suffolk County] as a residence with at least some degree of permanency.