NYSBA FAMILY LAW SECTION, Matrimonial Update, April 2020

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Agreements - Mediator Drafted – Upheld

In Irizarry v. Hayes, 66 Misc3d 1223(A) (Sup. Ct. Monroe Co., Dollinger, A.J., Feb. 5, 2020), the wife commenced a plenary action in late 2018, seeking to set aside a mediator-drafted agreement (a collaboration of a non-attorney mediator and an attorney) signed in September 2016 and incorporated into a November 2016 judgment of divorce, upon the ground of unconscionability, lack of financial disclosure, and overreaching. The husband moved for summary judgment dismissing the wife's rescission claim. The mediator had advised the parties to retain counsel, and the agreement and the divorce affidavits made multiple recitations that the same advice was given. Supreme Court found that the wife raised no triable issue of fact and granted the husband's motion for summary judgment.

Child Support - CSSA – Deviation – Extraordinary Expenses; Non-Monetary Contributions

In Matter of Firenze v. Firenze, 2020 Westlaw 117 NYS3d 910 (4th Dept. Mar. 13, 2020), the father appealed from a June 2017 Family Court order which, following the partial granting of the mother's objections to a Support Magistrate order, set his child support obligation at $1,206.56 semi-monthly. The Fourth

Department affirmed, holding that the father failed to establish that his payment of some of the children's sports equipment and sports registration fees, and for food, lodging and travel associated with some of the games, was "extraordinary" and that the mother's expenses were substantially reduced as a result thereof, which would be required to support a deviation under FCA 413(1)(f)(9)(i). The Appellate Division further held that the father did not prove that his past service as a volunteer coach for the children's sports teams and his decision to travel less for work were "non-monetary contributions toward the care and well-being of the children" within the meaning of FCA 413(1)(f)(5).

Child Support - CSSA - Equally Shared Custody; Over $141,000; Equitable Distribution – Business Loans and Separate Property; Maintenance - Durational

In Alliger-Bograd v. Bograd, 180 AD3d 975 (2d Dept. Feb. 26, 2020), the husband appealed from an April 2017 Supreme Court judgment which, after trial of the wife's 2014 divorce action, awarded the wife certain credits upon equitable distribution, awarded the wife maintenance of $100 per week for 5 years, without providing for termination thereof upon the death of either party or the wife's remarriage, and directed him to pay child support of $633.36 per week plus 72% of add-ons. The parties were married in 1998 and had two children born in 1999

and 2002. The wife was employed by her father and earned $60,060 annually as of the time of trial. The husband was the sole owner of a corporation from which he earned $168,000 per year as of the time of trial. The Second Department affirmed the credits awarded to the wife: $50,000, for her liquidation of premarital stocks used toward the purchase of the marital residence; $66,952.97 for a loan to the husband's business from a home equity line of credit in the wife's sole name, noting that the wife received no award for any interest in said business; and $36,000 for loans she made to the husband's business, funded by liquidation of her premarital stocks. The Appellate Division rejected the husband's argument that the wife was not entitled to maintenance based upon her inheritance of $440,000 of which $320,0000 remained, given that Supreme Court considered the relevant factors, including the length of the marriage and incomes of the parties, modifying only to provide that maintenance would terminate upon the death of either party or the wife's remarriage. As to child support, the Second Department held that Supreme Court properly applied the CSSA to the parties' shared custody arrangement and "on income over the ceiling."

Child Support - CSSA – Imputed Income – Broker Signing Bonus/Loan; College Denied; Life Insurance Denied; Counsel Fees – After Trial; Equitable Distribution – Broker Signing

Bonus/Loan; Maintenance – Durational Guidelines, Life Insurance Denied

In Bell-Vesely v. Vesely, 180 AD3d 1272 (3d Dept. Feb. 27, 2020), the wife appealed from an October 2018 Supreme Court judgment which granted equitable distribution, maintenance to her of $164.86 per month for 7 years, and child support for a daughter born in 1999 of $614.66 per month based upon imputed income to the husband of $49,000, and which denied her further counsel fees and determined that a sum remaining in the husband's brokerage account was his separate property. The Third Department affirmed as to all of the above, modifying only to direct that the husband be ordered to maintain the health insurance for the child which he testified he intended to provide and that the wife's pro rata share (49%) of the premiums be deducted from child support. The parties were married in 1996, had 2 children, one of whom was emancipated, and the wife commenced the divorce action in July 2016. The Appellate Division found that Supreme Court properly imputed $49,000 in income to the husband, even though his 2016 W-2 reported $91,000. The husband received a $350,000 lump sum loan/bonus payment when he joined his employer in January 2012, which he would be required to repay if he left the firm prior to December 2021. The employer testified that the 2016 W-2 included commission income of $49,000 plus a portion of the loan/bonus

amount received in 2012. If the husband remained employed for the requisite time period, the employer would give the husband a bonus credit for the amount owed, effectively offsetting the debt. The husband paid income taxes on the loan/bonus amount each year, and on this basis, the Third Department found no basis to disturb the finding of $49,000 of imputed income. As to the $23,000 in the husband's brokerage account which Supreme Court found to be the husband's separate property, although the funds were received during the marriage and are presumed to be marital property, the Appellate Division found that "the nuance is that the funds came with a hitch[,]" given the proportionate transformation into a debt if the husband did not stay with the employer through December 2021. The Court concluded that given the husband's continued payment of income tax due on the loan/bonus, he "is entitled to retain the funds *** as part of the equitable distribution of marital assets." The Third Department rejected the wife's contention that Supreme Court erred in awarding maintenance for 7 and not 8 years, finding that the 7-year award was within the 6-8 year range provided by the post-divorce maintenance guidelines and that Supreme Court considered the relevant statutory factors. As for the wife's contention that Supreme Court should have provided for college costs, the Appellate Division noted that the daughter was a senior in high school and that "the wife provided no testimony

as to the daughter's intention to enroll in college or her college-related expenses." The Court rejected the wife's contention that Supreme Court erred by not directing the husband to name the wife or daughter as beneficiaries of his life insurance, citing the husband's testimony that he already had life insurance for the daughter's benefit and noting the wife's distributive award, including half the husband's 401k, and concluding that Supreme Court "did not abuse its discretion in failing to direct the husband to maintain life insurance for the benefit of the wife." The Third Department concluded that given "the financial circumstances of the parties, the award of maintenance and the distribution of marital property made herein, *** the court properly" limited the wife's counsel fees to a $6,250 interim award.

Child Support - CSSA – Opt-Out Agreement – Upheld

In Pearce v. Pearce, 66 Misc3d 1223(A)(Sup. Ct. Monroe Co., Dollinger, A.J., Feb. 10, 2020), the parties' agreement, incorporated into a judgment of divorce, recited the father's income and the appropriate percentage to be applied to his CSSA income and stated: "Pursuant to the CSSA, the presumptive amount of child support would be $45 per week." The mother moved to vacate the child support provisions upon the ground of lack of compliance with the opt-out requirements of DRL 240(1-b)(h). Supreme Court denied the mother's motion, finding that the

language in the agreement "clearly provides 'adequate' and 'sufficient' notice to the parties of their respective obligations under the CSSA," citing, among other cases, Spivak v. Spivak, 177 AD3d 660 (2d Dept. 2019).

Child Support - College – Room and Board, Work-Study (Co-op) Credits – Denied

In Matter of Deborah R. v. Dean E.H., 2020 Westlaw 1056521 (1st Dept. Mar. 5, 2020), the father appealed from a February 2019 Family Court order, which denied his objections to a November 2018 Support Magistrate order denying his request for credit against his child support obligation for the child's college room and board expenses and for any income the child earns from his college co-op program. The First Department affirmed, holding that financial aid in the form of work study has no bearing on a parent's college obligations and thus does not result in a credit to the parent. The Appellate Division held that a credit against child support for room and board "is not mandatory but depends on the facts and circumstances ***." The Court noted that the father: contributed more than $400,000 to his own political campaigns; offered to pay $1 million to provide a statue of Billy Joel at the Nassau Coliseum; owns two properties, with one valued at over $2 million; and is currently enrolled in a Columbia University Master's Degree program with annual tuition of $80,000.

Child Support - Enforcement–College–Imputed Income; Pro Rata Shares; Room and Board Credit Denied; Willful Violation Found; Modification – Agreement-Denied-No Substantial Change in Circumstances; Counsel Fees – Enforcement-Willful Violation

In Matter of Susko v. Susko, 2020 Westlaw 1056323 (3d Dept. Mar. 5, 2020), the mother appealed from an October 2018 Family Court order which, following a hearing before a Support Magistrate, dismissed her petition for modification of the child support provisions of an agreement incorporated into a judgment rendered in her 2015 divorce action, and granted her petition for enforcement to the extent of: finding that the father violated (but not willfully) the judgment by failing to make adequate contributions to college expenses, directed him to pay 41% thereof, granting the father a credit against child support, directed him to pay $9,449 of $42,558 in college expenses the mother had paid as of the time of trial, but declined to impute income to the father. The Third Department modified, on the law: (a) by finding that the father's violation was willful, given that he paid 50% of the initial college deposit ($450) and nothing more and that the Magistrate found he had the financial ability to pay, and upholding Family Court's finding that he gave implied consent to the college expenses; (b) by remitting, to a different Support Magistrate, for a determination of mandatory counsel fees to the mother arising from the willful

violation; (c) by imputing $120,000 in income to the father while upholding the finding that the mother's income was $121,856, setting the parties' pro rata shares of college expenses at 50% each and directing the father pay 50% of the $42,558 already expended by the mother; and (d) finding that since there was no specific mandatory language in the separation agreement, the father was not entitled to a credit against child support for room and board expenses. The Appellate Division affirmed the dismissal of the mother's modification petition, noting that the agreement provided that the parties "had standing" to seek modification of the father's obligation upon a showing of substantial change in circumstances or a change of 15% in either party's gross incomes. The Court concluded that "[n]othing in the language of the agreement indicates that the parties intended to deviate from this well-established standard [the Boden-Brescia rules] by *requiring* a de novo calculation of child support whenever a party's income changed by 15%."

Counsel Fees - Custody – Ability to Pay Not a Bar to Award

In Matter of Dean E.H. v. Deborah R., 2020 Westlaw 1465686 (1st Dept. Mar. 26, 2020), the father appealed from an August 2018 Family Court order which awarded the mother $60,000 in counsel fees, as against her request for $85,000. The First Department affirmed, holding that the award was a proper exercise of Family Court's discretion under DRL 237(b) and "the

fact that the mother was able to pay her own attorneys' fees was not a bar to an award of legal fees in her favor."

Counsel Fees - Enforcement – Willful Violation

In Matter of Grace v. Amabile, 117 NYS3d 616 (2d Dept. Mar. 4, 2020), the father appealed from an August 2018 Family Court order, which denied his objections to a June 2018 Support Magistrate order granting the mother's violation and upward modification petitions regarding child support, a money judgment of $3,167.73 and counsel fees of $13,200 in her favor. The Second Department affirmed, holding that Family Court properly granted upward modification upon imputed income of $60,000 to the father and $30,000 to the mother, based primarily upon credibility determinations, and that the father failed to satisfy his burden of showing that his failure to pay child support was not willful. Given the finding of willful violation, counsel fees were mandated by FCA 438(b).

Custody - Bias – Reversed; Forensic – Denied

In Matter of Siegell v. Iqbal, 2020 Westlaw 1435214 (2d Dept. Mar. 25, 2020), the mother appealed from a December 2018 Family Court order which, after a hearing, granted sole legal and physical custody of the parties' child born in February 2018 to the father. The Second Department reversed, on the law and in the exercise of discretion, and remitted for a new hearing before a different judge, with all convenient speed, leaving the

order appealed from in place as a temporary order. The Appellate Division found that Family Court "predetermined the outcome of the case during the hearing and took an adversarial stance against the mother by, among other things, interjecting herself into the proceedings by cross-examining the mother on matters irrelevant to a determination of custody, including referring to the mother as 'emotionally excessive' and inquiring as to how many online dating web sites the mother utilized at the time she met the father and as to when the mother and the father became intimate." The Second Department observed that Family Court's inquiry of the mother exceeded 30 pages of transcript over the two-day hearing. The Appellate Division rejected the mother's contention that Family Court should have *sua sponte* ordered a forensic evaluation, noting that the mother did not request the same and there was no evidence that the father's mental health condition ever negatively impacted his parenting ability or that he was not compliant with his mental health treatment.

Custody - Forensic Objections Denied; Internet Accusations as Factor; Sole Custody; Supervised Visitation

In S.A. v. R.H., 2020 Westlaw 1290703 (1st Dept. Mar. 19, 2020), the mother appealed from: (a) a June 2018 Supreme Court order which, after trial, granted the father sole legal and residential custody and supervised visitation to the mother; and (b) a July 2018 order of the same court which appointed a social

worker to supervise visits and directed the mother to refrain from speaking to the child about court proceedings, making negative comments about the father and others, recording visits and disseminating information about visits on the internet or otherwise. The First Department affirmed, rejecting the mother's objection to the forensic psychiatrist, noting that she failed to object to the use of the report at trial and the appointment was upon her consent, and dismissing her allegations of impropriety arising from the father's payment of the forensic psychiatrist's fees, a provision also contained in the order of appointment. The Appellate Division held that supervised visitation was justified, and that Supreme Court's finding that the mother was responsible for an internet website containing accusations of wrongdoing by the paternal grandfather, the attorney for the child, the psychiatrist and others, was "not based on the court's bias against her, but is the product of its careful deliberations as to her credibility, motives, revenge-oriented temperament, and ability to manipulate others," noting the "broad harm done by the website, including harm to the child."

Custody - Modification – Joint Physical and Legal to Sole – Allergies, Diminished Exercise of Access, Excessive Punishment

In Matter of Reyes v. Fisher, 180 AD3d 1050 (2d Dept. Feb. 26, 2020), the father appealed from a June 2018 Family Court

order which, after a hearing, granted the mother's December 2016 petition to the extent of modifying an August 2013 stipulated order (joint custody, alternate weeks), by awarding the mother sole legal and residential custody of the parties' child born in 2009, with alternate weekends to the father during the school year and alternate weeks in the summer. The Second Department affirmed, noting that: the father did not regularly exercise his parenting time; despite his knowledge of the child's allergies to certain foods and pet dander, he obtained a dog and gave the child foods to which the child is allergic; and his punishment of the child was excessive.

Custody – Relocation (NC) – Granted – Following Self-Help Move

In Matter of McMiller v. Frank, 117 NYS3d 915 (4th Dept. Mar. 13, 2020), the father appealed from a September 2018 Family Court order, which, after a hearing, modified a prior order by permitting the mother to relocate to North Carolina with the child, after she had moved from Syracuse without notice to the father. The Fourth Department affirmed, holding that Family Court properly determined that "relocation would enhance the child[']s life] economically, emotionally and educationally ***."

Custody - Sole – Working Parent Not to be Deprived

In Matter of Gilbert v. Nunez-Merced, 2020 Westlaw 1225082 (4th Dept. Mar. 13, 2020), the mother appealed from a May 2018 Family Court order, which awarded the father sole legal and

residential custody of the parties' child. The Fourth Department affirmed, noting "the mother's efforts to interfere with the father's contact with the child." The Court concluded by rejecting the mother's contention that the father should not have been awarded custody due to his work schedule, holding that "a more fit parent will not be deprived of custody simply because the parent assigns day-care responsibilities to a relative owing to work obligations."

Custody - Third Party – Grandparent Custody – Granted

In Matter of Bruen v. Merla-Profenna, 2020 Westlaw 1056252 (2d Dept. Mar. 4, 2020), the father appealed from an October 2018 Family Court order, which, after a hearing, granted custody of the subject child born in 2009 to the maternal grandmother, with whom the child had resided since June 2011, and denied the father's February 2015 custody petition. The mother had moved out of the grandmother's residence and a neglect proceeding was commenced against the mother in January 2013; the father's prior custody petition was dismissed in December 2013 based upon his lack of stable housing and any way to support the child. The Second Department affirmed, holding that Family Court properly found that the grandmother had standing, based upon 24 continuous months during which the father voluntarily relinquished care of the child, who resided with the grandmother, without financial support from the father, and that

the award of custody to the grandmother was in the child's best interests.

Custody – Third Party – Standing; Tri-Custody Denied

In Matter of Tomeka N.H. v. Jesus R., 2020 Westlaw 1314993 (4th Dept. Mar. 20, 2020), the issue was whether petitioner, the former partner of the mother, has standing to seek joint custody of, and visitation with, the subject child, which would result in a tri-custodial arrangement among the biological mother, the father of the child and her. Petitioner moved into the mother's home before the child was born, was present at the child's birth, lived with the mother until the child was about 18 months old, and even cared for the child after her relationship with the mother ended in the Spring of 2012. Petitioner and the AFC contended that the facts are a natural extension of Matter of Brooke S.B., in that although there was no pre-conception agreement, there was a post-conception agreement between petitioner and the mother to raise the child together. The Fourth Department affirmed Family Court's dismissal of the petition (61 Misc3d 775 [Fam. Ct. Monroe Co. 2019]), but for different reasons, holding that "petitioner cannot establish standing because Domestic Relations Law §70(a) simply does not contemplate a court-ordered tri-custodial arrangement," given the statute's language stating that "either parent" may be awarded custody and related relief, meaning 2 parents and not 3.

The Appellate Division concluded: "We agree with the father that a tri-custodial arrangement raises a host of issues, including child support, that are best left addressed by the legislature." This was a 4-1 split, Justice Winslow dissenting. To the same effect is Matter of Wlock v. King, 2020 Westlaw 1315131 (4th Dept. Mar. 20, 2020).

Custody - UCCJEA – Home State – Yemen

In Matter of Karimah K. v. Bassim A., 66 Misc3d 1217(A) (Fam. Ct. Kings Co., Vargas, J., Feb. 3, 2020), the parties were married in Yemen in September 2002 and had 4 children. They lived in Yemen until 2005. The family traveled frequently back and forth between Yemen and the US and the mother became a US citizen. In the spring of 2016, the family traveled back to Yemen and in September 2016, the father, according to the mother, made a unilateral decision for the family to stay in Yemen. The mother left the home in November 2018 without the children for her brother's residence in a distant Yemeni city, alleging domestic violence. The parties signed divorce documents in Yemen on April 3, 2019 (under duress and literally at gunpoint and knifepoint according to the mother), which gave custody of the 2 older children to the father and the younger girls to the mother; on April 7, 2019, the custody provisions were modified upon the mother's agreement to give the father full custody of all 4 children. The mother came to NY a few days

later, without the children, to be with her parents. Family Court granted the father's motion to dismiss the mother's October 2019 petition for custody, finding that Yemen was the home state since the spring of 2016.

Custody - UCCJEA – NY Declines Jurisdiction; Divorce – NY Inconvenient Forum

In William L. v. Therese L., 66 Misc3d 1228(A) (Sup. Ct. NY Co., Hoffman, J., Feb. 7, 2020), the parties were married in England in 2014 and had a daughter born in London in 2011. The husband is employed by a company whose main office is in London. The parties and child lived in NY from about May 2014 to December 2018, by reason of the husband's employment. The husband's work visa was revoked in December 2018 because of pending domestic violence charges, to which he ultimately entered a plea and which resulted in a 2-year order of protection in favor of the wife. As a result, the wife and daughter (both British citizens) were forced to leave NY and return to England. During the period December 2018 to June 2019, the husband worked in his company's Singapore office. The husband commenced the divorce action in May 2019 and verified his complaint while in London. The wife was served with the Summons and Complaint in July 2019 and moved to dismiss on forum non conveniens grounds as to the divorce action in general (CPLR 327) and on the issue of custody pursuant to the UCCJEA. Supreme

Court granted the motion, analyzing the facts first on the issue of custody, finding that as of May 2019, the child's home state was NY, since the child had not resided in England for 6 months as of that point (DRL 75-a[7]), but still declined to exercise jurisdiction on inconvenient forum grounds (DRL 76-f[1]) noting, among other facts, that the child had been in school in England for over a year at the time of its decision. The Court concluded that the wife demonstrated that litigating the divorce action in NY would be a burden to her, while the husband did not show "that London would be an inconvenient forum for him."

Custody - Visitation–Children's Wishes (13 & 10)-Denial Upheld; No *In Camera* Upheld

In Matter of Stanley G.M. v. Ivette B., 117 NYS3d 568 (1st Dept. Mar. 5, 2020), the father appealed from a September 2018 Family Court order which, after a hearing, dismissed his petition seeking visitation with the then 13 and 10-year-old children, with prejudice. The First Department affirmed, noting that in 2008, when the children were 5 and 2 years old, the father moved to Florida and had not seen or spoken to them in 9 years as of the time of the hearing. The Appellate Division found that the children, who both had special needs which the father had not learned how to address, "expressed a strong preference not to have a relationship with their father," as indicated through the mother's testimony and the AFC's

statements in court.

Custody - Visitation – Children's Wishes (11 & 13); Supervised

In Matter of Georgiou-Ely v. Ely, 2020 Westlaw 1436182 (2d Dept. Mar. 25, 2020), the mother appealed from a December 2018 Family Court order which, after a hearing at which the father failed to appear, dismissed her July 2017 petition to modify a July 2015 consent order (joint legal, residential to mother, unsupervised access to father) so as to award her sole legal and physical custody of the parties' children born in 2005 and 2007, with supervised access to the father. The Second Department reversed, on the facts and in the exercise of discretion, granted the mother's petition and awarded her sole legal and physical custody with supervised access to the father, and remitted to Family Court to establish a schedule for the father. The Appellate Division held that Family Court erred by determining that there was no change in circumstances warranting modification, noting: the children's relationship with the father has deteriorated since the issuance of the custody order; the father had threatened to strike the children with a belt; the father had denigrated the mother in the presence of the children; the children, ages 11 and 13 at the time of the hearing, expressed a strong preference to reside with the mother; and unsupervised parental access with the father would be detrimental to the children at this time.

Equitable Distribution - Artwork – Public Auction Upheld

In Macklowe v. Macklowe, 2020 Westlaw 1173014 (1st Dept. Mar. 12, 2020), the wife appealed from an August 2019 Supreme Court order, which granted the husband's motion to appoint a receiver to coordinate the sale of the parties' art collection at a public auction. The First Department affirmed, rejecting the wife's argument that there should be an internal auction, where each party would submit a sealed bid for each item, which would be awarded to the higher bidder. The Appellate Division noted that it had affirmed Supreme Court's divorce judgment (176 AD3d 470 [1st Dept. Oct. 10, 2019]), which ordered that the art be sold and the proceeds be equally divided. The Court held that the internal auction would not be a sale, but rather, would essentially be an in-kind distribution, and the wife "should not be permitted to relitigate this issue under the guise of an internal auction."