NYSBA FAMILY LAW SECTION, Matrimonial Update, January 2020

By Bruce J. Wagner
McNamee Lochner P.C., Albany

Adoption - Child Born During Marriage; Transitioned Gender

In Matters of A and LU, NY Law Journ. Dec. 13, 2019 at 1, col. 5 (Fam. Ct. Kings Co. Dec. 12, 2019, Ross, JHO), in each of 2 private placement adoption proceedings, the father seeks to adopt a child "who is already legally his by virtue of the child's birth during the father's marriage to the child's mother," with the consent of each of their spouses, the birth mothers of each child. Each child was conceived through an anonymous donor and each father was named on the birth certificate. The fathers in both proceedings "argue that because they have transitioned from female to male gender, their status as legal father remains uncertain depending on where they may be living or traveling with their child and that adoption is necessary as to ensure their parental status and promote their child's best interests." After a hearing, relying upon DRL 73(1)[child born by artificial insemination is "the legitimate birth child of the husband and his wife"], Public Health Law 4103(2)[birth certificate is prima facie evidence of the facts stated therein] and DRL 111-a [each mother filed an affidavit stating that no man is entitled to notice of the proposed adoption], Family Court granted both adoption petitions, noting

that in "a substantial majority of the 192 United Nations member countries, as well as many states within the United States of America, New York State's legal protections of the instant petitioners' parentage of the subject children might not be available to them if they are physically within those jurisdictions and their male gender identity is not recognized – unless they have an adoption decree for their child." Family Court noted the recent amendment to DRL 110, which "prohibits denial of an adoption solely on the basis that a petitioner's parentage, as herein, is already legally-recognized" and that the Governor's press release pertaining thereto stated that the amendment "protects parents whose names were not on the birth certificate, same-sex couples, and parents who had a child through surrogacy from being denied an adoption when the parent petitioning is already recognized as the child's parent." Family Court found that while the petitioner fathers "do not match the types of parents specifically described in the press release ***, the facts underlying these proceedings raise the potential that the families will not be treated with the fairness and equality envisioned" in the press release.

Agreement – Separation-Voided by Cohabitation; Counsel Fees – After Trial; Equitable Distribution – Security-Life Insurance, Money Judgment, QDRO; Violation Automatic Orders; Wasteful Dissipation

In Martin v. Martin, 2019 Westlaw 7173295 (3d Dept. Dec. 26, 2019), the wife appealed from a November 2018 Supreme Court judgment which, after trial of the wife's October 2015 divorce action, determined that the parties' 2005 separation agreement providing for distribution of their assets was void, distributed marital assets and debts, and awarded $25,000 in counsel fees to the husband. The parties were married in 1991 and continued to live together following the 2005 agreement until 2015, during which time they filed joint tax returns, maintained a joint checking account and credit cards and lived as a married couple. Supreme Court credited the husband's testimony that the parties only signed the 2005 agreement so that the wife could take out more college loans for her daughters from a previous marriage. The Third Department held that the parties maintained the marital relationship and "manifest[ed] an intention to void the agreement in its entirety." Regarding Supreme Court's wasteful dissipation findings: as to $15,000 transferred to the wife's account around the October 2015 commencement date, the Appellate Division determined that Supreme Court improperly charged the wife with dissipation in that said sum was paid to her attorney; with respect to the wife's use of marital assets to pay her daughter's car loan, the Third Department again rejected a credit to the husband given trial testimony, including his own, that the wife used the vehicle during the period in question and

sold it; and the Court upheld a credit to the husband for marital funds the wife obtained from a home heating oil escrow account after the commencement of the action, in violation of the automatic orders. The Appellate Division affirmed, as security for payment of the husband's distributive award: a $150,000 life insurance policy, a money judgment and a QDRO so that those monies could be deducted from the wife's pension. The Third Department upheld the $25,000 counsel fee award to the husband, based upon: his status as the less monied spouse; the relative merits of the parties' legal claims; the legal services rendered; and what Supreme Court characterized as "the wife's efforts to use her superior knowledge of the parties' finances 'to obtain leverage' over the husband."

Child Support - CSSA – Imputed Income; Over $148,000

In Matter of Fanelli v. Orticelli, 2019 Westlaw 6519694 (2d Dept. Dec. 4, 2019), the father appealed from a July 2018 Family Court order, which denied his objections to a March 2018 Support Magistrate order rendered after a hearing upon the mother's 2017 petition for upward modification of child support established by a 2013 judgment ($2,400 per month), directing him to pay $3,525 per month toward the support of the two children. The father argued that Family Court erred in determining his income and failed to explain the application of the CSSA to the combined parental income in excess of $148,000. Initially, upon the

father's appeal, the Second Department remitted to Family Court "to enable the Support Magistrate to set forth the factors she considered and the reasons for her determination." 170 AD3d 831, 832 (2d Dept. Mar. 13, 2019). The Appellate Division found that upon remittitur, the Support Magistrate provided "multiple reasons for her determination, including: the father's testimony that he had desired the children to engage in additional activities; the children's participation in those activities; the cost of the children's orthodontic care; the mother's expenses of $595.66 per month to repay a personal loan that she had taken to meet the 'debts and bills for the children' due to her income shortfall; the mother's added living expenses due to the father's failure to exercise parental access with the children since December 2015; the parties' agreement in their amended stipulation of settlement to deviate from the application of the CSSA 'to permit their children to enjoy a better standard of living'; the mother's monthly income was insufficient to pay for the children's monthly household expenses; the father's income; the father's expenses, including those that were tax deductible; the father's reimbursement, through his employer, for airfare, hotel, mileage, and meal expenses; the mother's 'concession that the basic child support would be reduced by her pro rata share contribution towards the cost of medical, dental and optical insurance attributed to the

children'; and the mother's gross income of $60,519.18 'being substantially less' than the father's gross income of $192,191.04. Based upon these additional findings of fact, we agree with the Family Court's determination to deny the father's objections to the Support Magistrate's order." As to the issue of imputed income, the Second Department held that "it was not error for the Support Magistrate to impute to the father the income of the father's current spouse," based upon FCA 413(1)(b)(5)(iv)(D) [imputed income may include "money, goods or services provided by relatives and friends."]

Child Support - CSSA–Over $143,000; Counsel & Expert Fees – After Trial; Maintenance - Durational

In Klein v. Klein, 2019 Westlaw 6720490 (2d Dept. Dec. 11, 2019), the husband appealed from a March 2017 judgment of divorce, rendered upon a November 2016 decision after trial of the wife's June 2012 divorce action, which among other things, imputed $450,000 in income to him and awarded child support in excess of the $143,000 cap, directed him to pay maintenance to the wife of $5,000 per month for 7 years, and awarded the wife $140,000 in counsel fees and $36,000 in expert witness fees. The parties were married in November 1987 and had 6 children. The Second Department affirmed, sustaining the imputed income determination and holding that the calculation of child support upon combined parental income in excess of $143,000 "is

adequately supported by the record." As to maintenance, the Appellate Division found that "Supreme Court considered the relevant statutory factors and providently exercised its discretion." The Court concluded that the counsel and expert fee awards were proper, "considering the disparity of income between the parties, the relative merits of the parties' positions, and the [husband's] conduct that delayed the proceedings."

Counsel Fees – Custody Standing; Custody - Third Party–Equitable Estoppel Factors

In Matter of Kelly G. v. Circe H., 2019 Westlaw 6869009 (1st Dept. Dec. 17, 2019), petitioner appealed from a January 2019 Supreme Court order [62 Misc3d 1219(A) (Sup. Ct. NY Co., Nervo, J., January 18, 2019)] which, upon remand from the Appellate Division [163 AD3d 67 (1st Dept. June 26, 2018)], set forth criteria to establish equitable estoppel and granted respondent $200,000 in interim counsel fees without prejudice to further application (reserving decision on respondent's application for outstanding counsel fees pending a hearing), and from a separate January 2019 order of the same court, which directed petitioner to pay 100% of the costs for an attorney for the child and for a neutral forensic evaluator. The First Department affirmed both orders. The Appellate Division found that petitioner's appeal "raises an issue of first impression for this Court, that is, whether in a proceeding to establish standing to assert parental

rights in seeking custody under Domestic Relations Law §70 (citation omitted), the court has discretion to direct the 'more monied' party to pay the other party's counsel and expert fees under Domestic Relations Law §237 before that party has been adjudicated a parent. We find that it does." The First Department observed that neither DRL 237 nor DRL 70 define the term "parent," but noted that the Court of Appeals has stated that it "has gone to great lengths to escape the inequitable results dictated by a needlessly narrow interpretation of the term parent," citing Matter of Brooke SB v. Elizabeth ACC, 28 NY3d 1, 24 (2016). Upholding Supreme Court's counsel fee order, but without determining that petitioner is a parent for purposes beyond DRL 237(b), the Appellate Division concluded that "highly inequitable results would flow in this case from permitting the party with far greater resources to seek custody as against the child's primary parent without allowing that parent to seek counsel fees." The First Department disagreed with petitioner's contention that Supreme Court's "articulation of 11 estoppel factors to be considered at trial creates a heightened burden for her to meet by clear and convincing evidence when the appropriate analysis has already been well-established by precedent." Rather, the Appellate Division found that "the factors enumerated by the motion court encompass criteria proposed by both parties and closely track evidence relied upon

in other cases," citing Matter of Shondel J. v. Mark D., 7 NY3d 320 (2006) and Matter of Chimienti v. Perperis, 171 AD3d 1047 (2d Dept. 2019), lv denied 33 NY3d 912 (2019). The First Department noted that Supreme Court "identified estoppel factors at the parties' urging 'in order that any appointed forensic expert, as well as all others concerned with the orderly progression of this matter, [may] be properly guided.'" The Appellate Division concluded that Supreme Court, as *parens patriae,* has the authority to direct petitioner to pay the fees for the attorney for the child and the neutral forensic evaluator, and "in light of the disparate financial positions of the parties, *** the motion court appropriately exercised its discretion in allocating the fees, particularly since each order is subject to reallocation."

Custody - AFC – Failure to Appoint Reversed

In Matter of Marina C. v. Dario D., 177 AD3d 1228 (3d Dept. Nov. 27, 2019), the father appealed from a July 2018 Family Court order which, after a hearing, granted the mother's November 2017 petition to modify a September 2017 stipulated order (joint legal custody, 5 of 14 nights to the father, plus other terms) so as to grant her sole legal and primary physical custody of the parties' child born in 2013, with visitation to the father 4 out of every 5 weekends (Friday-Sunday), plus other time. The Third Department modified, on the law, by reversing

so much of the order as granted the mother's petition, and remitted for a new hearing, without reaching the merits, upon the ground that Family Court's failure to appoint an AFC was an improvident exercise of its discretion, especially where, as here, the child had an AFC in the proceeding which resulted in the September 2017 order.

Custody - Domestic Violence - Not Limited to Physical; Temporary Modification Reversed

In Matter of Andreija N. (Michael N.), 177 AD3d 1236 (3d Dept. Nov. 27, 2019), DSS appealed from a May 2019 Family Court order which, on the first day of trial in an Article 10 proceeding against the father (the mother had filed a custody modification petition in August 2018) and before any testimony had been taken, modified a July 2018 stay away order of protection, which had prohibited any contact between the father and the subject child born in 2012. The order appealed from allowed the father to exercise unsupervised visitation, comparable to the terms of a stipulated May 2018 order, which the mother was seeking to modify by her aforesaid August 2018 petition. DSS argued that Family Court abused its discretion by modifying the stay away order. The Third Department agreed, noting that the psychologist's reports (November 2018 and May 2019) were received into evidence upon consent, but DSS "was not precluded from subpoenaing the psychologist for purposes of

cross-examination" and "intended to call the child's therapist as a witness." The Appellate Division found that DSS' petition "speaks to specific acts of sexual abuse, as well as the emotional stress on the child resulting from respondent's threatening behavior towards the mother." The psychologist's report: stated that the mother perceives the father as "dangerous and threatening" but did not produce any documentary proof of violence; characterized the father's "behavior and statements [as] unconventional"; and noted that "he has never been violent or caused harm to [the child] or [the mother]." The Third Department concluded: "Our concern with these observations is that domestic violence is not limited to physical violence. In our view, respondent's behavior and threats were alarming and demonstrated a concerted effort to control and coerce the mother and others who were associated with this custody case. As such, we believe that respondent's unabashed behavior evinced the hallmarks of domestic violence and should not have been diminished as simply 'unconventional' (citations omitted)." The Court noted that the father "threatened multiple judges, posted on social media prior to an appearance that he was 'getting ready to f*** up some justice and go to jail tomorrow,' posted a photo of himself pointing a rifle equipped with a scope – in violation of the stay-away order of protection – and posted, the night before the child's interview with the psychologist, 'I

know where and when so I'm packed up and ready to take back what's mine tomorrow. Thoughts and prayers.'"

Custody – Modification – Drug Conviction

In Matter of Jamiyla SJ v. Kenneth D, 2019 Westlaw 7173931 (1st Dept. Dec. 26, 2019), the mother appealed from a January 2018 Family Court order which, after a hearing, dismissed her petition for custody modification. The First Department reversed, on the law, reinstated the petition and remitted for a best interests hearing. The Appellate Division held that the mother demonstrated changed circumstances warranting modification of the parties' shared custody stipulation, based upon the father's post-stipulation failure to disclose to her his convictions on drug charges and his court-mandated admission to a drug treatment facility.

Custody - Modification – Hearing Needed

In Katsoris v. Katsoris, 2019 Westlaw 6720505 (2d Dept. Dec. 11, 2019), the mother appealed from a November 2018 Supreme Court order which, without a hearing, granted the father's June 2018 motion to modify the custody provisions contained in a February 2018 stipulation incorporated into a May 2018 judgment of divorce. The parties were married in 1996 and have 3 children, the youngest of whom was born in 2010. Their February 2018 stipulation provided for shared residential custody of the youngest child and that their named family specialist could

submit written recommendations to the court. The father's June 2018 motion alleged that the mother threatened him with physical harm in the presence of the youngest child and that said child "was distressed by an upcoming increase in the [mother's] parental access and had developed a twitch." The mother's opposition alleged that the child's reluctance to spend time with her was due to the father's actions. The attorney for the child supported the father having primary residential custody. The family specialist submitted a September 2018 report which stated that no changes should be made, but then recommended in a November 2018 report that the mother's time with the child be reduced to 8 hours per week in the presence of "a therapeutically trained professional." Supreme Court's November 2018 order implemented the latter recommendation of the family specialist. The Second Department reversed, on the law, and remitted to Supreme Court for an expedited hearing, holding that while the father made the necessary showing entitling him to a hearing on his modification motion, Supreme Court "relied solely on information provided at court conferences and the hearsay statements and conclusions of the family specialist, whose opinions and credibility were untested by either party." To the same effect, reversing an order which partially granted a post-judgment motion to modify custodial terms without a hearing (also directing the appointment of an AFC), is Walter v. Walter,

2019 Westlaw 6884758 (2d Dept. Dec. 18, 2019).

Custody - Modification – Joint to Sole–Alienation; Child's Wishes; Counseling Directive

In Matter of Krier v. Krier, 2019 Westlaw 7043498 (4th Dept. Dec. 20, 2019), the mother and the AFC appealed from an April 2018 Family Court order, which, following a hearing, modified a prior order by awarding sole legal and physical custody of the then 15-year-old child to the father. The Fourth Department affirmed the custody determination, noting that the father, who had not seen the subject child in the 4 years since the parties' divorce, due to the child's refusal of contact, established the requisite change of circumstances, based on both "the expert testimony that the child was demonstrating elements of parental alienation (citation omitted) and 'the continued deterioration of the parties' relationship' (citations omitted)." Regarding the child's wishes, the Appellate Division found that Family Court properly determined that the same were not entitled to great weight, "inasmuch as the child was so profoundly influenced by his mother 'that he cannot perceive a difference between' the father's abandonment of the marriage and the father's abandonment of him and that it was in the child's best interests to reside with the father despite his wishes to the contrary (citations omitted)." The Fourth Department concluded that Family Court "did not err in including a directive that the

mother obtain counseling as a component of the order on appeal inasmuch as the court did not 'order such counseling as a prerequisite to custody or visitation' (citation omitted)."

Custody - Modification – Joint to Sole – Inadequate Housing; No Overnights

In Matter of Ellen TT v. Parvaz UU, 2019 Westlaw 7173418 (3d Dept. Dec. 26, 2019), the father appealed from a December 2017 Family Court order which, after a hearing, modified a July 2008 stipulated order (joint legal custody, primary to mother) by granting sole legal and physical custody of children born in 2002 and 2005 to the mother. The Third Department affirmed, but reversed overnight visitation upon the mother's consent and instead prohibited all overnight visitation, and allowed the father to petition for the same upon a showing of change in circumstances. The Appellate Division noted that the father and his wife live in a basement beneath a small convenience store they operate in Brooklyn, along with their two children ages 22 and 20, with "no satisfactory bathroom or sleeping facilities" and they use "a restroom on the first floor that is accessible to customers and bathe by using a hose and a bucket in an area of the basement that has no drain and affords no privacy." The Court further observed that the father's "entire family – which consists of six people when the children are visiting – sleeps on two mattresses placed on the floor" and that the father: "was

unable to provide guidance for the children's emotional and intellectual development"; "did not spend time with the children during visits"; and "is unable to engage in appropriate parent-child conversations."

Custody - Relocation – Motion to Dismiss Denied

In Matter of Johnston v. Dickes, 2019 Westlaw 7043878 (4th Dept. Dec. 20, 2019), the mother appealed from a February 2018 Family Court order, which granted the father's motion to dismiss her petition seeking to relocate with the parties' child to the Honeoye Falls-Lima Central School District or Livingston County. A prior consent order provided for joint legal custody, primary residence to mother and restricted the mother's residency to certain towns within Monroe County. The Fourth Department reversed, on the law, denied the father's motion, reinstated the petition and remitted to Family Court for a hearing and a determination pursuant to the Tropea factors. The Appellate Division held that the mother was not required to show changed circumstances because she was seeking relocation. The Court found that the mother adequately alleged: relocation was in the best interests of the child due to the lower cost of housing in Livingston County; her father would be able to assist her with childcare, allowing her to return to work; and that the relocation would not interfere with the father's visitation.

Custody - Sole – Unfounded Sexual Abuse Allegations; Supervised

Visitation Upheld

In Matter of Ballard v. Piston, 2019 Westlaw 7045283 (4th Dept. Dec. 20, 2019), the mother appealed from a January 2018 Family Court order which, after a hearing, awarded sole legal and primary physical custody of the children to the father and directed that the mother's visitation be supervised until she completes a counseling program. The Fourth Department affirmed, finding that "the record establishes that the mother made multiple unfounded allegations of sexual abuse against the father, and that she subjected the parties' oldest child to repeated unnecessary physical examinations by numerous individuals" and upholding the directive for supervised visitation. The Appellate Division held that joint legal custody was not appropriate due to the parties' acrimonious relationship and inability to communicate with each other in a civil manner.

Custody - Third Party – Standing; Visitation Granted

In Matter of Heather NN v. Vinnette OO, 2019 Westlaw 7173471 (3d Dept. Dec. 26, 2019), both parties appealed from a May 2018 Family Court order which, following a hearing upon petitioner's 2016 petition, found standing and granted sole legal and physical custody to respondent and graduated, initially therapeutically supervised, visitation to petitioner. Respondent is the biological mother of a female child born in 2008 and conceived by artificial insemination during a same-sex

relationship with petitioner, with whom she lived beginning in 2005. The parties separated in 2009 when the child was about a year old. Petitioner had visitation until respondent terminated her access in 2010. The Third Department affirmed Family Court's standing and custody determinations but modified the visitation provisions only by providing a selection method for a therapeutic counselor and directing that the child shall attend 3 sessions alone with the counselor, before being joined by petitioner. The Appellate Division held that "the parties planned jointly for the child's conception, participated jointly in the process of conceiving the child, planned jointly for her birth, and planned to raise her together" and concluded that "petitioner satisfied her burden to prove by clear and convincing evidence that she and respondent entered into an agreement to conceive the child and raise her as co-parents" as required by Matter of Brooke S.B.

Custody - Visitation – Supervised – Upheld; Family Offense – Aggravated Harassment 2d

In Matter of Paliani v. Selapack, 2019 Westlaw 7044579 (4th Dept. Dec. 20, 2019), the mother appealed from an April 2018 Family Court order which among other things, granted an order of protection, upon a finding that she committed aggravated harassment in the second degree, and provided that she shall have only supervised visitation with the subject child. The

Fourth Department affirmed, finding the father proved that after he was awarded sole custody, "the mother called him and told him that if he took the child away from her, she would kill herself and the child." The Appellate Division upheld the supervised visitation directive, finding that the record established that "the mother's behavior, including threatening and making disparaging remarks about the father and attempting to limit his involvement with the child, was harmful to the child's relationship with the father."

Equitable Distribution -Reimbursement for Non-Marital Obligation Denied; Evidence –Best Evidence Rule

In Mutlu v. Mutlu, 177 AD3d 979 (2d Dept. Nov. 27, 2019), the husband appealed from an October 2016 Supreme Court judgment rendered after trial of the wife's November 2013 divorce action, which, among other things, granted her motion to enforce the parties' February 2008 postnuptial agreement and for a $4,500 money judgment against him, as reimbursement to her for payment of the husband's brother's immigration bond. The Second Department reversed the judgment, on the law and the facts, denied the wife's motion to enforce the postnuptial agreement and for a money judgment and remitted to Supreme Court for a new determination relating to equitable distribution. Supreme Court received a copy of the agreement into evidence, based upon the wife's claim that she did not have the original, did not know

its whereabouts and believed it had been lost or stolen, over the husband's objection that he did not sign the document and that none of the signatures were his. The Appellate Division held: "Given the significance of the postnuptial agreement to the issues of equitable distribution, the defendant's allegations that his purported signature on the document was forged, and the plaintiff's failure to adequately explain the unavailability of the original document, we disagree with the Supreme Court's determination to admit a copy of the document into evidence (citations omitted) ***." Regarding the money judgment, the Second Department, citing Mahoney-Buntzman, 12 NY3d at 421, noted that "where the payments are made before either party is anticipating the end of the marriage, and there is no fraud or concealment, courts should not look back and try to compensate for the fact that the net effect of the payments, may, in some cases, have resulted in the reduction of marital assets."

Family Offense - Harassment 2d

In Matter of Diane E. v. Lynette E., 2019 Westlaw 7173309 (3d Dept. Dec. 26, 2019), respondent daughter appealed from a November 2018 Family Court order which, after a hearing upon her mother's June 2018 family offense petition, found that she had committed harassment 2d and granted an order of protection. The daughter resided with her boyfriend and children in a second-

floor apartment at the mother's home. The Third Department affirmed, noting that the mother's testimony, credited by Family Court, described a variety of conduct by the daughter following a dispute over household expenses, including: spraying pesticide into the mother's eyes; striking her in the head with a broom handle; throwing a lightbulb at the mother's head; shoving the mother forcefully into a washing machine; surveilling her telephone calls; referring to the mother and her friends in vulgar terms; and threatening to kill her and cut her body up. The Appellate Division held that the daughter engaged in a course of conduct that had no legitimate purpose which was meant to and did "alarm or seriously annoy" the mother, thus satisfying the definition of harassment 2d as provided by Penal Law 240.26(3).

Legislation –Adoption-Where Parentage Already Legally Recognized

DRL 110 is amended, **effective September 16, 2019**, to provide that a petition to adopt, "where the petitioner's parentage is legally-recognized under New York State law shall not be denied solely on the basis that the petitioner's parentage is already legally-recognized." A.00460/S.0399, L. 2019, Ch. 258.