NYSBA FAMILY LAW SECTION, Matrimonial Update, July 2020

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COURT OF APPEALS NOTE: In Cole v. Cole, 2020 Westlaw 3420803 (June 23, 2020), the Court of Appeals held that defendant wife "failed to preserve her arguments" regarding DRL §240(1)(a) and "[a]s a result, the parties never litigated, and Supreme Court did not pass upon, or make any findings with respect to, whether a withdrawn family offense petition constitutes a 'sworn petition' for purposes of this statute or whether defendant proved her allegations of domestic violence 'by a preponderance of the evidence' (Domestic Relations Law §240[1][a]) – issues that are essential to the arguments defendant now raises. Record evidence supports the affirmed custody award." This appeal was handled as an "SSM" (*sua sponte* examination of the merits) and a 5-judge majority joined in the brief unsigned memorandum. Judge Rivera wrote a lengthy dissenting opinion, in which Judge Wilson concurred. The Appellate Division decision is reported at 172 AD3d 680 (2d Dept. May 1, 2019).

Agreements - Postnuptial – Statute of Limitations

In Washiradusit v. Athonvarankul, 2020 Westlaw 3443008 (2d Dept. June 24, 2020), the wife appealed from an April 2017 Supreme Court order which granted the husband's October 2016 motion to enforce, and denied the wife's cross-motion to set

aside, a November 2002 postnuptial agreement. The wife commenced the divorce action in November 2011 and the husband answered, seeking spousal maintenance and counsel fees. Neither party's pleadings asserted any claims regarding the postnuptial agreement, which governed the disposition of certain marital real property. The Second Department reversed, on the law, and denied the husband's motion, holding that Supreme Court erred by applying the 6-year statute of limitations (CPLR 213[2]) instead of the 3-year statute provided by DRL 250 and which is tolled until process has been served in a matrimonial action. Given that the husband did not assert his claim to enforce the prenuptial agreement until more than 4½ years after he was served with process, his claim is untimely and the wife's motion to set aside the agreement should have been denied as academic.

Attorney & Client - Disqualification – Denied; Disclosure – Letters Rogatory

In Azria v. Azria, 2020 Westlaw 2951103 (1st Dept. June 4, 2020), the wife appealed from: (1) a September 2019 Supreme Court order which denied her motion for the issuance of letters rogatory in order to depose the husband's brother in France; and (2) from a November 2019 order of the same court which denied her motion to disqualify the husband's attorney. The First Department affirmed both orders, holding that the wife did not show that the information she sought through an international

deposition, concerning loans the husband received from a trust, of which he and his brother were co-trustees, was "crucial" and, further, that she "failed to show why she does not already have the necessary information for the imputed income argument she hopes to make," given that the husband had already produced the trust account statements for the entire time period she requested." As to the motion to disqualify, the wife had a meeting in 2016 and some follow up phone calls with a partner at the husband's counsel's law firm but did not retain the firm. The Appellate Division found that the wife "fails to show that the partner with whom she met received information from her that could be significantly harmful to her in connection with the [firm's] representation of her husband" and that "the financial information she shared with the partner would have been subject to discovery and was already known to the husband."

Attorney & Client - Disqualification – Granted

In Matter of Blauman-Spindler v. Blauman, 2020 Westlaw 3067363 (2d Dept. Jun. 10, 2020), the paternal grandmother appealed from a June 2019 Family Court order, which granted the father's motion to disqualify her attorney, upon the ground that the attorney had defended the father on assault and drug charges, prior to the grandmother's March 2019 petition seeking custody of her grandchild, alleging domestic violence between the mother and father and that both parents were drug users. The

Second Department affirmed, holding that "the father established that the attorney's prior representation of him created a substantial risk of prejudice such that the appearance of a conflict of interest was sufficient to warrant disqualification."

Child Support - CSSA – Deviation Denied (4/3 Schedule)

In *Matter of Jennifer VV v. Lawrence WW.*, 183 AD3d 1202 (3d Dept. May 28, 2020), the father appealed from a December 2018 Family Court order which granted the mother's petition to modify the child support provisions of an August 2015 agreement incorporated into an October 2015 judgment of divorce, pertaining to the parties' two children born in 2008 and 2012. The judgment provided for equally shared physical custody and a mutual waiver of child support. In March 2018, Family Court modified the custody order to a 4-night/3-night schedule in favor of the mother, who sought child support modification shortly thereafter. The father's presumptive CSSA obligation for the two children, based upon the mother's imputed income ($52,000) and the father's income ($82,774) was $361.71 per week. The Support Magistrate had directed a downward deviation to $150 per week, based upon the fact that the father had the children "almost half the time." Family Court overturned the Support Magistrate, finding the deviation unwarranted, noting that the amount was "significantly less than what the [CSSA]

guidelines are for even one child." The Third Department affirmed, noting that the father testified that: his daily expenses had "not really" changed since the March 2018 custody order; he regularly incurs certain lifestyle expenses, such as dining out as restaurants "many days a week," spending up to $80 per month on lottery tickets; he withdraws large amounts of cash in order to bet on various games and sporting events; and he "has not considered changing his lifestyle to reduce his discretionary expenses."

Child Support - UIFSA – Continuing Exclusive Jurisdiction

In Matter of Susan A. v. Christopher O., 2020 Westlaw 3086572 (1st Dept. June 11, 2020), the mother appealed from a September 2018 Family Court order denying her objections to a Support Magistrate Order, which, after a hearing, found a lack of continuing jurisdiction over a 2011 child support order and dismissed her June 2018 petition for upward modification. The First Department affirmed, finding that the father resides in Texas and that the mother and child no longer resided in NY as of January 2017, and in fact, resided in Rhode Island. The Appellate Division noted that even if the father consented to NY jurisdiction by filing a modification petition (FCA 580-205[a][2]), there was no competent evidence adduced as to the child's needs as required to establish changed circumstances.

Counsel Fees – Family Offense; Family Offense – Harassment 2d & Violation – Found

In Matter of Cheryl H. v. Clement H., 183 AD3d 533 (1st Dept. May 28, 2020), the husband appealed from a December 2017 Family Court order which, after a hearing, found that he violated a temporary order of protection and committed harassment 2d (PL 240.26(1)], granted the wife a 2-year order of protection and directed the husband to pay her counsel fees of $2,275. The First Department affirmed, holding that the wife established that the husband willfully violated the temporary order of protection through her testimony that he slapped her in the face in November 2015, after she refused to discuss reconciliation. The Appellate Division upheld the counsel fee award as a provident exercise of discretion (FCA 846-a), especially in view of the court's finding that the husband "was evasive and incredible as to his finances."

Custody-Discipline; Forensic Outdated; Unilateral School Removal

In Matter of Dawn S. v. Michael L.Y., 2020 Westlaw 3086480 (1st Dept. June 11, 2020), the mother appealed from a May 2018 Family Court order which, after a hearing, awarded sole legal custody of the children to the father, with visitation to the mother. The First Department affirmed, noting that the mother "exhibited poor judgment when she made the unilateral decision to remove one of the children from his school and enroll him in

a different school without notice to the father" and had "allowed her boyfriend to discipline the children in an inappropriate manner." The Appellate Division concluded that Family Court appropriately determined that the forensic expert's report, issued more than 2 years prior to the conclusion of the trial, was unsupported by the record.

Custody - Domestic Violence – Failure to Consider – Reversed

In Matter of Michael R. v. Pamela G., 2020 Westlaw 3272727 (1st Dept. June 18, 2020), the mother appealed from a June 2019 Family Court order which, after a hearing, granted sole legal and physical custody of the parties' child to the father, with visitation to her. The First Department reversed, on the law and the facts, and remanded for further proceedings. The Appellate Division held that Family Court failed to determine whether the mother had established, by a preponderance of the evidence, "that the father had committed acts of domestic violence against her and, if she met this burden, the effect of such domestic violence upon the best interests of the child," as required by DRL 240(1)(a). The mother testified that the father "grabbed her by the hair and pulled her finger back, causing her nail to break."

Custody - Failure to Support; Interference; Medication Refusal; Work Schedule

In *Matter of Johnell E.K. v. Fatima T.*, 123 NYS2d 485 (1st Dept. June 4, 2020), the mother appealed from an October 2016 Family Court order which, after a hearing, granted the father sole legal and physical custody of the parties' child and denied her petition. The First Department affirmed, noting that the child has lived with the father since October 2014 and he takes care of her physical, emotional, educational and medical needs. In contrast, the Appellate Division found that the mother: "provided little or no financial support and has an unpredictable work schedule"; "continually interfered with the father's access to the child"; and "did not initially believe the child's asthma diagnosis and refused to administer the prescribed medication."

Custody - Modification – Order Delegating Visitation

In Matter of Paul JJ. v. Heather JJ., 2020 Westlaw 3271765 (3d Dept. June 18, 2020), the father, a Virginia resident, appealed from July 2018 and February 2019 Family Court orders which dismissed his petitions seeking modification of the custody provisions of a June 2007 Connecticut divorce judgment he registered in June 2017, following the mother's December 2016 relocation to New York with the parties' youngest child born in 2002, upon the ground that he failed to show a sufficient change in circumstances. The Connecticut judgment awarded sole custody to the mother and directed that the father "shall have no

visitation with the minor children, except at the discretion of the [mother] and initiated only by the [mother].” The father contended that this provision, which would not be valid under NY law as an unauthorized delegation of the court’s authority to determine visitation, was not enforceable and excused him from meeting a burden of showing a substantial change in circumstances. The Third Department disagreed, holding that the UCCJEA requires NY courts to recognize and enforce the CT judgment as having been rendered substantially in conformity with the UCCJEA, DRL 77-b(1), and further, the father was required to show a change in circumstances.

Custody -Modification– Joint to Sole– Breakdown of Relationship; Child’s Wishes (14 y/o)

In Matter of Zhao v. Rong, 183 AD3d 895 (2d Dept. May 27, 2020), the mother appealed from a March 2019 Family Court order which, after a hearing, granted the father’s May 2017 petition to modify an August 2013 custody order (joint legal, primary to mother) and granted him sole legal and physical custody of the parties’ child born in 2005. The Second Department affirmed, holding that “the breakdown of the relationship between the mother and the child, which resulted in the child not wanting to live in the mother’s home,” constituted the requisite change in circumstances. On the issue of best interests, the Appellate Division found no reason to disturb Family Court’s custody award

to the father or its finding that the mother's testimony was not credible. The Court noted that the child, age 14 at the time of the hearing, expressed a wish to live with the father and while not controlling, "the child's age and maturity make her input particularly meaningful."

Custody - Relocation (NC) – Granted

In Matter of James TT. V. Shermaqiae UU., 2020 Westlaw 3271713 (3d Dept. June 18, 2020), the father appealed from a December 2019 Family Court order, which granted the mother's May 2018 petition to relocate to North Carolina with the parties' child born in 2016 and dismissed his January 2018 petition seeking to prohibit such relocation. The Third Department affirmed. An October 2017 order provided for joint legal custody, primary physical custody to the mother and at least two weekends per month to the father, from 9 am on Saturday to 7 pm on Sunday, plus other times as agreed between the parties. A stipulated February 2018 temporary order permitted the relocation, pending a hearing in the event the mother did not return to NY by May 31, 2018; she did not and filed a relocation petition that same month. The Appellate Division found that the mother met her burden of showing that relocation was in the child's best interests, by proving that she would be better able to provide financially for the child through her new employment (she had lost her job in NY) and due to the lower cost of

living, was able to afford a two-bedroom apartment allowing the child to have her own room, which was not the case in NY. In addition, the maternal grandmother was available to assist with child care; in NY, the mother proved that the father was often not available to assist with child care when, for example, the child was ill and had to stay home from day care, causing the mother to accrue numerous work absences which led to the loss of her employment and to her being upon the verge of eviction from her one bedroom apartment.

Custody – Third Party – Grandparent

In Matter of Mumford v. Milner, 183 AD3d 893 (2d Dept. May 27, 2020), the mother appealed from a February 2019 Family Court order which, after a hearing, granted the maternal grandmother's August 2017 petition for sole legal and physical custody of the subject child born in 2006. The Second Department affirmed. The child lived with the mother and grandmother in the grandmother's home from his birth until 2012, when the mother moved out after an argument and thereafter visited the child on weekends and returned to live with them for 2 months in 2016. The mother removed the child from the grandmother's home in September 2017, which caused Family Court to award temporary custody to the grandmother in October 2017. The Appellate Division noted that the hearing testimony established that the grandmother was the child's primary caregiver and had standing under DRL 72(2)(b)

inasmuch as the mother "voluntarily relinquished care and control of the child for more than 24 months" and "assumed the role of a noncustodial parent." The Court concluded that the record supported Family Court's award of sole custody to the grandmother as being in the child's best interests.

In Matter of Terry PP. v. Domiyon PP., 2020 Westlaw 2951035 (3d Dept. June 4, 2020), the maternal grandmother appealed from an April 2018 Family Court order which dismissed her custody petition and awarded sole legal and physical custody of a child born in 2016 to the paternal grandmother. The mother was tested positive for drugs during her pregnancy and the child also tested positive for drugs at birth and was hospitalized. DSS removed the child from the custody of the parents; they admitted neglect in an Article 10 proceeding and consented to the paternal grandmother having custody. Both parents were incarcerated. The Third Department affirmed, noting that: the child has been in the paternal grandmother's care for most of his life; she provided a stable home; and was employed.

Custody - UCCJEA – NY Inconvenient Forum (CA)

In Matter of Coia v. Saavedra, 2020 Westlaw 3162911 (4th Dept. June 12, 2020), the father appealed from a March 2019 Family Court order, which granted the mother's motion to dismiss his custody modification petitions upon the ground of inconvenient forum under DRL 76-f. The father filed the

petitions after the mother moved to California with the parties' 5-year-old child without informing him. He was incarcerated at the time. The Fourth Department modified, on the law, by reinstating the father's petitions, and remitting to Family Court for further proceedings, including entry of an order staying proceedings upon the condition that a custody proceeding be promptly commenced in California. The Fourth Department agreed that NY was inconvenient forum, noting that the father abused the mother in front of the child, an order of protection had been entered against him for domestic violence and that the mother moved to California to avoid any further abuse, which "weighs heavily in favor of California being the more appropriate forum to protect the safety of the mother and the child."

Enforcement - Child Support–Willful Violation–Incarceration

Reversed

In Matter of Augliera v. Araujo, 2020 Westlaw 3443439 (2d Dept. June 24, 2020), the father appealed from a May 2019 Family Court order which, after a hearing, found that he willfully violated a December 2015 child support order and directed that he be committed to jail for 40 days. The Second Department modified, on the law, by deleting the jail sentence, and otherwise affirmed, holding that the parties' agreement at the May 2019 hearing that the father had paid the full amount due

precluded a jail sentence, inasmuch as "incarceration may only continue until the offender complies with the support order," citing Judiciary Law 774(1).

Family Offense - Harassment 2d; Menacing 2d – Found

In Matter of Sheila N. v. Rudy N., 2020 Westlaw 3454829 (1st Dept. June 25, 2020), respondent appealed from an April 2019 Family Court order which, after a hearing, found that he committed harassment 2d and menacing 2d and granted petitioner a 2-year order of protection. The First Department affirmed, holding that petitioner established that respondent committed menacing 2d (PL 120.14) through her testimony that during a May 2017 conversation about his failure to deposit rent checks, respondent "grabbed a nine-inch meat knife, gestured with it aggressively, and told petitioner and another family member that they were going to vacate the apartment where all three resided," and that "respondent's actions made her very nervous." The Appellate Division affirmed Family Court's finding that respondent committed harassment 2d (PL 240.26[1]) through her testimony that 4 days after the knife incident, "respondent punched her in the chest, causing her to fall to the ground." The Court concluded that the 2-year order of protection was "warranted and reasonable" and "will likely end the family disruption," noting that respondent had already been excluded from the home while the petition was pending.

Family Offense- Intimate Relationship– Foster Mother– Not Found

In Matter of Veronica C. v. Ariann D., 2020 Westlaw 3454714 (1st Dept. June 25, 2020), respondent appealed from a May 2019 Family Court order of protection issued after a hearing, upon a finding that he committed certain family offenses. The First Department reversed, on the law and the facts, vacated the order of protection and dismissed the petition upon the ground of lack of subject matter jurisdiction, holding that petitioner, the foster mother of respondent's children, "failed to establish that she and respondent, who are not members of the same family or household, are or have been in an intimate relationship," as defined by FCA 812(1)(e). The Appellate Division noted petitioner's testimony that she did not even know respondent's first name and that her contact with respondent "has been limited to scheduling visitation with the children at the agency and, perhaps, interacting with respondent when she went to petitioner's home to pick up the children for visits."

Paternity – Equitable Estoppel – Denied

In Matter of Luis V. v. Laisha P.T., 2020 Westlaw 3067325 (2d Dept. June 10, 2020), petitioner appealed from an April 2019 Family Court order which, following a hearing, dismissed his November 2017 petition seeking a declaration that he is the father of a child born in 2016. Petitioner is incarcerated and neither the attorney for the child nor the mother disputed that

he was the father. Family Court determined that petitioner was equitably estopped from asserting paternity upon the ground that it was not in the child's best interests, given an established parent-child relationship with the mother's husband. The Second Department reversed, on the law and the facts, and remitted to Family Court for further proceedings, holding that Family Court should have dismissed the equitable estoppel defense and noting that: (1) the only evidence of a relationship between the child and the mother's husband came from the child's foster mother, with whom he has lived since he was one year old; and (2) the husband never appeared in court and did not testify. In contrast, petitioner testified that until the child was removed from the mother's care, he did not know the mother was married and he then commenced this proceeding promptly.

Paternity - Equitable Estoppel – Granted

In Matter of Rosa Y.A.P. v. Jose B.P.T, 123 NYS3d 496 (2d Dept. June 3, 2020), the father appealed from a June 2019 Family Court order, which adjudicated him as the father of 2 children born in 2003 and 2004 in the Dominican Republic, from which the father emigrated in 2016 and the mother and children followed in 2018. The Second Department affirmed, applying equitable estoppel against the father upon findings that he: recognized the children as his own; was present at both children's births and named on their birth certificates; supported the children

and visited them. The children knew him as their father and visited their paternal grandmother. The father's basis for denying paternity was his claim that the mother had circulated a rumor that he was not the father, but there was no evidence to support that claim.