NYSBA FAMILY LAW SECTION, Matrimonial Update, June 2020

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Child Support - CSSA – Child Care (Summer Camp); Over the Cap Denied; Counsel Fees – After Trial; Equitable Distribution - Marital Residence – Proportions (60%/40%); Vacation Home (50%/50%); Wasteful Dissipation – Not Found; Exclusive Use and Occupancy – After Trial; Maintenance - Denied

In Marino v. Marino, 2020 Westlaw 2545299 (2d Dept. May 20, 2020), the husband appealed from a November 2018 Supreme Court judgment which, among other things: (1) failed to award him maintenance; (2) directed him to pay child support of $1,425 per month and 34% of add-ons; (3) failed to direct the wife to pay for his health insurance; (4) awarded the wife exclusive use and occupancy of the marital residence until the youngest child attains age 18 and awarded him 40% of the value to be paid within 90 days of the 18th birthday or 10 days after a closing; (5) failed to award him a credit for monies spent from investment accounts pendente lite; and (6) awarded him only $30,551 or 65% of his outstanding counsel fees. The wife cross-appealed from so much of the judgment as: (1) awarded child support and 34% of add-ons as above; (2) failed to direct the husband to pay a share of unreimbursed dental expenses and summer activities; (3) awarded the husband 50% of the value of a

vacation home; and (4) directed her to pay counsel fees as above. The parties were married in August 1994, have 5 children and the wife commenced the divorce action in October 2013. Supreme Court imputed annual income to the husband of $130,000. The Second Department upheld the denial of maintenance, holding that Supreme Court properly considered the husband's earning history and capacity and the distribution of property. As to child support, the Appellate Division upheld the imputed income determination based upon the husband's prior earnings and his admission that he did not attempt to find equivalent employment after losing his job, and, further, determined that Supreme Court properly rejected the wife's request to exceed the CSSA income cap, given the financial resources of both parents, the wife's greater income, the denial of maintenance to the husband, and the other significant expenses of the children to which the parties must contribute. The Second Department modified the judgment to direct that the husband pay 34% of unreimbursed dental expenses and summer camp expenses, "required as and for child care in order for the plaintiff to be employed." The Appellate Division upheld the award of exclusive use and occupancy, given the special needs of 2 of the children in the wife's custody and the husband's failure "to establish an immediate need for the proceeds of the marital residence, especially in light of the equitable distribution award." While

the Second Department upheld the 50% distribution of the vacation home and the 40% award for the marital residence to the husband, based upon the parties' unequal financial contributions to the latter, the reconstruction of the residence by the wife's father's company and the wife's parents' repayment of the home equity loan, the court modified the terms to remove the provision that the husband's 40% be based upon the present stipulated value of $1,200,000, and directed that the wife have the option of selling and paying the husband 40% of the net proceeds, or paying him 40% of the then fair market value, noting that the youngest child's 18th birthday would be 10 years following the trial. The Appellate Division rejected the husband's claim for a wasteful dissipation credit based upon the wife's pendente lite spending from the investment accounts, noting that "both parties admitted that the [wife] used these accounts to pay marital expenses, and the [husband] was unable to point to any exorbitant spending on the part of the [wife]." The Court concluded that the counsel fee award to the husband was proper under the circumstances.

Child Support - CSSA - Income – Maintenance Exclusion; Equitable Distribution –Credit for Debt Payments; Maintenance - Durational

In Gargiulo v. Gargiulo, 2020 Westlaw 2545308 (2d Dept. May 20, 2020), the wife appealed from a June 2017 Supreme Court judgment which, upon a November 2016 decision after trial of her

March 2014 action, determined issues of maintenance, equitable distribution, marital debt and child support. The parties were married in September 1994 and had 3 children. Supreme Court awarded the wife maintenance of $4,000 per month for 7 years, directed an equal sharing of the proceeds of the marital residence, subject to credits to the husband for mortgage principal reduction, carrying charges, boat and vehicle loan payments, and determined child support between the March 2014 date of commencement of the action and April 2016 when the oldest child became emancipated, but included maintenance in the wife's CSSA income. The Second Department affirmed the maintenance award, given that Supreme Court properly considered the wife's age, limited work history, her medical issues and the marital standard of living. On the issue of credits, the Appellate Division held that Supreme Court erred by giving the husband credit for 100% of vehicle and boat loan payments and mortgage principal reductions and other carrying charges pendente lite and reduced those credits to 50%, while eliminating a duplicate credit in the judgment for mortgage principal. As to the issue of the wife's CSSA income, the Second Department stated that the law in effect in March 2014 "did not include alimony or maintenance as part of the recipient's income for child support purposes" and remitted for recalculation on this issue.

Child Support – Modification-Educational & Medical Expenses– Hearing Required; Custody - Communications Limited; Forensic Denied; Visitation Supervised

In Lin v. McGhee, 182 AD3d 526 (1st Dept. Apr. 30, 2020), the father appealed from February 2017 and June 2018 Supreme Court orders, which: (1) prohibited him from communicating with the parties' child except as deemed appropriate by her residential treatment provider and directed him to pay 50% of the costs of her residential treatment and education at the provider's school; (2) limited his access to the child to visits initiated by her in consultation with her treatment team, to occur in public under supervision by a named service, prohibited him from initiating contact with the child, limited his responsive communications and prohibited him from communicating with treatment and school personnel upon the child's release from the treatment provider; (3) appointed a social worker from a named service to supervise his access time and directed him to pay all costs thereof; and (4) denied his motion to appoint a forensic expert. The First Department affirmed all directives except for the provision requiring the father to pay 50% of the costs for the child's treatment and education, noting that the mother conceded that the financial terms of the judgment of divorce should not have been altered without a showing of changed circumstances, and modified the February 2017 order and

remanded for a hearing. As to the parental access order, the Appellate Division determined that the same was made following a hearing and that Supreme Court's decisions were "informed by more than a decade of presiding over this case." The First Department concluded that Supreme Court properly required the father to pay the supervision costs, noting that: the same were not addressed by the judgment and incorporated stipulation; "it was solely his conduct that necessitated the social worker's involvement"; and he did not show "that his resources are so limited that he is unable to pay these costs."

Counsel Fees – After Trial; Equitable Distribution - Credit for Post-Commencement Transfers Denied; Separate Property Appreciation Distributed; Maintenance - Durational–Length of Temporary Maintenance as Factor

In Gallen v. Gallen, 2020 Westlaw 2201010 (1st Dept. May 7, 2020), both parties appealed from an August 2018 Supreme Court judgment, which awarded the wife 25% ($494,626) of a portion of the husband's premarital Vanguard account, awarded the wife 50% of the husband's Chase account, without first crediting him with $20,000 in post-commencement transfers to the wife, terminated the wife's non-taxable maintenance as of December 31, 2018 and awarded the wife only $70,000 in counsel fees. The First Department affirmed, holding that Supreme Court properly found that the increase in value in the Vanguard account was due in

part to the husband's active trading and deposits of funds not traced to separate property. The Appellate Division rejected the husband's claim that he was entitled to the $20,000 credit as a de facto advance on equitable distribution, given "there was no evidence that the parties entered into such an agreement." The First Department upheld the termination of maintenance "after considering [the wife's] employment prospects, the parties' modest marital lifestyle, and the equitable distribution of assets," while also noting that the wife had received temporary maintenance "since the commencement of the action in 2011, a duration longer than the parties' six-year marriage." The Court concluded that there was "no reason to disturb the referee's finding that both parties prolonged the litigation, and therefore decline to award [the wife] additional counsel fees."

Counsel Fees - Support Proceeding

In Matter of Deborah R. v. Dean E.H., 2020 Westlaw 2561412 (1st Dept. May 21, 2020), the father appealed from a September 2019 Family Court order, denying his objections to a July 2019 Support Magistrate order which, after a hearing, granted the mother's motion for counsel fees (amount not specified). The First Department affirmed, holding that Family Court properly considered the financial circumstances of the parties, the merits of the parties' positions, the nature and extent of the services rendered, the complexity of the issues and the

reasonableness of the fees. The Appellate Division noted that respondent father's assets "greatly exceeded those of petitioner and that it was respondent who prolonged the litigation by disrupting the proceedings and being evasive about his finances."

Custody - Court Appointed Expert – Error to Deny Adjournment to Secure Testimony

In Matter of Markowitz v. Markowitz, 2020 Westlaw 2462400 (2d Dept. May 13, 2020), the mother appealed from a September 2018 Supreme Court judgment, rendered upon a July 2018 decision after trial of the custody and child support issues raised in the mother's 2016 action, which awarded the father sole physical and legal custody of the parties' child. The Second Department reversed, on the facts and in the exercise of discretion, and remitted for a new trial and a new determination on the issue of custody, leaving the terms of the judgment in effect in the interim. The parties were married in 2010 and have one child. Supreme Court directed a forensic evaluation, which was completed, but the father did not consent to it being admitted into evidence at trial. The mother sought the evaluator's testimony and Supreme Court directed the parties to pay their respective pro rata shares of the evaluator's trial fees. The mother paid her share, but the father did not, and the expert did not testify due to lack of full compensation. The mother

sought a 2-week adjournment in order to raise the funds, which Supreme Court denied. The Appellate Division held that Supreme Court should not have denied the mother's request for an adjournment, as "the testimony of the neutral forensic expert that the court had appointed was material to resolving the issue of custody," noting that: the mother was not at fault for the delay; the evaluator was an expert who could not be "compelled to testify without appropriate compensation" (citation omitted); and the mother's "inability to produce the witness was a result of the defendant's failure to pay."

Custody - Modification – AFC Position; Child's Mental Health & Wishes; School Performance; Stability

In Matter of Alwardt v. Connolly, 2020 Westlaw 2090229 (4th Dept. May 1, 2020), the father appealed from a February 27, 2019 Family Court order, which denied his modification petition seeking primary custody of the parties' child. The Fourth Department reversed, on the law, granted the father's petition and remitted to Family Court to determine the mother's visitation. The Appellate Division found that the only factor in the mother's favor was her lengthy time as primary custodian, while noting that during that time, "the child performed poorly at school and experienced a significant increase in her depression" and "due to the mother's work schedule, the child was required to arise before 5:00 a.m. and to thereafter be

taken to a relative's house, where the child stayed for two hours before going to school." In contrast, the father, unlike the mother, was able to assist the child with schoolwork and schedule and attend her medical and mental health counseling appointments. The Court concluded by noting the child's wishes were properly considered given her age (unspecified) and maturity and that the AFC supported the child's wish to live with her father.

Custody - Modification – Coronavirus as Alleged Factor

In Matter of Jennifer R. v. Lauren B., 2020 Westlaw 1979356 (Fam Ct. Kings Co., Vargas, J., April 22, 2020), the mother and ex-wife were married in CT in October 2010 and the subject child was born in 2011. The parties signed an agreement in March 2013 which was incorporated into an April 2018 judgment of divorce, providing for joint legal and physical custody. The mother made several unsuccessful applications for relocation to NJ with the child and/or sole custody, one during the pendency of the divorce action, which was denied in July 2017, and 3 unsuccessful applications following the judgment of divorce. On March 14, 2020, the parties, due to the pandemic, agreed in writing to a temporary modification consisting of alternating two-week periods, and the child was scheduled to return to the ex-wife on April 5. The mother failed to return the child and sought emergency relief on April 6, 2020, arguing that her

location in NJ was safer than the ex-wife's Brooklyn residence, which the mother labeled as a virus "hotspot." The ex-wife filed for emergency relief on April 7, 2020. Family Court denied the mother's application, noting that: she had failed to comply with the agreement's condition precedent of mediation before litigation; she had failed to demonstrate changed circumstances warranting an immediate change in custody; the 9 year-old child's wishes are not controlling; the mother has a modification petition pending, in which proceeding a forensic was ordered in November 2019 and the matter is due back in court on May 19, 2020; and "[t]he parents' behavior during the Pandemic and while the case is pending in court will be relevant to the Referee in her ultimate custody determination," citing Sunshine, "COVID-19 and Future Custody Determinations," N.Y. Law Journ. Mar. 27, 2020 at 3, col.1. Family Court referred the ex-wife's motion for counsel fees and sanctions to the Referee presiding over the pending petition.

In Matter of S.V. v. A.J., 2020 Westlaw 2374624 (Fam. Ct. Bronx Co., Chesler, J., May 7, 2020), the father filed a motion to enforce in-person visitation with children ages 4 and 2½ under a January 2020 temporary Family Court order providing him with alternate weekend visitation from Fridays at 8 pm to Sundays at 6 pm, with exchanges at a police station. A December 2019 criminal court order of protection requires the father to

stay away from the mother, refrain from communicating with her and from committing any offenses against her, until December 2021, subject to subsequent Family Court orders. The father had his visitation until the weekend of March 27, 2020, when the parties, due to the coronavirus, started daily video conference visits and the father did not have his March 27, April 10 and April 24 weekend visits, and they could not resolve a resumption of in-person visits. The father lives in a 2-story home in New Jersey with a backyard, has observed social distancing, has not tested positive for the virus and has a car, so that the children would not need to use public transportation. The father claims that the mother points the camera at the ceiling during the video visits. The mother's position is that the father's in-person visits were suspended under NY and NJ stay at home orders and that it is irresponsible to have in-person visits during the pandemic. Family Court granted the father's motion, noting that "the mother has failed to articulate, submit evidence or even allege any particularized health concern such that the Court would consider suspension of in-person visits," and ordered an immediate recommencement of visits starting with the weekend of May 8, and starting May 28, an expansion of his weekends to alternate Thursdays at 6 p.m. to Mondays at 6 p.m. until school or the parties' work begins again, to then revert to the alternate Friday-Sunday schedule of the January 2020 order.

Family Court further directed daily video conferences for both parents at 7 p.m. and compliance with social distancing, public wearing of masks, and adherence to city, state and federal government guidelines.

Custody - Modification–Domestic Violence; Supervised Visitation

In Matter of Nicole Y. v. Joshua X., 2020 Westlaw 2200875 (3d Dept. May 7, 2020), an April 2018 order provided for joint legal custody of the parties' children born in 2014 and 2016 with primary physical custody to the mother. The mother petitioned for sole custody in October 2018, following an incident "in which the father inflicted serious physical injury on the mother," specifically, "the father struck the mother in the head in the presence of the children with such force as to knock her unconscious and *** left the home with the children, requiring them to walk past their injured and unconscious mother." Following a hearing, at which the father chose not to testify, Family Court granted sole legal and primary physical custody to the mother and directed that the father have 2 hours of supervised visitation every other Sunday and electronic communications 3 times per week. The Third Department affirmed. To the same effect, modifying a Family Court order to impose supervised visitation where domestic violence was an issue, is Matter of Kane FF. v. Jillian EE., 2020 Westlaw 2201040 (3d Dept. May 7, 2020).

Custody - Third Party – Grandparent Custody – Granted

In Matter of Driscoll v. Mack, 121 NYS3d 706 (4th Dept. May 1, 2020), the mother appealed from a December 2018 Family Court order, which granted physical custody of the subject children to the maternal grandmother. The Fourth Department affirmed, holding that the grandmother established extraordinary circumstances, given that the children had lived in her home for 7 years or more and that "despite the mother having scheduled visitation with the children, [under a prior stipulated order] she has failed to resume her parental role in their lives." The Appellate Division held that the grandmother established the requisite change in circumstances since entry of the prior order (overruling prior cases suggesting that a change in circumstances analysis was not required in a case such as this) and noted that "the mother *** often chose to spend time with her boyfriend," as opposed to exercising her scheduled visitation. The Court concluded that the custody award to the grandmother was in the children's best interests.

Custody - Third Party – Grandparent Visitation – Granted

In Matter of Panebianco v. Panebianco, 121 NYS3d 704 (4th Dept. May 1, 2020), the mother appealed from an August 2018 Family Court order which granted visitation to the maternal grandfather. The Fourth Department affirmed, holding that the grandfather established standing pursuant to DRL 72(1), it being

"undisputed that [he] had a long-standing and loving relationship with the subject child." As to best interests, the Appellate Division agreed with Family Court that "the mother's proffered objections to visitation *** were primarily pretextual."

Enforcement - Child Support – Willful Violation

In Matter of Alterman v. Shmushkovich, 121 NYS3d 672 (2d Dept. May 6, 2020), the father appealed from a May 2019 Family Court order which, among other things, found that he willfully violated a child support order and sentenced him to 6 months in jail unless he paid a $14,000 purge amount. The Second Department affirmed, holding that the mother made a prima facie case and the father failed to offer competent and credible evidence of his inability to pay. The Appellate Division found that the father "failed to submit sufficient medical evidence to substantiate his contention that he was unable to work due to medical impairments" and that he "failed to demonstrate that he made reasonable efforts to obtain employment to satisfy his child support obligations." To the same effect is Matter of DeNittis v. Chalfant, 121 NYS3d 648 (2d Dept. May 6, 2020).

Family Offense - Aggravated Harassment 2d – Found; Intimate Relationship

In Matter of Phyllis H. v. Didier C., 182 AD3d 511 (1st Dept. Apr. 30, 2020), respondent appealed from a November 2018

Family Court order, which found that he committed aggravated harassment 2d and granted a two-year order of protection. The First Department affirmed, holding that Family Court properly exercised jurisdiction pursuant to FCA 812(1)(e), "as the undisputed evidence establishes that the parties previously had an intimate relationship" and "[t]hat they were not romantically involved for a number of years preceding the filing of the petition is of no moment under the statute." The Appellate Division further determined that a preponderance of the evidence showed that "with intent to harass petitioner," respondent "communicat[ed] to her a threat to cause her physical harm," satisfying the elements of aggravated harassment in the 2d degree, PL 240.30(1)(a).

Family Offense - Harassment 2d – Found

In Matter of Wandersee v. Pretto, 121 NYS3d 705 (4th Dept. May 1, 2020), respondent appealed from an October 2018 Family Court order of protection, issued upon a finding that he committed harassment in the 2d degree as defined by PL 240.26(3). The Fourth Department affirmed, holding that petitioner established that "she found respondent hiding in her bedroom closet while she was getting dressed" and that "respondent secretly placed a cell phone in petitioner's bedroom with the camera aimed at her bed, and monitored petitioner from his laptop in a nearby room." The Appellate Division determined

that respondent's course of conduct "evidenced a continuity of purpose to harass, annoy or alarm petitioner."