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ANNUAL MATRIMONIAL LAW UPDATE

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March 14, 2022
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Chapter on "Use of Appraisers in the Valuation of Marital Property", Valuation & Distribution of Marital Property, Matthew Bender, 1984

"Equitable Distribution and Valuation of Assets", Family Law Review, New York State Bar Association

"Child Support and Visitation", Family Law Review, New York State Bar Association

"Distribution of Proceeds from Partition and Sale of Real Property", Family Law Review, New York State Bar Association

"Stipulations of Settlement in Matrimonial Litigation", The Nassau Lawyer, Nassau County Bar Association

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GARDEN CITY, N.Y.

AGREEMENTS

Acknowledgment

Anderson presents the question left open in *Matisoff v Dobi* (90 NY2d 127, 681 N.E.2d 376, 659 N.Y.S.2d 209 [1997]), specifically whether the acknowledgment must be contemporaneous with the signing of the agreement in order to comply with DRL § 236 (B) (3). We conclude that the signature must be acknowledged contemporaneously within a reasonable time of signing. Because in *Anderson* the wife signed and acknowledged the agreement the month after the wedding, while the husband delayed nearly seven years before acknowledging his signature and did so shortly before he commenced a divorce action, the husband's acknowledgment is ineffective and the nuptial agreement unenforceable. The only remedy under the circumstances was for the parties to reaffirm the agreement's terms, which did not occur in this case***. Anderson v Anderson***, 37 N.Y.3d 444 (2021).

In ***Matter of Koegel***, the **acknowledgments** of each party were made contemporaneously with the signing of the nuptial agreement, but the certificates of acknowledgment were defective. The parties' lawyers failed to include in the respective certificates the undisputed fact that the signer was personally known to them at the time of signing Where, as here, the signatories have satisfied the prerequisites for a valid certificate of acknowledgment—i.e., the defect in the certificate of acknowledgment is occasioned by the notary's or other official's error and not by a flaw in the parties' actual signing and acknowledgment—a reaffirmation of the agreement terms is unnecessary. Thus, this defect in the certificate may be overcome, as here, with extrinsic evidence of the official's personal knowledge or proof of identity of the signer.

An acknowledgment may be made at any place within the state, before a notary public. Real Property Law § 298[1][d]. There is no requirement that a certificate of acknowledgment contain the precise language set forth in the Real Property Law. Rather, an acknowledgment is sufficient if it is in substantial compliance with the statute The acknowledgment requirement fulfills two important purposes. First, acknowledgment serves to prove the identity of the person whose name appears on an instrument and to authenticate the signature of such person. Second, it necessarily imposes on the signer a measure of deliberation in the act of executing the document. Just as in the case of a deed where the law puts in the path of the grantor formalities to check haste and foster reflection and care here, too, the formality of an acknowledgment underscores the weighty personal choices to relinquish significant property or inheritance rights, or to resolve important issues concerning child custody, education and care. In the context of notarization of a document, contemporaneous is defined to mean, existing, occurring, or originating during the same time or happening or existing at the same period of time. Contemporaneous is not to be equated to or confused with simultaneous, which is defined as happening or being done at exactly the same time. Thus, it is clear that for an acknowledgment to be valid, there can be some time lapse between the signer's execution and the completion of the acknowledgment. ***Ryerson v Ryerson***, 72 Misc.3d 865 (Sup Ct, Warren County 2021)

Coercion, Duress, Overreaching

Separation agreement was not the product of duress or overreaching, although wife was not represented by an attorney, as there was no evidence that the wife was prevented from seeking advice of counsel of her own choosing, wife's claim of mental anxiety and panic attacks suffered around the time of the agreement is not supported by medical evidence, and husband's alleged threat to divorce or she did not agree to the terms of the agreement did not amount to duress. Further, husband's failure to disclose entirety of his financial assets did not warrant setting aside the agreement on the ground of fraud as the agreement gave each party the right to complete financial disclosure from the other, and provided that each party waives such right, and the parties met with their financial advisors where their financial assets were reviewed, and each had independent authority to contact financial advisors and ask questions. ***Weddell v. Trickha,*** 200 A.D.3d 1464 (3d Dept. 2021)

A contract is voidable on the ground of duress when it is established that the party making the claim was forced to agree to it by means of a wrongful threat precluding the exercise of his or her free will. Generally, the aggrieved party must demonstrate that threats of an unlawful act compelled his or her performance of an act which he or she had the legal right to abstain from performing. The threat must be such as to deprive the party of the exercise of free will. A contract may be set aside on the grounds of coercion whenever a party is so situated as to exercise a controlling influence over the will, conduct and interest of another. Generalized contentions that a party felt pressured are insufficient. To rescind a separation agreement on the ground of overreaching, a party must demonstrate both overreaching and unfairness. No actual fraud need be shown, for relief is granted if the settlement is manifestly unfair to a spouse because of the other's overreaching in its execution. ***JG v. NG,*** NYLJ, 6/22/21 (Supreme Court, Nassau Co., Prager, J.)

Triable issues of fact exist as to whether parties' 2013 prenuptial agreement was the product of overreaching. At the time of execution, wife was pregnant, in the US on 90-day tourist visa, unemployed with student loan debt while husband had a net worth of over $30 million. Under the agreement, wife was entitled to $1,500,000 plus an additional $100,000 for each year of marriage up to 15 years. An agreement that might not have been unconscionable when entered into may become unconscionable at the time final judgment would be entered. In determining enforceability of provisions in a prenuptial agreement, there comes a point where the imbalance is so extreme it is appropriate for equity to intervene. Here, wife would receive no maintenance, no housing costs, and an equitable distribution amount representing at most 5% of husband's net worth despite 16 years of marriage, 3 children, and wife's stay-at-home parenting role during 15 of those years. ***Pia M. v. Mitchell M.***, 71 Misc.3d 666, 144 N.Y.S.3d 312 (Supreme Court, NY Co., Hoffman, J.)

Contract Interpretation

The terms of a separation agreement incorporated but not merged into a judgment of divorce operate as contractual obligations binding on the parties. A matrimonial settlement agreement is a contract subject to principles of contract interpretation, and a court should interpret the contract in accordance with its plain and ordinary meaning. Where such an

agreement is clear and unambiguous on its face, the parties' intent must be construed from the four corners of the agreement, and not from extrinsic evidence. A court may not write into a contract conditions the parties did not insert by adding or excising terms under the guise of construction, nor may it construe the language in such a way as would distort the contract's apparent meaning. The words and phrases used in an agreement must be given their plain meaning so as to define the rights of the parties. ***Karakash v Karakash***, 197 A.D.3d 1159, 154 N.Y.S.3d 67 (2d Dept. 2021)

A stipulation of settlement entered into by the parties to a divorce action constitutes a contract between them subject to the principles of contract interpretation. Where the intention of the parties is clearly and unambiguously set forth, effect must be given to the intent as indicated by the language used. A court may not write into a contract conditions the parties did not insert by adding or excising terms under the guise of construction, and it may not construe the language in such a way as would distort the contract's apparent meaning. In making the determination, the court should examine the entire contract and consider the relation of the parties and the circumstances under which the contract was executed. ***Berlin v Berlin***, 192 A.D.3d 856, 140 N.Y.S.3d 738 (2d Dept. 2021)

Incapacity

Plaintiff failed to meet her burden of showing that she lacked the capacity to enter into the stipulation. As the party asserting incapacity to enter into the stipulation, the plaintiff was required to show that her mind was 'so affected as to render her wholly and absolutely incompetent to comprehend and understand the nature of the transaction. The plaintiff's assertions that she was "very confused" when she signed the stipulation, that she had experienced a "breakdown" in 2011, and that she had received treatment from a doctor and a therapist were insufficient to sustain her claim of incapacity. ***Barone v Barone***, 199 A.D.3d 875, 154 N.Y.S.3d 494 (2d Dept. 2021)

Motion to Set Aside Prenuptial Agreement; Burden of Proof; Hearing

Whichever spouse contests a prenuptial agreement bears the burden to establish a fact-based, particularized inequality before a proponent of the prenuptial agreement suffers the shift in burden to disprove fraud or overreaching. An agreement which might not have been unconscionable when entered into may become unconscionable at the time a final judgment would be entered. Although as a general rule where the execution of an agreement is fair, no further inquiry will be made, in this case a hearing should have been held on the issue of overreaching in view of the vast disparity of the parties' assets at the time of execution, the fact that plaintiff may have unilaterally selected and paid the defendant's attorney, and the negotiation between the attorneys went on for approximately six weeks prior to defendant's initial consultation with her attorney. ***Marinakis v. Marinakis***, 196 A.D.3d 472, 147 N.Y.S.3d 416 (2d Dept. 2021)

Procedure

Where a judgment of divorce is granted, to set aside a separation agreement a claimant is required to bring a plenary action or assert an affirmative defense or counterclaim, as such

relief cannot be granted on motion. ***Vandamme v. Curran***, 200 A.D.3d 1641, 155 N.Y.S.3d 894 (4th Dept. 2021)

Oral Modification

To be effective, an oral modification must be fully executed or so acted upon that the enforcement of the original agreement would be inequitable and must be deemed withdrawn. ***Lewis v Thomas***, 192 A.D.3d 508, 140 N.Y.S.3d 410 (1st Dept 2021)

Severability

Where the child support provisions of the parties' stipulation of settlement did not comply with the CSSA requirements and thus were unenforceable, the remaining provisions of the stipulation, including those regarding equitable distribution, maintenance, and college tuition, continue to be enforceable as those provisions were not so closely intertwined with the child support provisions. ***Vasileva v. Christy***, 195 A.D.3d 980, 151 N.Y.S.3d 111 (2d Dept. 2021)

Testamentary Provision; Constructive Trust

An agreement to make a testamentary provision is an enforceable contract provided it is supported by valid consideration. The Oyster Bay property and the retirement accounts were part of the decedent's "gross estate" which he agreed in a stipulation of settlement in his divorce action would go to his children. His subsequent inter vivos transfer of the Oyster Bay property to a tenancy by the entirety and his designation of the defendant as beneficiary of the retirement accounts defeated the purpose of the stipulation of settlement, thus warranting the imposition of a constructive trust and an award of summary judgment on the issue of liability for breach of contract. ***Van de Walle v Van de Walle,*** 200 A.D.3d1095 (2d Dept. 2021)

Mahr Agreement

A nikah agreement is a mutual agreement signed by spouses during their religious marriage ceremony that is typically verified by two male witnesses and includes a mahr provision. A mahr provision, or sadaq, is a term in the nikah agreement whereby the husband gives something of value to the wife. Although New York courts had not specifically addressed the validity and enforceability of unacknowledged mahr agreements when all the proceedings took place in New York, even if the New York courts had adopted the neutral principles of law approach and applied it to the parties' mahr agreement, it still could not have been upheld due to the lack of an acknowledgment. The language, history, and subsequent New York statutory law of Domestic Relations Law § 236(B)(3), including the case precedent, clearly created no exception to the acknowledgment requirement. Accordingly, the husband's motion for summary judgment was granted because the parties' mahr agreement was not enforceable and was deemed void. ***Khan v Hasan***, 73 Misc 3d 422, 423 (Sup Ct, Nassau County 2021, Goodstein, J.)

Embryo Agreement

Court upheld agreement between parties and fertility clinic regarding disposition of embryos as Domestic Relations Law §236(B)(3) was not applicable to such agreements and as the Court of Appeals ruled in *Kass v. Kass*, 91 NY2d 554, that an agreement between progenitors, or garmete donors, regarding disposition of their pre-zygotes should generally be presumed valid and binding, and enforced in any dispute between them. ***K.G. v. J.G.***, NYLJ, 6/15/21 (Supreme Court, Suffolk Co., Leis, J.)

ATTORNEY & CLIENT

Right to Counsel

A divorce litigant has a statutory right to counsel for the custody portion of the litigation (*see* Family Ct Act § 262[a][iii], [v]; Judiciary Law § 35[8]). Here, the defendant's attorney was permitted to withdraw during the trial, and the defendant proceeded pro se. However, the Supreme Court did not determine whether the defendant was unequivocally, voluntarily, and intelligently waiving his right to counsel and failed to inquire whether the defendant understood the risks and disadvantages of appearing pro se. Accordingly, matter remitted, and new trial ordered. ***Brandel v Brandel***, 197 A.D.3d1287, 152 N.Y.S.3d 323 (2d Dept. 2021)

An indigent person accused of a willful violation of a prior support order has the right to assigned counsel (Family Ct Act § 262 [a] [vi]), although this entitlement does not encompass the right to counsel of one's own choosing. Whether to grant substitution of counsel or an adjournment to obtain or consult with counsel falls within the discretion of the court, upon good cause shown. Such determinations are necessarily case-specific, and courts consider, among other things, the timing of the request, its effect on the progress of the case and whether present counsel will likely provide meaningful assistance. ***Matter of Saber v Saccone***, 192 A.D.3d 1400, 145 N.Y.S.3d182 (3d Dept. 2021)

Family Ct Act § 262 provides certain persons in Family Court proceedings with a statutory right to the assistance of counsel and sets forth parameters with which a court must abide pertaining to that right. The deprivation of a party's fundamental right to counsel under § 262 requires reversal, without regard to the merits of the unrepresented party's position. H Here, grandmother should have been advised of her right to counsel in custody case with court determining if she is financially eligible for assigned counsel. ***Matter of Renee S. v Heather U.***, 195 A.D.3d 1170, 150 N.Y.S.3d 361 (3d Dept. 2021)

Assigned Counsel on Appeal – Function

In a relocation case, the brief submitted by the father's assigned counsel pursuant to *Anders v. California*, 386 U.S. 738 was deficient. Instead of acting as ana advocate and evaluating whether there were any "nonfrivolous issues", appellate counsel acted as a "mere adviser to the court on the merits of the appeal", thus requiring new counsel to be assigned to the father for the appeal. ***Thomas v. Mobley***, 195 A.D.3d 933, 146 N.Y.S.3d 504 (2d Dept. 2021)

Effective Assistance of Counsel

Plaintiff was denied effective assistance of counsel in connection with his defense to application to adjudge him in contempt. Plaintiff's attorney failed to present any medical evidence, whether in the form of admissible medical records or testimony of medical witnesses, to support plaintiff's defense that his failure to pay child support was not willful, but rather due to his medical condition which rendered him unable to work. Therefore, as

plaintiff was deprived of meaningful representation, he is entitled to a new hearing. ***Winter v. Winter***, 195 A.D.3d 882, 150 N.Y.S.3d 294 (2d Dept. 2021)

Malpractice Claims

Plaintiff was hired mid-trial, after defendant had been represented by eight prior law firms, and at times represented herself. Defendant's conclusory allegations that plaintiff law firm failed to prepare for trial and gather evidence in her matrimonial action do not state a cause of action for legal malpractice. Defendant's retrospective complaints about plaintiff's recommendations and trial are an insufficient basis to show that plaintiff's decisions are actionable, nor does defendant allege facts that would establish that, but for plaintiff's negligence, she would have obtained a more favorable result. ***Garr Silpe, P.C. v Gorman***, 192 A.D.3d 633, 141 N.Y.S.3d 310 (1st Dept. 2021)

Judiciary Law § 487 allows for the imposition of civil and criminal penalties against an attorney who "1. is guilty of any deceit or collusion, or consents to any deceit or collusion, with intent to deceive the court or any party; or, 2. wilfully delays his client's suit with a view to his own gain ...." A cause of action under the statute must be pled with particularity in compliance with CPLR 3016 (b). A cause of action for legal malpractice is predicated upon an attorney's failure "to exercise 'the ordinary reasonable skill and knowledge' commonly possessed by a member of the legal profession". To prevail on a claim for legal malpractice, the plaintiff must demonstrate the existence of an attorney-client relationship and the plaintiff must plead and prove "the negligence of the attorney; that the negligence was the proximate cause of the loss sustained; and actual damages. An attorney's conduct or inaction is the proximate cause of a plaintiff's damages if 'but for' the attorney's negligence the plaintiff would have succeeded on the merits of the underlying The failure to show proximate cause mandates dismissal of a legal malpractice action regardless of whether the attorney was negligent. ***Kaufman v Boies Schiller Flexner***, 2021 NY Slip Op 31340[U] [Sup Ct, NY County 2021])

CHILD SUPPORT

CSSA

An agreement to opt out of the CSSA must include provisions: (1) stating that the parties have been advised of the provisions of the CSSA; (2) stating the basic child support provisions of the CSSA would presumptively result in the determination of the correct amount of child support to be awarded; (3) stating what the amount of basic child support would have been if calculated pursuant to the CSSA, if the parties' stipulation or agreement deviates from the basic child support obligation; and (4) setting forth the parties' reason or reasons for deviating from the CSSA calculation, if they have chosen to deviate. ***Poirier v. Demasi,*** --A.D.3d--, 2022 NY Slip Op 00448 (2d Dept. 2022)

A consent child support order is unenforceable where neither the record of the hearing nor the order sets forth the presumptive child support amount or states the parents' respective incomes. Furthermore, there was no explanation as to whether or why there was a deviation from the child support calculation provided by the statute. While the order recites that the parties were aware of the Child Support Standards Act guidelines and that the agreed to amount was the presumptively correct amount under the statute, as the father notes, the order included three different basic child support awards and three separate pro rata allocations, which indicates that there were deviations from the presumptively correct amount under the CSSA guidelines. Additionally, the order was issued three years after the parties' allocution. ***Matter of Michael J.F. v Jennifer M.B.***, 192 A.D.3d 556, 145 N.Y.S.3d 24 (1st Dept. 2021)

Temporary Order

After a child support petition is filed, the Family Court is required pursuant to section 434 of the Family Court Act, to "make an order for temporary child support pending a final determination, in an amount sufficient to meet the needs of the child, without a showing of immediate or emergency need". ***Matter of Commr. of Social Servs. v Omar G.,*** 200 A.D.3d 527 (1st Dept. 2021)

Custodial Parent for Child Support Purposes

The 'custodial parent' within the meaning of the CSSA is the parent who has physical custody of the child for the majority of the time. The court may determine which parent is the custodial parent based on the "'reality of the situation". Here, because the stipulation gives great weight to the children's wishes, and because there was undisputed testimony that two of the three children were not following the parental access schedule, the reality of the situation, despite the permitted parental access as set_ forth in the stipulation, was that the plaintiff was the custodial parent for child support purposes. ***Sexton v. Sexton***, 195 A.D.3d 972, 146 N.Y.S.3d 522 (2d Dept. 2021)

In cases where custody is shared equally, the parent having the greater share of the support obligation after applying the statutory formula is identified as the "noncustodial" parent for the purposes of support. However, if the statutory formula yields a result that is unjust or inappropriate, the court can resort to the paragraph (f) factors and order

payment of any amount that is just and appropriate. ***Alliger-Bograd v. Bograd***, 180 A.D.3d 975, 118 N.Y.S.3d 720 (2d Dept. 2020)

Support Cap

Where combined parental income exceeds the statutory cap, in fixing the basic child support obligation on income over the ceiling, the court has the discretion to apply the factors set forth in Family Court Act § 413(1)(f), or to apply the statutory percentages, or to apply both, but the court must articulate an explanation of the basis for its calculation of child support based on parental income in excess of the statutory cap. in addition to providing a record explanation for deviating or not deviating from the statutory formula, a court must relate that record articulation to the factors set forth in Family Court Act § 413(1)(f). ***Glick v. Ruland,*** 185 A.D.3d 926, 128 N.Y.S.3d 652 (2d Dept. 2020)

Capping of combined parental income in excess of $143,000 at $250,000, rather than $400,000, when calculating husband's child support obligation was warranted in divorce proceeding, although trial court set forth factors it considered in determining child support percentage of 25% of parties' combined income in excess of $143,000, and husband was high-wage earner. Trial court did not offer any reasons as to why it was appropriate to award child support based on combined parental income up to $400,000, children lived middle-class lifestyle, children attended public school, and there was no indication that children lived lavish lifestyle. ***Spinner v Spinner***, 188 A.D.3d748, 134 N.Y.S.3d 377 (2d Dept. 2020)

Supreme Court's decision to award child support on the combined parental income over the cap (then $154,000) was not supported by the record as the record did not show that the children were not living in accordance with the lifestyle they would have enjoyed had the household remained intact, that plaintiff had no extraordinary expenses, lived rent-free at her parents' house, reported no child care costs, and reported minimal costs for education and extracurricular activities. ***Hepheastou v Spaliaras***, 201 A.D.3d 793 (2d Dept. 2022)

Supreme Court properly exercised its discretion in applying the child support percentage to the amount above the statutory cap primarily due to the parties' considerable income, the needs of the child, and the fact that the defendant was not seeking any add-on contributions from the plaintiff for the child's expenses, other than basic child support. ***Moradi v Buhl***, 201 A.D.3d 928, 158 N.Y.S.3d 597 (2d Dept. 2022)

Where court decides to award child support in excess of the statutory cap, it is required to articulate an explanation for its calculation of child support based on parental income in excess of the statutory cap, and the court's explanation should reflect a careful consideration of the basis for its exercise of discretion, the parties' circumstances, and the court's reasoning why there should or should not be a departure from the prescribed percentage. ***Ward v Hall***, 188 A.D.3d 1222, 132 N.Y.S.3d 879 (2d Dept. 2020)

Family Court erred in increasing father's child support obligation from $5,650 per month per their 2011 agreement, to $6,500 per month, as the reasons articulated for calculating

support on income in excess of the former amount were not supported by the record. The support magistrate stated she considered the standard of living the children would have enjoyed had the household remained intact, and the needs of the children. However, the record does not support that the children were not living in accordance with the lifestyle they would have enjoyed. In addition to the periodic payment, the father was paying 80% of significant add-ons for the children including uncovered health expenses, educational expenses, extracurricular expenses, summer camp and sleep away camp, a trip to Europe, and electronics. The father was also paying $1600 per month for childcare, albeit the mother was only incurring childcare expense of $520 per month. ***Good v. Ricardo***, 189 A.D.3d 830, 136 N.Y.S.3d 472 (2d Dept. 2020)

Add-On Expenses

Basic child support has become understood to mean the regular periodic payment of support made by the noncustodial parent to the custodial parent. The obligations for health care, childcare, and education expenses are commonly referred to as add-on expenses. The add-on for uncovered, unreimbursed medical and related expenses, responsibility for future reasonable unreimbursed health care expenses shall be prorated in the same proportion or percentage as each parent's income bears to the combined parental income. Education expenses are not directly connected to the basic child support calculation and are not necessarily prorated in the same proportion or percentage as each parent's income bears to the combined parental income. A court may direct a parent to contribute to a child's educational expenses, even in the absence of special circumstances or a voluntary agreement of the parties. The court does not have unfettered discretion in making such an award, and must consider the circumstances of the case, the circumstances of the respective parties, the best interests of the children, and the requirements of justice. Basic child support, when calculated properly, is presumed to meet all the child's basic needs. Thus, the expenses of leisure, extracurricular and enrichment activities, such as after-school clubs, sporting activities, etc., are usually not awarded separately, but are encompassed within the basic child support award. A court can order a parent to pay these expenses "over and above basic child support". However, if it does so, it is a deviation from the basic statutory formula and requires an analysis under the factors set forth in Domestic Relations Law § 240(1-b)(f). ***Sinnott v Sinnott***, 194 A.D.3d 868, 149 N.Y.S.3d 441 (2d Dept. 2021)

CSSA – Averaging Income – Imputation of Income

The CSSA Does not permit the court to determine a party's income for child support purposes by averaging a party's earnings over several years. The court may impute income in determining child support based on the party's employment history, future, earning capacity, educational background, resources available to the party, including money, goods, or services provided by relatives and friends, or When it is shown that the marital lifestyle was such that, under the circumstances, there is a basis for the court to conclude that the party's actual income and financial resources are greater than what he or she reported on his or her tax return. Where the plaintiff was employed by his family and his tax returns show substantial downward fluctuations in income, the court should have conducted an analysis as to whether to impute income to the plaintiff. ***Kontsouras v. Mitsos-Kontsouras,*** 198 A.D.3d 630, 152 N.Y.S.3d 331 (2d Dept. 2021)

Purely mathematical child support determination directing mother to reimburse father for child support payments for the older of their two children while mother's sister had temporary residential custody of older child was improper; while temporary transfer of custody to sister may have constituted substantial change in circumstances sufficient to warrant modification of father's existing child support obligation, trial court merely halved father's monthly obligation for both children and multiplied that amount by time during which sister had temporary custody of older child, without addressing any other practical and financial considerations involved, such as whether father remained obligated to pay certain expenses for older child during that period. ***Park v Park***, 193 A.D.3d1065,147 N.Y.S.3d 690 (2d Dept 2021)

The Support Magistrate may consider income for the tax year not yet completed in determining a party's income for child support purposes. Where the party's testimony regarding his or her finances is not credible, the Support Magistrate is justified in finding a true or potential income higher than that claimed. Here the Support Magistrate calculated the father's child support obligation based on his income as of the completion of the hearing based on credibility determinations which was supported by the record. ***Aslam v. Younas***, 198 A.D.3d 747, 153 N.Y.S.3d 619 (2d Dept. 2021)

The Supreme Court erred in calculating the defendant's child support obligation based on testimony regarding his yearly income instead of his most recent tax return. The Child Support Standards Act requires the court to establish the parties' basic child support obligation as a function of the 'gross (total) income' that is, or should have been, reflected on the most recently filed income tax return. ***Kiani v Kiani,*** 197 A.D.3d 1168, 153 N.Y.S.3d 521 (2d Dept. 2021)

In assessing a parent's ability to provide child support, a court may impute income to a parent based upon the parent's past income or demonstrated future potential earnings, rather than relying on the parent's account of his or her finances. The Support Magistrate may also consider income for the tax year not yet completed in determining a party's income. Where the party's testimony regarding his or her finances is not credible, a court is justified in finding a true or potential income higher than that claimed. Here, the Support Magistrate providently exercised his discretion in calculating the father's child support obligation based upon the father's income as of the completion of the hearing. ***Matter of Aslam v Younas***, 198 A.D.3d 747, 163 N.Y.S.3d 619 (2d Dept. 2021)

The Support Magistrate properly calculated the father's income from employment based upon his most recent tax return (*see* Family Ct Act § 413[1][b][5][i]). While the Support Magistrate had the discretion to consider the father's recent pay increase, which took effect approximately one month before the hearing, it was not required to do so. ***Matter of Remsen v Remsen***, 198 A.D.3d 658, 156 N.Y.S.3d 44 (2d Dept. 2021)

A court may impute income to a party based upon his or her employment history, future earning capacity, educational background, or money received from friends or relatives.

Where a party's account is not believable, the court may impute a true or potential income higher than alleged. Here, the court erred in imputing an annual income of over $60,000 to plaintiff-wife, which finding was purely speculative as based upon assumptions as to Plaintiff's purported investment income from her distributive award, unsupported by evidence in the record. Additionally, Plaintiff left the workforce over 30 years ago at Defendant's request. Therefore, no annual income should have been imputed to her in determining child support. ***Tuchman v. Tuchman***, 201 A.D.3d 993, 157 N.Y.S.3d 775 (2d Dept. 2022)

Support Cap; Child Support – Deviation

The Support Magistrate properly determined to impute to the father his 2017 adjusted gross income, rather than rely on his 2018 adjusted gross income as reported, and the monthly contributions made to the father by his friend which was based on credibility determinations and supported by the record. The court deviated from the guidelines in light of the needs of the household, the father's $350,000 personal injury settlement, the mother's debts and previous financial struggles, and the enhanced standard of living the children would have enjoyed had the household remained intact. ***Evans v. Evans***, 186 A.D.3d 1684, 129 N.Y.S.3d 838 (2d Dept. 2020)

Objections

Family Ct Act § 439(e) is mandatory insofar as it plainly states that the court shall, within 15 days of an objection to a support award being fully submitted, issue a ruling on it. Otherwise, it would defeat the goal of promoting speedy resolution of support matters. ***Matter of Liu v Ruiz***, 200 A.D.3d 68, 158 N.Y.S.3d 25 (1st Dept 2021)

Income – Tort Action Award

A lump-sum payment received by a parent in a tort action is not excluded from consideration in determining child support. The Support Magistrate's determination to calculate Mother's income by applying a reasonable rate of return to the entire settlement award was not an improvident exercise of discretion. The mother did not present any evidence to demonstrate what, if any, portion of the award was for future medical expenses. Further, while she spent a portion of the award, parents have a duty to use available financial resources to support their children and cannot insulate such resources from consideration for child support by transforming them into nonincome producing assets. ***Geraghty v. Muniz***, **193 A.D.3d 729, 141 N.Y.S.3d 883 (2d Dept. 2021)**

High Income Cases

In cases involving high levels of income, the amount of basic child support attributable to the combined parental income over the statutory baseline should be predicated upon the children's actual needs and the amounts required for the children to live an appropriate lifestyle. ***Kaufman v. Kaufman***, 189 A.D.3d 31, 133 N.Y.S.3d 54 (2d Dept. 2020)

Deduction of Union Dues

Although no deduction from income for union dues is specifically mandated by the Family Court Act, there is an allowable deduction for "unreimbursed employee business expenses

except to the extent said expenses reduce personal expenditures" (Family Ct Act § 413[1][b][5][vii][A]). Nonvoluntary union dues may be deducted under this category; however, such expenses are properly deducted from parental income in calculating child support obligations only when proven, usually by tax returns accompanied by records and receipts. ***Julien v. Ware***, 179 A.D.3d 921118 N.Y.S.3d 245 (2d Dept. 2020)

Overpayments – Add-on Remedy

There is a strong public policy against restitution or recoupment of the overpayment of child support, the reason being that the payments are deemed to have been devoted to that purpose and no funds exist from which one may recoup monies so expended. However, public policy does not forbid offsetting add-on expenses against an overpayment of child support, such as educational expenses and unreimbursed medical expenses. ***Collette v. Collette***, 188 A.D.3d1047, 136 N.Y.S.3d 372 (2d Dept. 2020)

Where plaintiff overpaid his obligation for unreimbursed medical, dental and other add-on expenses, and given the strong public policy against restitution or recoupment of overpayment of child support, to the extent plaintiff overpaid, such overpayment should be an offset against future add-on expenses. ***Levi v. Levi***, 186 A.D.3d 1628, 132 N.Y.S.3d 61 (2d Dept. 2020)

Imputation of Income

The Support Magistrate providently exercised its discretion in determining to impute annual income to the mother based upon her ability to work full time for minimum wage. The record established that, although the mother had worked only part time during the course of the parties' marriage, the mother had a college degree. The mother offered no evidence to support her conclusory assertions that she was unable to work full time because she was needed to care for her elderly parents and the parties' younger child, and because of undisclosed health limitations. The Support Magistrate providently exercised its discretion in determining to impute income to the mother for monthly housing costs paid by her brother-in-law as a court may consider, inter alia, money received from relatives or friends. Although such contributions may properly be excluded where the obligor party refuses to provide support during the pendency of the proceedings here, the father had consistently made voluntary support payments **to** the mother since the parties' separation in 2015. It was not error to fail to impute income to the father on the ground that he lived in an uncle's home with no obligation to pay rent. The evidence demonstrated that the father was living in his uncle's home in exchange for having assisted the uncle with refinancing the home and acted as a cosigner for the new mortgage loan without taking an interest in the real property. ***Matter of Remsen v Remsen***, 198 A.D.3d 658, 156 N.Y.S.3d 44 (2d Dept. 2021)

It was proper for the court to impute $130,000 in annual income to the defendant based upon his prior earnings and his admission that he did not attempt to find equivalent work after his employment was terminated. ***Marino v. Marino***, 183 A.D.3d 813, 123 N.Y.S.3d 638 (2d Dept. 2020)

The court may impute income based on the parent's employment history, future earning capacity, educational background, or money received from friends and relatives. However, the court must provide a clear record of the source of the imputed income, the reasons for such imputation, and the resultant calculations. ***Pilkington v Pilkington***, 185 A.D.3d 844, 846, 127 N.Y.S.3d 523 (2d Dept. 2020)

Support Magistrate properly refused to impute income to mother for child support purposes where the record did not demonstrate how much income the mother could earn based on her education and limited work experience if she did return to work, that her investments were capable of generating income or how much income they generated, or that she regularly received any income in the form of gifts from her family. ***Sacchetti v. Sacchetti,*** 192 A.D.3d 810, 139 N.Y.S.3d 868 (2d Dept. 2021)

While a court may impute income to a party based on the party's past income or demonstrated future potential earnings, the court must provide a clear record of the source of the imputed income, the reasons for such imputation, and the resultant calculations. Here, while income could be imputed to the father as the sole shareholder of a subchapter S corporation, the amount the court below imputed was not supported by the record. The Support Magistrate utilized gross receipts of the corporation to calculation additional income to impute to the father, without accounting for the corporation's returns and allowances or the cost of goods sold, where the corporation's gross profit should have been used for the calculation. ***Linh Ho v. Tsesmetzis***, 199 A.D.3d 686 (2d Dept. 2021)

A court may impute income based upon a party's past income or demonstrated future potential earnings. The court properly imputed an annual income to the defendant of $80,000 based upon defendant's prior work experience in the real estate business, as well as money received from his father. However, the court erred in determining plaintiff's annual income to be only $23,943.31, as the referee failed to consider the plaintiff's full ability to provide support, instead determining her annual income based upon a tax return for 2015, where she worked only from May through December, and more recent income information was available from 2016 earnings statements which the referee should have utilized. In recalculating the parties' respective child support obligations, the court should add the maintenance award to the plaintiff's annual income and deduct the amount of maintenance from the defendants annual imputed income. ***Nosratabdi v. Aroni***, 198 A.D.3d 976 (2d Dept. 2021)

Child Support; Payment after death of the Mother

The father's child support obligation did not cease upon the death of the mother with the grandparents being awarded sole custody of the child after the mother's death, and the award was retroactive to the date of the mother's death. Child support obligation is owed to the child, not to the payee spouse, and thus the death of the payee spouse does not terminate the obligation. ***Sultan v. Khan***, 183 A.D.3d 829, 122 N.Y.S.3d 528 (2d Dept. 2020)

Modification; Change in Circumstances

The father was properly granted a downward modification of his child support obligation based upon the terms of a 2008 consent order as he established a substantial change in circumstances based upon his testimony that, after a 12-year career in the NFL, he was no longer able to play football and generate the same income. ***Rodriquez v. Starks***, 194 A.D.3d1063, 149 N.Y.S.3d 474 (2d Dept. 2021)

A substantial change of circumstances to warrant a modification of child support is measured by comparing the parties' financial situation at the time of application for modification with that existing at the time the order sought to be modified was issued. ***Lopez v. Campoverde***, 201 A.D.3d 719 (2d Dept. 2022)

Application for downward modification of child support denied as the father was unemployed at time he entered into the stipulation and was unemployed at time of the modification application, but his financial situation and potential earning capabilities had actually improved at the time he made the application, and he failed to submit competent proof that he diligently searched for reemployment commensurate with his previous earning capacity. ***Matter of Solomon M. v Adelaide M.,*** 192 A.D.3d 424, 142 N.Y.S.3d 542 (1st Dept 2021)

A substantial change in circumstances may be measured by comparing the parties' financial situation at the time of the application for modification with that existing at the time the order sought to be modified was issued. Here, the mother demonstrated her entitlement to an upward modification by providing the father's 2018 federal income tax return, showing that his current income has more than doubled since the time the stipulation was entered. Additionally, the stipulation and the judgment of divorce were never modified or adjusted, and more than three years have passed, triggering review pursuant to Family Court Act § 451(3)(b)(i). ***Matter of Giraldo v Fernandez***, 199 A.D.3d 796, 158 N.Y.S.3d 149 (2d Dept. 2021)

Plaintiff's application for a downward modification of his child support obligation properly denied, where plaintiff claimed, inter alia, a decrease of more than 15% in his gross income. the court properly considered the totality of plaintiff's financial circumstances, i.e., his income at the time of his motion, as well as his potential earning capacity based on his prestigious educational credentials and extensive professional experience and his ownership of the condominiums. ***Amley v Amley***, 198 A.D.3d 559, 152 N.Y.S.3d 896 (1st Dept. 2021)

In child support modification proceeding, where the parties did not opt out of the provisions of Family Court Act § 451(3)(b), the father was not obligated to demonstrate a substantial change in circumstances where he demonstrated that three years had passed since the last order concerning child support was entered. Moreover, the father also demonstrated that the mother's gross income had increased by 15% or more during that time. ***Khost v. Ciampi***, 189 A.D.3d 1409, 134 N.Y.S.3d 735 (2d Dept. 2020)

Father did not become de facto custodial parent of parties' children to warrant suspension of his entire basic child support obligation, although children chose to reside with father for a period of time; father neither wanted nor petitioned court to be primary physical custodian of children, mother never acquiesced to children's relocation to father's residence, and judgment of divorce remained unchanged in designating mother as custodial parent for child support purposes. However, Father established an unanticipated and unreasonable change in circumstances warranting reduction in father's basic child support obligation; children were spending much more time in father's household than originally contemplated in stipulation of settlement. ***Listokin v Listokin***, 188 A.D.3d862, 136 N.Y.S.3d 64 (2d Dept. 2020)

In support of his petition for a downward modification of his child support obligation, the father was not obligated to demonstrate a substantial and unanticipated change in circumstances, as the parties' stipulation regarding child support was executed after the effective date of the 2010 amendments to Domestic Relations Law § 236(B) and Family Court Act § 451, and the parties did not opt out of the provisions of Family Court Act § 451(3)(b). ***Matter of Emig v Emig***, 192 A.D.3d1024, 140 N.Y.S.3d 764 (2d Dept. 2021)

Father's petition for downward modification of child support, where parties executed the agreement prior to the effective date of the 2010 amendments to Family Court Act § 451, properly dismissed even though parties' son began living primarily with father after child support provisions of separation agreement were signed; parties' agreement set forth liberal living arrangement for parties' children, and father failed to establish that son living primarily with him constituted unreasonable or unanticipated event. ***Muenichsdorfer v. Biagiotti,*** 179 A.D.3d805, 118 N.Y.S.3d 226 (2d Dept. 2020)

The court did not err in refusing to grant a downward modification with respect to father's child support and spousal maintenance obligations under Domestic Relations Law § 236(B)(9)(b)(1) because farther failed to demonstrate that he made a good-faith or diligent effort to obtain employment commensurate with his ability, qualifications, and experience; and in addition to his non-taxable disability income, father has substantial assets. In the context of modification of child support, the proper amount of support payable is determined not by a parent's current economic situation, but by a parent's assets and earning powers. Here, although a surgeon, suffered a disability not of his own making, his effort to regain commensurate employment was deemed lackluster at best. ***Ryan v Ryan***, 197 A.D.3d 869 (4th Dept. 2021)

Family Court may modify an order of child support upon a showing of a substantial change in circumstances, or where three years have passed although there's been a change in either party's gross income by 15% or more since the order was entered, last modified, or adjusted. ***Hall v. Pancho***, 191 A.D.3d 670, 139 N.Y.S.3d 637 (2d Dept. 2021)

Suspension

Child support payments may be suspended where the noncustodial parent establishes that his or her right of reasonable access to the child has been unjustifiably frustrated by the

custodial parent. Such a suspension is warranted only where the custodial parent's actions rise to the level of deliberate frustration or active interference with the noncustodial parent's rights. ***Matter of Maldonado v Cappetta***, 195 A.D.3d1562, 145 N.Y.S.3d 902 (4th Dept 2021)

Modification; 15% Income Variance

Where the evidence showed that the mother's income had increased by more than 15% since entry of the Judgment of Divorce, a new determination of the parties' child support obligation was warranted irrespective of whether any decrease in the father's income may also properly be considered. ***Castelli v. Maiuri-Castelli,*** 198 A.D.3d 752, 156 N.Y.S.3d 273 (2d Dept. 2021)

Where Plaintiff brought motion for upward modification of child support, she was not obligated to demonstrate a substantial change in circumstances where three years had passed since the last order concerning child support was entered and the father's income had increased by 15% or more since the last order. ***Assad v. Assad***, 200 A.D.3d 831(2d Dept. 2021)

Modification – No Hearing

The Family Court did not err in failing to conduct a separate hearing on the modification petition, where the Court made a finding at a prior contempt hearing that the father had the ability to pay the existing order of support and wilfully failed to comply with the support order. ***Matter of Nannan L. v Stephen L.***, 191 A.D.3d 533, 141 N.Y.S.3d 57 (1st Dept 2021)

Application by husband for downward modification of the support applications properly denied without a hearing as he failed to raise an issue of fact as to whether the collapse of the hedge fund, where he worked in which he partially owned, resulted in his unemployment and allegedly diminished assets, substantially changes circumstances or course of extreme hardship. His assertion that he applied and interviewed for just one position after the hedge fund collapse failed to show a diligent search commensurate with his prior employment. Even in the context of the Covid-19 pandemic and the publicity surrounding the hedge fund collapse, he did not sufficiently demonstrate that he was unable to find employment or that he was facing extreme hardship. ***Weinig v Weinig***, 198 A.D.3d 470, 156 N.Y.S.3d144 (1st Dept 2021)

Claim of Parental Alienation

Child support payments may be suspended where the noncustodial parent establishes that his or her right of reasonable access to the child has been unjustifiably frustrated by the custodial parent. Suspension of child support is only appropriate when the custodial parent's actions rise to the level of deliberate frustration or active interference with the noncustodial parent's visitation rights. ***Fielder v Fielder***, 189 A.D.3d 1231, 134 N.Y.S.3d 261 (2d Dept. 2020)

Same-sex Relationship; Non-biological Parent; Child Support

Where the court found that respondent was the non-biological parent of the children, she was responsible for the financial support of the children. The credible evidence adduced at the hearing established that the parties planned jointly for the children's conception, participated jointly in the process of conceiving the children, planned jointly for their birth, and planned to raise them together. It was not error for the Family Court to consider post-conception behavior in determining the existence of a preconception agreement. ***Scott v. Adrat***, 196 A.D.3d 585, 151 N.Y.S.3d 431 (2d Dept. 2021)

College Expenses

Payment for a child's college education is not mandatory, and absent a voluntary agreement, is subject to the exercise of the court's discretion in accordance with Domestic Relations Law §240[1-b][c][7]. Educational expenses are not necessarily prorated in the same percentage as each parent's income bears to the combined parental income. Plaintiff is entitled to a room and board credit against his basic child support obligation during the periods when the child is in school. ***Rafferty v. Rafferty***, 199 A.D.3d 725, 158 N.Y.S.3d 123 (2d Dept. 2021)

Pursuant to Domestic Relations Law Sec. 240(1-b)(c)(7), the court may direct a parent to contribute to a child's educational expenses, even in the absence of special circumstances or a voluntary agreement of the parties, so long as the court's discretion is not improvidently exercised in that regard. ***Messiana v. Pena***, 195 A.D.3d 849, 145 N.Y.S.3d 825 (2d Dept. 2021)

In determining whether to award educational expenses, the court must consider the circumstances of the case, the circumstances of the respective parties, the best interests of the children, and the requirements of justice. Upon consideration of the relevant factors, including the plaintiff's income, which far exceeds the defendant's income, imputed or otherwise, an appropriate apportionment of responsibility for the older child's college expenses is 80% to the plaintiff and 20% to the defendant. ***Saks v Saks***, 199 A.D.3d 950, 154 N.Y.S.3d 484 (2d Dept. 2021)

Where mother sought to obtain reimbursement from the father for his pro rata share of the college expenses she paid for the parties' child, pursuant to their agreement, she must show that she actually paid the sums for which reimbursement is sought. Proof of payment suffices, and she does not have to demonstrate where she obtained the funds for the payment. However, it was error for the Support Magistrate to fail to credit the father against his pro rata share of room and board expenses for the amount he paid in child support during the relevant time period. ***Parente v. Parente***, 193 A.D.3d 862, 148 N.Y.S.3d138 (2d Dept. 2021)

Order for husband to contribute to college expenses of parties' younger child was premature; at time of divorce trial, parties' younger child was 14 years old, and no evidence was presented concerning her academic ability, interest in attending college, choice of college, or expenses attendant with college. With respect to the

older child's costs of college attendance, in ordering Husband to pay 92% of such costs, the court should have directed that when that child was living away from home while attending college, husband's monthly child support obligation shall be reduced, or awarded husband credit against his child support obligation for any amounts that he contributed toward college room and board expenses for that child during those months. Whether a SUNY cap is applicable is determined on a case-by-case basis, considering the parties' means and the child's educational needs. ***Spinner v. Spinner***, 188 A.D.3d 748, 134 N.Y.S.3d 377 (2d Dept. 2020)

College Expenses; Room and Board Credit

Referee's recommendation to credit the father for room and board expenses he paid on the child's behalf for the 2016-2017 and 2017-2018 academic years was supported by the testimony of the father and the child that the child lived in off-campus housing during that period, paying rent to various individuals, as corroborated by certified bank records showing checks made payable to these individuals. To the extent that room and board credits deducted by the father might negate direct child support to the mother once both children are in college, there is no apparent violation of public policy that would justify setting aside the parties' financial agreement since the children would still be benefitting from the father's support. ***Meshel v Meshel***, 201 A.D.3d 472, 156 N.Y.S.3d 848 (1st Dept. 2022)

Private School

Pursuant to Domestic Relations Law § 240 (1-b) (c) (7), the court may direct a parent to contribute to a child's education, even in the absence of special circumstances or a voluntary agreement of the parties, as long as the court's discretion is not improvidently exercised in that regard. Supreme Court providently exercised its discretion in not requiring the plaintiff to pay a pro rata share of the parties' children's private school tuition as defendant failed to submit evidence to establish that the education provided by the public schools in Florida would be inferior to that provided by Hillel Day School of Boca Raton, a private religious school, or that the needs of either child would be better served by their attendance at a private religious school. ***Pilkington v Pilkington***, 185 A.D.3d 844, 127 N.Y.S.3d 523 (2d Dept 2020)

Family Court did not improvidently determine that the phrase "educational and extracurricular activities," included private school tuition for the parties' children. The judgment of divorce included "educational and extracurricular activities" in a non-exhaustive list of child-related add-on expenses, for which the Supreme Court determined the father was 61% responsible. The mother's uncontroverted testimony at the willfulness hearing was that the parties had been planning to enroll their children in private school at the time of their divorce, and the mother believed the subject phrase encompassed private school tuition as a child-related add-on expense. The father failed to appear and testify before the Support Magistrate and cannot now challenge the mother's uncontroverted testimony by way of objections to seek clarification of the specified language in the judgment of divorce. ***Matter of Ritossa v Ritossa***, 200 A.D.3d 783, 155 N.Y.S.3d 126 (2d Dept. 2021)

Constructive Emancipation

Child was not deemed constructively emancipated where the child's refusal to continue a relationship with the plaintiff was a result of father's mistreatment of her. Plaintiff failed to show that his behavior was not a primary cause of the child's decision to cease communicating with him and did not show that he made a serious effort to contact the child after her 18th birthday. ***Rafferty v. Rafferty***, 199 A.D.3d 725, 158 N.Y.S.3d 123 (2d Dept. 2021)

Effective Date; Credits

A party's child support obligation commences, and is retroactive to, the date the application was made, which here was the date the action was commenced. The paying party is entitled to a credit for any amount of temporary child support already paid as well as for carrying charges on the marital residence. Both voluntary child support payment which were made prior to a pendente lite order and payments made pursuant to the pendente lite order may be credited toward a party's retroactive child support. ***Ford v. Ford***, 200 A.D.3d 854 (2d Dept. 2021)

UIFSA

The family court erred in denying a father's motion to dismiss the DSS's petition for support on behalf of his daughter because New York did not have subject matter jurisdiction to modify the support order since Florida had continuing, exclusive jurisdiction over its order under the UIFSA—the father still resided in Florida—and, under the plain language of the 28 U.S.C.S. § 1738B(e) of the UIFSA, the New York order of support was a "modification" of the Florida judgment, despite the termination of the father's obligations under that order. ***Matter of Nassau County Dept. of Social Servs. v Ablog***, 194 A.D.3d 817, 149 N.Y.S.3d 109 (2d Dept. 2021)

Jurisdiction

Father argued that he was no longer obligated to support two of the three children who had moved to Pennsylvania with their mother as the age of emancipation in PA was 18, and the children were 19. The court stated father's argument PA law controlled as the state where the children now resided was unpersuasive. Father and one child lived in NY and no proof established parties consented to PA jurisdiction, thus, NY maintained continuing, exclusive jurisdiction. Hence, the triplets were entitled to support until they turned 21 or emancipated themselves. A state issuing an order loses continuing, exclusive jurisdiction where all of the parties and children no longer reside there, or all of the parties file their written consent for another state to assume such jurisdiction. The state issuing a child support order retains continuing, exclusive jurisdiction so long as an individual contestant continues to reside in the issuing state. ***Haydee U v. Brian P.***, NYLJ, 6/4/21 (Family Court, Nassau Co., SM Toscano)

Foreign Order Registration

A foreign support order may be registered in this state by sending certain enumerated records to the appropriate tribunal in this state. The tribunal shall promptly notify the parties of the registration. As the Family Court Act does not specify how the tribunal shall

notify the nonregistering party of the registration of the foreign support order, the provisions of CPLR 2103 governing the service of papers, are applicable. Pursuant to CPLR 2103(b)(2), "service by mail shall be complete upon mailing; where a period of time prescribed by law is measured from the service of a paper and service is by mail, five days shall be added to the prescribed period. ***Laczko v. Szoca***, 191 A.D.3d 678, 137 N.Y.S.3d 715 (2d Dept. 2021)

Switzerland, is a foreign reciprocating country under the Uniform Interstate Family Support Act (UIFSA), codified by Family Court Act (FCA) 5-b, and thus should be analyzed as such under the statute. The father failed to meet his burden in proving that the Swiss court failed to establish personal jurisdiction over him, a defense under Family Court Act § 580-607(a). He admitted that he was advised by the Swiss court of the support proceedings pending against him and asked to provide a Swiss contact for further notifications in lieu of service via publication, which he failed to do, even though he was engaged in custody litigation in Switzerland at the time and was represented by counsel in those proceedings. Contrary to the father's contention, we find that the Swiss methods of service are consistent with our notions of procedure and due process in that he was given "meaningful notice" of the foreign proceeding against him. ***Matter of Alava v. Caceres***, 195 A.D.3d 511 (1st Dept. 2021)

COUNSEL FEES

Numerous law firms retained

Supreme Court improvidently awarded Plaintiff $15,000 in counsel fees where plaintiff retained four different law firms during the pendency of the action and used loans from his family to pay the counsel fees. Additionally, fault exists on both sides for the extent of the litigation involved. No counsel fees should have been awarded to either party to date. ***Kontsouras v. Mitsos-Kontsouras,*** 198 A.D.3d 630,152 N.Y.S.3d 331 (2d Dept. 2021)

Presumption

There is a statutory rebuttable presumption that counsel fees shall be awarded to the less monied spouse (Domestic Relations Law § 237[a]). The decision to award an attorney's fee in a matrimonial action lies, in the first instance, in the discretion of the trial court and then in the Appellate Division whose discretionary authority is as broad as that of the trial court. In exercising that discretion, the court must consider the financial circumstances of the parties and the circumstances of the case as a whole, including the relative merits of the parties' positions and whether either party has delayed the proceedings or engaged in unnecessary litigation. ***DiNapoli v DiNapoli***, 200 A.D.3d 1027 (2d Dept. 2021)

Factors

Here, considering all of the relevant circumstances, including the disparity in the parties' respective incomes and the size of the distributive award, we conclude that the defendant should be responsible for $100,000 of the plaintiff's counsel fees, in addition to his prior payments made pendente lite. ***Mahoney v Mahoney***, 197 A.D.3d 638, 152 N.Y.S.3d 727 (2d Dept. 2021)

In determining whether to award attorney's fees, "the court must consider the financial circumstances of the parties and the circumstances of the case as a whole, including the relative merits of the parties' positions and whether either party has delayed the proceedings or engaged in unnecessary litigation. ***Mashieh v Mashieh***, 198 A.D.3d 911, 154 N.Y.S.3d 457 (2d Dept. 2021)

Willful Default

In any proceeding for failure to obey any lawful order compelling payment of support of a spouse or former spouse and children, or of children only, the court shall, upon a finding that such failure was willful, order respondent to pay counsel fees to the attorney representing the petitioner or person on behalf of the children. (Family Ct Act § 438[b]). ***Matter of Packman v. Cywiak***, 199 A.D.3d 811, 154 N.Y.S.3d 260 (2d Dept. 2021)

Less Monied Spouse

In awarding counsel fees, a less-monied spouse should not be expected to exhaust all, or a large portion, of available finite resources available, particularly where the more affluent spouse is able to pay his or her own legal fees without any substantial lifestyle impact. The court may consider whether either party has engaged in conduct or taken positions

resulting in delay or unnecessary litigation. ***Silvers v Silvers***, 197 A.D.3d 1195, 153 N.Y.S.3d 548 (2d Dept. 2021)

Domestic Relations Law §238 authorizes a court, in its discretion, to award counsel fees in a proceeding to enforce the provisions of a divorce judgment. There is a rebuttable presumption that counsel fees shall be awarded to the less monied spouse, with the amount being a matter within the sound discretion of the trial court. ***Tuchman v. Tuchman,*** 201 A.D.3d 993, 157 N.Y.S.3d 775 (2d Dept. 2022)

Conduct Causing Fees

Where parties were to cooperate in effectuating the sale of the former marital residence, and the wife delayed the process, including interference with potential purchases, commencing numerous lawsuits, including an action against the presiding justice, the receiver, and other court personnel, it was a proper exercise of discretion to have the legal costs the wife's conduct caused to be paid from the proceeds of sale of the residence. ***Motta v Motta***, 192 A.D.3d 481, 139 N.Y.S.3d 833 (1st Dept 2021)

Account Stated – Summary Judgment

The Court grants summary judgment with respect to the account stated cause of action. Plaintiff alleges that the sent timely invoices for legal services rendered and defendant did not object after receiving these bills. Defendant does not argue in her opposition that she raised timely objections to these bills or that she failed to receive the invoices. Instead, she appears to make substantive objections to the invoices. Unfortunately, raising objections for the first time in this litigation is not a sufficient basis to raise an issue of fact. The time to object was when defendant received the bills not in opposition to motion for summary judgment. ***Kamaras v . Bristow***, 2021 NY Slip Op 31528[U], *3 [Sup Ct, NY County 2021)

Counsel Fees Pendente Lite

Supreme Court providently exercised its discretion in granting the plaintiff's motion for an award of additional interim counsel fees to the extent of directing the defendant to pay the sum of $460,000 to the plaintiff's counsel. ***Tomassetti v Tomassetti***, 194 A.D.3d 884 (2d Dept 2021)

Counsel Fees on Appeal

Supreme court may, either before or after the appeal, award appellate counsel fees to enable a spouse to defend an appeal. In exercising its discretion, the court should review the financial circumstances of both parties together with all the other circumstances of the case, which may include the relative merit of the parties' positions. ***Curley v. Curley***, **195 A.D.3d 1183, 150 N.Y.S.3d 357 (3d Dept. 2021)**

Charging Lien

Under DRL section 237 (a), an attorney discharged without cause in a matrimonial action may seek counsel fees against the monied spouse. A client has an absolute right to discharge an attorney at any time. An attorney's right to recover fees rests on the determination of whether he or she has been discharged by the client for cause or without

cause. An attorney who is discharged without cause has three separate and distinct remedies available: (1) a retaining lien, which permits the attorney to retain all of the client's papers and files until all fees are paid; (2) a charging lien against any judgment or settlement in favor of the client; and (3) a plenary action in quantum meruit seeking a judgment for the reasonable value of the services, which would be enforceable against all of the client's assets. Where, however, an attorney is discharged with cause, neither a retaining lien nor a charging lien may be asserted. In the matrimonial context, compliance with the rules promulgated in 22 NYCRR section 1400 et seq. is also a requirement for the recovery of legal fees by lien. 22 NYCRR section 1400 et seq. was enacted to remedy abuses in the practice of matrimonial law and as a means to better protect the public. A charging lien is a statutory security interest in the favorable result of litigation, giving the attorney equitable ownership interest in the client's cause of action and ensuring that the attorney can collect his fee from the fund he has created for that purpose on behalf of the client" pursuant to Judiciary Law section 475. In a matrimonial action, a charging lien will be available to the extent that an equitable distribution award reflects the creation of a new fund by an attorney greater than the value of the interest already held by the client. ***A.H. v. Y.G.***, NYLJ, 12/27/21, Supreme Court, Kings Co., Quinones, J.

CUSTODY & ACCESS

Vaccination

Determination of the Family Court to award the mother, who opposed vaccinating the child, medical decision-making authority did not have a sound and substantial basis in the record, where forensic evaluator recommended that the father should be awarded medical decision-making authority due to his position on vaccinations which was safer for the child, and father testified that he would inoculate the child for diphtheria, tetanus, and pertussis, and measles, mumps, and rubella, and expressed his concern that the child could become infected and young and elderly members of his family would be at risk due to child's lack of immunization against highly contagious preventable diseases. ***Ednie v. Haniquet***,185 A.D.3d1029, 128 N.Y.S.3d 282 (2d Dept. 2020)

Joint custodial parents could not agree as to whether their 11-year-old child should be vaccinated against the COVID virus, with the father citing a series of factual concerns articulated on unpublished websites, and the mother in favor of having a child inoculated. The court held that while the father's objections were sufficient to raise some substantive concerns, the court should still conclude that the best interest of the child require the issuance of an order that the child was to be vaccinated as soon as possible. ***J.F. V. D.F.,*** 73 Misc.3d 1215(A), 154 N.Y.S.3d 748 (Supreme Court, Monroe Co., 2021, Dollinger, J.)

While the divorce action was pending, the mother pulled the children of a public school without the father's consent as violation of his joint custodial rights pursuant to a prior Family Court order. The court issued a temporary order directing the immediate enrollment of the parties' children in public school, finding no merit to the mother's unsubstantiated argument that mask wearing was unhealthy, or that the mandatory vaccinations were against her religious beliefs. Court noted the mother did not have a college degree or any experience as a teacher and found that the children should avoid the risk of falling academically behind at all ages. ***D.R.D. v. J.D.D.***, 73 Misc.3d 813, 158 N.Y.S.3d 549 (Supreme Court, Monroe Co., 2021, Dollinger, J.)

Where parties had shared joint custody and entered into a stipulation providing they would comply with all New York State and New York City issued guidelines related to Covid, and parties court not reach agreement as to whether the children should be vaccinated against Covid 19, mother's allegations of father's opposition to vaccination was sufficient to warrant a change of custody. ***B.S. v. A.S.,*** 2021 NY Slip Op 21349 (Supreme Court, Kings Co., Sunshine, J.)

The court ordered a child to be vaccinated against COVID-19 despite the father's objections because the mother wanted the child vaccinated, the child wanted to be vaccinated, the father, who was vaccinated, acknowledged that vaccines are important, and the child's pediatrician endorsed vaccination. ***J.F . v . D.F.***, 74 Misc.3d 175, 2021 NY Slip Op 21327 (Supreme Court, Monroe Co., 2021, Dollinger, J.)

Father's in-person parental access suspended until he agreed to obtain the first dose of the Covid-19 vaccine or undergo a regular protocol of testing. ***C.B. v. D.B.***, 2021 NY Slip Op 212268 (Supreme Court, NY Co., Cooper, J.)

Father's application to prevent son from receiving COVID-19 vaccine and to modify mother's final decision-making authority per custody order denied when based on father's vaccine skepticism. ***A.L. v. V.T.L.***, NYLJ, 2/14/22 (Family Ct., Rockland Co., Cornell, J.)

Hearing

Custody determinations should generally be made only after a full and plenary hearing in inquiry. This general rule furthers the substantial interest, shared by the State, the children, and the parents, in ensuring that custody proceedings generate a just and enduring result that, above all else, serves the best interest of a child. When the allegations of fact in a petition to change custody are controverted, the court must, as a general rule, hold a full hearing. ***Merchant v. Caldwell***, 198 A.D.3d 782, 156 N.Y.S.3d 254 (2d Dept. 2021)

Father's petition for parent access properly dismissed where Supreme Court repeatedly directed the father to cooperate with an Administration for Children's Services' (hereinafter ACS) home inspection and to submit to a drug test, but the father failed to comply. While ordinarily the issue should be determined after a hearing, the father's noncompliance prevented the matter from proceeding to a hearing. ***Matter of Cardona v McNeill***, ___A.D.3d ___, 2021 NY Slip Op 06615 (2d Dept. 2021)

It was error to grant, without a hearing, defendant's motion to modify the parties' stipulation and the judgment of divorce so as to award the mother's sole legal custody of the child to the extent of awarding her final decision-making authority as to any major child related issue about which the parties cannot agree and denying husband's cross-motion to award him sole legal custody. ***Trazzera v. Trazzera***, 199 A.D.3d 1002, 154 N.Y.S.3d 817 (2d Dept. 2021)

A parent seeking a change of custody is not automatically entitled to a hearing. Rather, a parent must make some evidentiary showing of a change in circumstances. ***Renner v. Renner***, 194 A.D.3d 822, 143 N.Y.S.3d 614 (2d Dept. 2021)

Generally, where a facially sufficient petition has been filed, modification of a custody order requires a full and comprehensive hearing at which a parent is to be afforded a full and fair opportunity to be heard. In assessing whether the petitioner has alleged the requisite change in circumstances, so as to withstand a motion to dismiss for failure to state a claim, the Family Court must liberally construe the petition, accept the facts alleged in the petition as true, afford the petitioner the benefit of every favorable inference and resolve all credibility questions in favor of the petitioner. Here, the modification petition was sufficient to warrant an evidentiary hearing based on the allegations indicating that the father failed to communicate with her to effectively co-parent, interfered with her relationship with the child, and failed to take advantage of his parenting time, ***Abigail Y. v.***

Jerry Z., 200 A.D.3d 1512 (3d Dept. 2021) (see also, ***Silla v. Silla***, 155 N.Y.S.3d 817 (2d Dept. 2021)

Factors; Initial Award

Family Court's award of custody to mother reversed where the evidence was insufficient to show that the father was less capable of providing the children with a stable home environment; the mother's work schedule required her to leave the children alone in the morning on school days, resulting in both children being late for school excessively; and while the express wishes of a child are not controlling, the express preferences are entitled to great weight where the child's age and maturity would make him or her input particularly meaningful. Here, the 12- and 14-year-old children expressed an unequivocal desire to live with the father. ***Lopez v. Reyes***, 195 A.D.3d 846, 150 N.Y.S.3d 290 (2d Dept. 2021)

Upon consideration of the relevant factors, including the fact that the child, who had been living a stable life with the father in New York for the past several years and expressed his desire to continue doing so, would have to relocate to Florida upon an award of custody to the mother, the child's best interests would be served by an award of custody to the father. ***Olea v. Diaz***, 194 A.D.3d 721,143 N.Y.S.3d 583 (2d Dept. 2021)

Award of custody and final decision making to father reversed where at of the time of the hearing, he had little or no relationship with the children; that the poor state of the relationship between the children and the father was due, in significant part, to the father's own conduct, including that the father was "dismissive" of the children's feelings during his therapy sessions with them; that despite his claims of attempted alienation by the mother, when the older child was crying when the father picked her up for visits, the mother tried to encourage that child to stop crying and to go with the father on multiple occasions; the court-appointed forensic examiner concluded that the children were fearful of their father and wanted nothing to do with him; and the fact that the preferences of the 12 and 15 year-old children to live with their mother should be entitled to some weight. ***DiNapoli v DiNapoli***, 200 A.D.3d 1027 (2d Dept. 2021)

In determining a child's best interest, the court must consider, among other things, (1) the parental guidance provided by the custodial parent; (2) each parent's ability to provide for the child's emotional and intellectual development; (3) each parent's ability to provide for the child financially; (4) each parent's relative fitness; and (5) the effect an award of custody to one parent might have on the child's relationship with the other parent. The existence of any one factor cannot be determinative on appellate review since the court is to consider the totality of the circumstances. ***Gillespy v Ceus***, 200 A.D.3d1033, 155 N.Y.S.3d 812 (2d Dept. 2021)

Mother awarded custody as not only is the Mother clearly better able to provide for the Children's wellbeing, but she is also more likely to foster their relationship with the Father than he would with respect to the Children's relationship with her. Throughout the trial, the Father displayed a bitterness and poorly veiled hatred toward the Mother, insulting her

morals, her truthfulness, and her overall fitness as a mother on the record in open court. Indeed, he would not answer when he was asked whether he will foster the Children's relationship with the Mother. This condescension towards the Mother would be totally incompatible with an award of custody to the Father. ***Matter of M.R. v Albert R.***, 71 Misc.3d 1230 (Family Court, Kings Co., 2021, Vargas, J.)

Extra-Curricular Activities; Camp

On facts of case, Supreme Court erred in directing father to pay his pro rata share of the costs of the extracurricular activities of the parties' youngest child, including summer camp. Although such expenses may be appropriately considered as an "add on expense" for childcare, Plaintiff failed to establish an entitlement to childcare expenses. Moreover, despite the fact that the child has previously attended summer camp, the child's standard of living during the marriage was taken into account in awarding child support using Defendant's income in excess of the statutory cap. Expenses for extracurricular activities are not specifically delineated as an "add-on" under the CSSA. The substantial basic child support award should be sufficient to cover the child's expenses, including the extracurricular activities. ***Tuchman v. Tuchman***, 201 A.D.3d 993, 157 N.Y.S.3d 775 (2d Dept. 2022)

Trial Court's Findings

Since custody determinations depend to a great extent upon an assessment of the character and credibility of the parties and witnesses, deference is accorded to the trial court's findings, and such findings will not be disturbed unless they lack a sound and substantial basis in the record. ***Barge v. Blackman***, 195 A.D.3d 926, 146 N.Y.S.3d 494 (2d Dept. 2021)

A sound and substantial basis exists in the record to support family court's determination that it was in the children's best interests to award the mother sole legal custody because the hearing evidence established that, historically, the mother had been the children's primary caretaker and had made the majority of the parenting decisions. Furthermore, the evidence, including a stay-away order of protection entered against the father in favor of the mother, demonstrated that the parties' relationship had been acrimonious and plagued by domestic violence. ***Matter of Darnell R. v Katie Q.***, 195 A.D.3d 1083, 150 N.Y.S.3d 135 (3d Dept. 2021)

Limiting Testimony

Although Supreme Court did limit the father from providing certain additional direct testimony as it pertained to the children, it did so only after the father had already provided a full day of testimony pertaining to custodial issues — which included testimony with respect to applicable best interests factors such as his past performance as a parent, the parties' financial resources and their respective relationships with the children, as well as testimony regarding disputed allegations with respect to his alcohol use, domestic violence and his supervision of the younger child's relationship with her boyfriend. These matters were also revisited during cross-examination and in his redirect testimony in reply thereto. Accordingly, the Supreme Court's ruling was an appropriate exercise of the court's discretionary control over the trial and its calendar and was an effort to avoid repetitive

testimony as opposed to a disdainful attempt to limit the father's ability to introduce evidence or otherwise interfere with his due process rights. ***Vickie F. v. Joseph G.***, 195 A.D.3d1064, 149 N.Y.S.3d 671 (3d Dept. 2021)

Forensic Evaluations

Not error for the court not to accept the court-appointed forensic evaluator's opinion that the father should have significant amounts of time with the children where such conclusions were issued over three years before the court's custody order, and after the forensic report was issued, the father's conduct prompted the court to order that his access with the children be supervised and he was held in contempt and incarcerated by his failure to comply with the pendente lite support obligations. ***Lvovsky v. Lvovsky***, 201 A.D.3d 571,157 N.Y.S.3d 713 (2d Dept. 2022)

The decision whether to direct a psychological or social evaluation in a child custody dispute is within the sound discretion of the court. Supreme Court properly denied father's motion seeking mental health evaluations. Court noted that all of the issues raised by the father in support of his request for a forensic evaluation were fully known to him at the time that this matter was settled in Family Court, and that the father made no claims of any new occurrences that had arisen since the parties' separation. Accordingly, it would be unlikely that he would have been able to demonstrate a change in circumstances. ***Gilbert Rr v Yaniry Rr***, 192 A.D.3d 1435, 145 N.Y.S.3d 171 (3d Dept. 2021)

The recommendations of court-appointed experts may be considered in making custody determinations, and such recommendations are entitled to some weight, unless the opinion is contradicted by the record. ***DiNapoli v DiNapoli***, 200 A.D.3d1027 (2d Dept 2021)

Where the mother's mental and emotional health was the central issue contested, the court abused its discretion in making its determination and awarding the father sole custody of the child without first considering the results of the psychological evaluations that it ordered. Although a psychological expert testified at the fact-finding hearing on behalf of the father, that expert interviewed the parties and the subject child to assess whether the child had been sexually abused, and therefore he did not provide much information on the mother's emotional functioning, the impact her mental health issues had on her ability to parent the child, or the fitness of either parent. ***Matter of Pontillo v Johnson-Kosiorek***, 196 A.D.3d 1163, 152 N.Y.S.3d 204 (4th Dept 2021)

Child's Activities During Access Period

There was a not a sound and substantial basis in the record for the Supreme Court's failure to require the father, each Tuesday, to take the child to all scheduled baseball practice sessions and other activities in which the child is interested, regardless of whether those activities may have been arranged by the mother***. R.K. v R.G.,*** 198 A.D.3d 628, 156 N.Y.S.3d 35 (2d Dept. 2021)

Termination of Parent Rights

A biological parent whose parental rights have been terminated is not entitled to thereafter seek custody of the child, including where parental rights have been terminated voluntarily. ***Matter of Mehmeti v Dautaj***, 198 A.D.3d 781,152 N.Y.S.3d 628 (2d Dept. 2021)

Jurisdiction; Home State

Mother's petition to be appointed as guardian of the child and for the issuance of an order making specific findings to enable the child to petition the United States citizenship and immigration services the special immigrant juvenile status properly dismissed for lack of subject matter jurisdiction. New York does not qualify as the child's home state since the child has not been residing in the State for at least six consecutive months immediately before the commencement of the proceeding. ***Aida T.M. v. Manuel R.T.M.,*** 197 A.D.3d 596, 149 N.Y.S.3d 894 (2d Dept. 2021)

The mother brought a writ of habeas corpus seeking custody of the parties' four children who were in Yemen with the father. The Family Court erred in dismissing the petition for lack of jurisdiction. As there were disputed issues of fact regarding the circumstances under which the parties moved with the children from New York to Yemen, the court was required to hold a hearing pursuant to Domestic Relations Law §§ 76(1)(a) and 75-a (7), i.e., the UCCJEA, to determine the home state of the children. ***Matter of Kassim v. Al-Maliki***, 194 A.D.3d 719, 143 N.Y.S.3d 585 (2d Dept. 2021)

Subject Matter Jurisdiction

Supreme Court should not have summarily determined, without a hearing, that it lacked exclusive, continuing jurisdiction on the ground that the children had been residing in Florida and Hawaii. As the court made the initial custody determination for the children in conformity with the provisions of the Uniform Child Custody Jurisdiction and Enforcement Act (hereinafter UCCJEA) and, therefore, would ordinarily retain exclusive continuing jurisdiction pursuant to Domestic Relations Law §76-1(1)(a). In order to determine the issue of whether it lacked exclusive continuing jurisdiction, the court should have afforded the parties an opportunity to present evidence as to whether the children had maintained a significant connection with New York, and whether substantial evidence was available in New York concerning the children's "care, protection, training, and personal relationships", ***Matter of Sutton v Rivera***, 200 A.D.3d 1048, 155 N.Y.S.3d 810 (2d Dept. 2021)

Age of Majority

As the parties' eldest son reached the age of 18, he is no longer subject to the custody and visitation provisions of the amended order and thus the appeal from so much of that order as related to the parties' eldest son must be dismissed as academic. ***Donker v. Donker***, 198 A.D.3d 892, 152 N.Y.S.3d 847 (2d Dept. 2021)

Modification; Alienation

Where the parties' stipulation provided that if either party moved the residence of either child beyond a radius of 75 miles from their present residence, the parties had to confer

and enter into a fair and equitable revision of the parenting time, and the mother did not tell the father when she moved to Georgia or provide him with an address, and the father had to text him one of the children after the move to find out where they lived, the mother testifying that she was entitled to relocate because "this is a free country" and the father is "no good" and she did not believe he should ever see the children again, the father was awarded sole custody of the children. The father testified he would ensure that the children spend time with the mother. The evidence showed the mother acted to alienate the children from the father and that the father was more willing than the mother to maintain contact between the children and the other parent. ***Sukul v. Sukul,*** 196 A.D.3d 661, 151 N.Y.S.3d 684 (2d Dept. 2021)

Modification

Where the Court's 2014 order directed that the father undergo a sex offender evaluation program, and the evidence showed that an independent evaluation conducted by a certain mental health professional was insufficient to assess the risk that the father's behavior might have on his children, and thus, the father failed to set forth sufficient information to warrant a modification of his parental access. ***Matter of Langenau v Hargrove***, 198 A.D.3d 650, 156 N.Y.S.3d 37 (2d Dept. 2021)

A parent seeking to modify an existing order of custody and visitation bears the burden of demonstrating that there has been a change in circumstances since entry of the prior order, which may be established by evidence that the relationship between the parents has deteriorated to the point where they simply cannot work together in a cooperative fashion for the good of their children. ***Matter of Cecelia BB. v Frank CC.***, 200 A.D.3d 1411 (3d Dept 2021)

Family Court's determination that there had been a change of circumstances sufficient to warrant a modification of custody, based, inter alia, on evidence that the mother interfered with the relationship between the father and the child, has a sound and substantial basis in the record and will not be disturbed. ***Matter of Coward v Biddle***, 195 A.D.3d 824, 145 N.Y.S.3d 822 (2d Dept 2021)

A change in circumstances is established when a parent is arrested and incarcerated, and was unavailable to care for the children. ***S.N. v. J.A.***, NYLJ, 5/24/21 (Family Court, Bx. Co., Chesler, J.)

Custody continued in father who is more capable of providing greater stability to the child and better able to provide for the child's overall well-being, as he has cared for the child since she was two months old, has arranged for his mother to provide child care while he is working, and has made all arrangements for the child's medical care. In contrast, the mother did not have a cell phone and has had to rely on others for transportation and her sole childcare provider was undergoing dialysis treatments three times per week. The mother also candidly admitted she did not answer the father's phone calls when the child was with her, did not believe the father needed to speak to the child, and stated she did

not "care about child having contact with her dad". ***Matter of Jahleel SS. v Chanel TT.,*** ___A.D.3d ___, 2022 NY Slip Op 00232, *2 [2022])

Although release from incarceration is generally not enough on its own, such release combined with a prior order that bases custody or visitation on a condition no longer in existence may warrant a finding of a change in circumstances. However, considering the appropriate factors, including the history of domestic violence between the parties, the record contains a sound and substantial basis to support Family Court's determination. The father did not meet his burden of proving that a modification would be in the children's best interests. ***Matter of Leah v Jose U.***, 195 A.D.3d 1120, 150 N.Y.S.3d 133 (3d Dept 2021])

The child's removal from school due to the mother's refusal to have the child fully immunized, and her corresponding decision to homeschool him, established the requisite change in circumstances. Additionally, the father's subsequent release from incarceration also constituted a change in circumstances warranting a best interests review.

A party seeking modification of an existing custody or parental access arrangement must show that there has been a subsequent change of circumstances such that modification is required. Extraordinary circumstances are not a prerequisite to obtaining a modification; rather, the standard ultimately to be applied remains the best interest of the child when all of the applicable factors are considered. ***Greim v. Greim***, 179 A.D.3d 646, 113 N.Y.S.3d 578 (2d Dept. 2020)

Change of circumstances justifying changing custody was mother's relocation with child to Louisiana without leave of the court with the child being thereafter removed from her care following her arrest. ***Murray v. Daves***, 195 A.D.3d1028, 145 N.Y.S.3d 805 (2d Dept. 2021)

Family Court's determination that there was a change of circumstances sufficient to warrant a modification of custody based, inter alia, on evidence that the mother interfered with the relationship between the father and the child, had a sound and substantial basis in the record. ***Coward v. Biddle***, 195 A.D.3d 820, 145 NYS2d 822 (2d Dept. 2021)

Modification; Domestic Violence

Custody modified to award mother sole legal and physical custody, the change in circumstances being that between the last custody order that until the order protection against the mother expired, the mother lived with the father and the child, and the father allegedly engaged in domestic violence and assaulted a third person in front of the child and the father was incarcerated for 4 months. In addition, it is the mother was more likely to meet the child's needs, while the father moves often. The mother was also more likely than the father to foster a relationship between the child and his noncustodial parent. ***Matter of Saymone N. v Joshua A.***, ___A.D.3d ___, 2022 NY Slip Op 00944 (1st Dept. 2022)

Spheres of Influence

Where stipulation of settlement provided that the plaintiff had decision-making authority over educational issues and that the defendant had decision-making authority over sports, and conflicts arose regarding balancing the two issues, a change of circumstances was extant and prioritizing educational activities over sports activities was in the best interest of the child. ***Baraz v Polyakov***, 198 A.D.3d 720 (2d Dept. 2021)

Joint legal custody was in the best interests of the child, with the mother retaining residential custody, is also supported by a sound and substantial basis in the record. While it appears that the parents' relationship has been rocky and disagreeable, there is no evidence that the joint custody arrangement would be unworkable. Father should have decision-making authority with respect to the child's education, medical care, and extracurricular activities as the mother had been significantly less involved in monitoring and arranging for the child's medical, educational, and extracurricular needs than the father, who had taken a proactive role in attending to the child's needs in those areas. *Matter of Frank G. v Crystal C.*, 198 A.D.3d 455, 152 N.Y.S.3d 582 (1st Dept 2021)

Appeal; Subsequent Events

Although the Family Court awarded custody to the father, the AFC in the brief submitted on appeal, brought to the court's attention new developments, including that shortly after living with the father, the child reported that the father told her the mother was evil, and that she no longer wanted to live with the father. As changed circumstances may have particular significance in child custody matters and may render the record on appeal insufficient for proper review, the matter was remitted for a new determination on the best interests of the child. ***Magana v. Delph***, 195 A.D.3d 720, 145 N.Y.S.3d 360 (2d Dept. 2021)

Joint Custody

Joint custody is encouraged primarily as a voluntary alternative for relatively stable, amicable parents behaving in mature civilized fashion. However, joint custody is inappropriate where the parties are antagonistic towards each other and have demonstrated an inability to cooperate on matters concerning the child. ***Shields v. Shields***, 192 A.D.3d 691, 139 N.Y.S.3d 853 (2d Dept. 2021)

Although there was some antagonism between the parties and difficulties in communications, they ultimately came to mutual agreements despite their initial disagreements on decisions regarding the children, and shared custody had been in place for four years, so the joint custody arrangement would not be disturbed. ***Franklin v. Franklin***, 199 A.D.3d 758, 158 A.D.3d 137 (2d Dept. 2021)

Joint custody changed to sole custody to mother. A change in circumstances exists where the parties' relationship becomes so strained and acrimonious that communication between them is impossible. ***Kopciowski v. Kopciowski,*** **195 A.D.3d 1455,** 145 N.Y.S.3d 486 (4th Dept. 2021)

The mother waived her contention that the father failed to establish a change of circumstances warranting an inquiry into the best interests of the children inasmuch as she alleged in her own petition that there had been such a change in circumstances. In any event, we agree with the father that he established the requisite change in circumstances based on the deterioration of the parties' relationship and ability to work together to co-parent the children. ***Allison v. Seeley-Seek,*** **198 A.D.3d 137,** 156 N.Y.S.3d 618 (4th Dept. 2021)

Custody – Conditions Imposed

Award of custody to father affirmed but modified to place condition that the father does not consume alcohol during his parenting time, not drive without a valid driver's license or permit and abide by all conditional, restriction, regulations or laws governing such license or permit. ***Shirreece AA. V. Matthew BB.,*** 195 A.D.3d 1085, 149 N.Y.S.3d 657 (3d Dept. 2021)

Sole Custody to Shared Custody

Family Court's award of sole residential custody to the father does not have a sound and substantial basis in the record. The parties enjoyed relatively equal parenting time with the child for most of her life, and that schedule was essentially adhered to by the court in its order. Further, the court awarded the parties' joint legal custody and, as noted, the parties have been able to work together well enough to share parenting time for many years. The testimony additionally raised significant questions about the father's willingness and ability to foster the child's relationship with the mother. Under the totality of the circumstances, the best interests of the child would be served by awarding the parties shared residential custody. ***Schlosser v Hernandez***, 201 A.D.3d 724, 156 N.Y.S.3d 901 (2d Dept. 2022)

Relocation

Mother permitted to relocate to Ottowa, Canada with the parties' children where they would have greater job opportunities and financial and emotional support of her parents, with whom the children have a close relationship. Additionally, the court properly considered the father's failure to pay pendente lite support as a factor in favor of granting the mother's application to relocate. ***Lvovsky v. Lvovsky***, 157 N.Y.S.3d 713 (1st Dept. 2022)

Plaintiff did not provide any evidentiary basis to show that relocation to Long Island would be in the children's best interests given that they attend private school in Manhattan and defendant, who returned to Manhattan in September 2020, has equal physical and legal custody that requires transitions every two to three days. Accordingly, the court properly denied plaintiff's application, without an evidentiary hearing, to remove the radius clause and granted defendant's request that plaintiff be responsible for transporting the children for his parenting time while she remains outside the agreed upon radius. ***Cleary-Thomas v Thomas***, 200 A.D.3d 516, 155 N.Y.S.3d 316 (1st Dept 2021)

The court properly denied plaintiff's request to relocate the child to California since she failed to demonstrate that such a move would be in the child's best interests and provide a

benefit sufficient to outweigh the detrimental impact on the child of taking him away from the only home he had ever known, his school, his therapist, and defendant, his primary caregiver. ***Emiko C. v Christopher P.***, 192 A.D.3d 627, 145 N.Y.S.3d 36 (1st Dept 2021)

Mother given right to relocate temporarily to Chicago with the children pending completion of the hearing on custody, visitation and relocation. Given the father's failure to pay child support and the fact that the maternal grandparents would provide the wife and children with stability, emotional support and financial support in the form of a place to live, free childcare, and paid for private school tuition. ***Jamee Bennett G. v. John Nicolaas B.***, 200 A.D.3d 413 (1st Dept. 2021)

Relocation; Initial Determination

With respect to the mother's relocation request, where a party seeks permission to relocate in the context of a petition seeking an initial custody determination, the strict application of the factors relevant to a relocation petition is not required. However, a parent seeking to relocate still bears the burden of establishing by a preponderance of the evidence that the proposed relocation would be in the Child's best interest. ***Damian S.C. v. Julie S.***, 73 Misc.3d 1230(A) (Family Court, Kings Co., 2021, Vargas, J.)

If a case involves an initial custody determination, it cannot properly be characterized as a relocation case to which the application of the factors set forth in *Matter of Tropea v Tropea* (87 NY2d 727) need be strictly applied". Although a court may consider the effect of a parent's relocation as part of a best interests analysis, relocation is but one factor among many in its custody determination Here, relationship with the father would be adversely affected by the proposed relocation, the mother's plans for housing, employment, and schooling in North Carolina were not well developed, and the record further establishes that the child had shown a marked improvement in behavior after the father's parenting time with the child was increased under temporary custody orders issued prior to the trial. ***Matter of Johnson v Johnson***, 192 A.D.3d1670, 145 N.Y.S.3d 262 (4th Dept 2021)

As case involves an initial custody determination, 'it cannot properly be characterized as a relocation case to which the application of the factors set forth in *Matter of Tropea v Tropea* (87 NY2d 727, 740-741, 665 N.E.2d 145, 642 N.Y.S.2d 575 [1996]) need be strictly applied. Although a court may consider the effect of a parent's proposed]relocation as part of a best interests analysis, relocation is but one factor among many in its custody determination. ***Matter of Hochreiter v Williams***, 201 A.D.3d 1303, 158 N.Y.S.3d 726 (4th Dept. 2022)

Relocation; Domestic Violence

Although the unilateral removal of the child from the jurisdiction is a factor for the court's consideration, an award of custody must be based on the best interests of the child and not a desire to punish a recalcitrant parent. In determining the best interests of the child, courts place considerable weight on the effect of domestic violence on the child,

particularly when a continuing pattern of domestic violence perpetrated by the child's father compels the mother to relocate out of legitimate fear for her own safety, or where the father minimized the past incidents of domestic violence. ***In re Robert C. E. v Felicia N. F.***, 197 A.D.3d 100, 151 N.Y.S.3d 301 (4th Dept 2021)

Relocation; Condition Precedent

Mother's motion to relocate with the children properly denied as she failed to demonstrate that she complied with the requirement in the parties' agreement that prior to filing an application for modification, the parties would seek the advice and counsel of the Parent Coordinator to assist in attempting to resolve the issue. ***Assad v. Assad,*** 200 A.D.3d 831(2d Dept. 2021)

Age of Majority

Where a parties' child attains the age of 18, the child is no longer subject to an order directing custody and parental access. ***Mondschein v. Mondschein***, 195 A.D.3d 1025, 151 N.Y.S.3d 134 (2d Dept. 2021)

Grandparental Visitation & Custody

Pursuant to Domestic Relations Law § 72, governing a grandparent's request for custody of a minor child, an extended disruption of custody between the child and the parent shall constitute an extraordinary circumstance. § 72[2][a]. The statute defines extended disruption of custody as including, but not limited to, a prolonged separation of the respondent and the child for at least twenty-four continuous months during which the parent voluntarily relinquished care and control of the child and the child resided in the household of the petitioner grandparent or grandparents. § 72[2][b]. However, the statute does not preclude a court from finding the existence of extraordinary circumstances even if the prolonged separation lasted less than 24 months. Moreover, lack of contact is not a separate element under this statute, rather, the quality and quantity of contact between the parent and child are simply factors to be considered in the context of the totality of the circumstances when determining whether the parent voluntarily relinquished care and control of the child, and whether the child actually resided with the grandparents for the required prolonged period of time. ***Matter of Mooney v Mooney***, 198 A.D.3d 784 156 N.Y.S.3d 263 (2d Dept. 2021)

In cases where the relationship between the grandparent and grandchild has been frustrated by a parent, the grandparent must show, inter alia, that he or she "has made a 'sufficient effort to establish [a relationship with the child], so that the court perceives [the matter] as one deserving the court's intervention." The sufficiently of the grandparent's efforts is measured against what they could have reasonably done under the circumstances. ***Kelly v Cairo***, 198 A.D.3d 964, 157 N.Y.S.3d 39 (2d Dept. 2021)

Grandparental Visitation – Sufficient Existing Relationship

Grandmother established a sufficient, existing relationship with grandchild to have standing to seek visitation. Mother and child lived with her for approximately the 1st 5

months after the child was born, the mother suffered from postpartum depression, the mother moved out of the home with child after a fight with the grandmother, the mother has essentially cut off all contact with her and is not allowed the grandmother to see the child for over a year. Visitation with the grandmother was in the child's best interest, despite mother's opposition to visitation. The mother testified that she was satisfied with the grandmother taking care of the child in the apartment, and the mother left the apartment due to an argument with the child's father and general animosity between the mother and the grandmother. ***Melissa X v. Javon Y.***, 200 A.D.3d 1451 (3d Dept. 2021)

Adoption – Grandparent v. Adoptive Parent

While the grandmother had standing to seek custody, her biological relationship to the children does not give her precedence over an adoptive parent selected by the authorized agency. Social Services Law Sec. 383(3) gives preference for adoption to a foster parent who has cared for a child continuously for 12 months or more, while members of the child's extended biological family are given no special preference. ***Lopez v. Lopez***, 195 A.D.3d844, 149 N.Y.S.3d 548 (2d Dept. 2021)

Parent v. non-Parent

As between a parent and a nonparent, the parent has a superior right to custody that cannot be denied unless the nonparent establishes that the parent has relinquished that right due to surrender, abandonment, persistent neglect, unfitness, or other like extraordinary circumstances. Extraordinary circumstances involve consideration of various factors including, among others, the length of time the child has lived with the nonparent, the quality of that relationship and the length of time the biological parent allowed such custody to continue without trying to assume the primary parental role. The burden of proof is on the nonparent to prove such extraordinary circumstances and once there is such a finding, a best interests determination is triggered. ***Matter of Madelyn E.P.***, 196 A.D.3d 489, 151 N.Y.S.3d 410 (2d Dept. 2021)

The burden of proof is on the nonparent to prove the existence of extraordinary circumstances in order to demonstrate standing. Without such proof, an inquiry into the best interests of the child is not triggered. ***Grosso v. Lamb***, 195 A.D.3d 710, 145 N.Y.S.3d 392 (2d Dept. 2021)

Maternal aunt established extraordinary circumstances based upon father's criminal history; history of domestic violence; prolonged separation from child as well as petitioner's ability to provide for child's financial, educational, emotional and medical needs without contribution from father. ***King v. King***, 191 A.D.3d 881, 138 N.Y.S.3d 884 (2d Dept. 2021)

The maternal aunt did not have the burden of making a showing of extraordinary circumstances inasmuch as she did not file a petition in this matter and was not awarded custody of the children, but rather the children were placed with her for the pendency of the article 10 proceeding pursuant to Family Court Act § 1017. ***Matter of Michael J.M. v Lisa M.H.***, 192 A.D.3d1470 (4th Dept 2021)

Arbitration

Disputes concerning child custody and visitation are not subject to arbitration as the court's role as parens patriae must not be usurped. ***Matsui v. Matsui***, 200 A.D.3d 774, 155 N.Y.S.3d 117 (2d Dept. 2021)

Religious Considerations

Provision in interlocutory judgment deleted which directed plaintiff – mother, during the periods of parental access, could not take the child to a place or expose the child to an activity that violates rules, practices, traditions and culture of the child's Orthodox Jewish Chasidic Faith. In the absence of a written agreement, the custodial parent may determine the religious training of a child. Consistent with the children's best interest, court can properly direct noncustodial parents, during periods of access, to respect the children's religious beliefs and practices and make reasonable efforts to ensure the children's compliance with their religious requirements. However, a court oversteps constitutional limitations when it purports to compel a parent to adopt a particular religious lifestyle. ***Weichman v. Weichman***, 199 A.D.3d 865, 158 N.Y.S.3d 154 (2d Dept. 2021)

AFC

Attorney for the Child (AFC) did not improperly substitute her judgment for that of the child by advocating a position that was contrary to the child's express wishes. An AFC "must zealously advocate the child's position" (22 NYCRR 7.2 [d]) and, "[i]f the child is capable of knowing, voluntary and considered judgment, the [AFC] should be directed by the wishes of the child, even if the [AFC] believes that what the child wants is not in the child's best interests" (22 NYCRR 7.2 [d] [2]). Where, however, the AFC "is convinced either that the child lacks the capacity for knowing, voluntary and considered judgment, or that following the child's wishes is likely to result in a substantial risk of imminent, serious harm to the child, the [AFC is] justified in advocating a position that is contrary to the child's wishes. ***Matter of Vega v Delgado***, 195 A.D.3d 1555, 145 N.Y.S.3d 907 (4th Dept 2021)

Right to Counsel

The parent of a child seeking custody or contesting the substantial infringement of his or her right to custody is entitled to the assistance of counsel, and while that right may be waived, the court must conduct a searching inquiry to ensure that the waiver has been made knowingly, voluntarily, and intelligently, with the record demonstrating that the party was aware of the dangers and disadvantages of proceeding without counsel. For example, the court may inquire about the litigants age, education, occupation, previous exposure to legal procedures and other relevant factors. ***Lherisson v. Goffe***, 198 A.D.3d 965, 157 N.Y.S.3d 43 (2d Dept. 2021)

Lincoln Hearing

Purpose is to allow a court to ascertain a child's preference and concerns, as well as corroborating information obtained during the fact-finding hearing. ***Matter of Patrick UU. v Frances VV.***, 200 A.D.3d 1156 (3d Dept. 2021)

A child's changing needs as he or she grows older can sufficiently constitute a change in circumstances regarding legal custody. In light of the evidence presented by the father and assertions of the attorney for the child, the Family Court should not have determined the father's petition without conducting an *in camera* interview with the child. ***Coleman v. Lymus,*** 193 A.D.3d 930, 142 N.Y.S.3d 431 (2d Dept. 2021)

The court did not abuse its discretion in failing to hold a *Lincoln* hearing given the young age of the child and the fact that the child may have been inadvertently coached by the mother to repeat unfounded allegations. ***Matter of Pontillo v Johnson-Kosiorek***, 196 A.D.3d 1163, 152 N.Y.S.3d 204 (4th Dept 2021)

A parent served with an order to produce a child for a Lincoln hearing is obligated to comply and may not simply ignore the court's directive. A hearing serves the vital purpose of allowing a court to ascertain a child's preference and concerns, as well as corroborating information obtained during the fact-finding hearing. There was no abuse of discretion in Family Court drawing a negative inference against the mother for failing to bring the child to the rescheduled *Lincoln* hearing. ***Matter of Patrick UU. v Frances VV.***, 200 A.D.3d 1156 (3d Dept. 2021)

The court denied the request for a *Lincoln* hearing, agreeing with the AFC that a *Lincoln* hearing would only cause more unnecessary stress for the children, particularly since the relevant and available facts were already before the court. Although a *Lincoln* hearing is the preferred manner for ascertaining the children's wishes, such a hearing is not mandatory — particularly where, as here, the record reflects that the hearing itself may do more harm than good. ***Matter of Mary Ellen H. v Joseph H.***, 193 A.D.3d 1275, 147 N.Y.S.3d 732 (3d Dept 2021)

Visitation; Improper Delegation

A Family Court's order was reversed, and the case was remitted since its decision to award the father sole legal and physical custody of the younger child lacked a sound and substantial basis in the record, the Family Court improperly delegated its authority to the younger child when it ordered that the mother's visitation would be only as she and the younger child could agree, its rationale for its parenting schedule--that a teenager could not be forced to do something that he or she did not want to do--fell far short of satisfying its obligation to provide the mother with frequent and regular access to the younger child and did nothing to support a healthy, meaningful relationship between the two, and the Family Court had to fashion an appropriate, more definitive visitation schedule. ***Matter of Cecelia BB . v . Frank CC.***, 200 A.D.3d 1411 (3d Dept. 2021)

Visitation Denied

Father denied access with 14-year-old child who had no relationship with the father, had not seen him for 10 years (8 of which he was incarcerated) and adamantly opposed any parental access. ***Colon v. Roggeman***, 194 A.D.3d 1042, 144 N.Y.S.3d 616 (2d Dept. 2021)

Visitation; Indefinite Schedule

Where the visitation provisions of the parties' separation agreement, allowing for a schedule that varies from month to month based upon the Husband's work schedule, as it gives rise to a level of uncertainty and instability in the family's home life, as well as an opportunity for conflict between the parents, was not supportive of the best interests of the children, and thus were modified by the Court. ***JG v. NG***, NYLJ, 6/22/22 (Supreme Court, Nassau Co., Prager, J.)

Visitation – Supervised

Family Court should not have directed the parties to equally share the costs of the father's supervised parental access, without evaluating the parties' "economic realities," including the father's ability to pay and the actual cost of each visit. ***Matter of Livesey v Gulick***, 194 A.D.3d1045, 149 N.Y.S.3d 479 (2d Dept 2021)

Access Modification

Petition to modify parental access properly denied with the court considering, inter alia, he testimony of the child's therapist and the express wishes of the then 12-year-old child. ***Matter of Khan v. Schwartz,*** 201 A.D.3d 718, 156 N.Y.S.3d 894 (2d Dept. 2022)

A component of the prior order that would constitute a change in circumstances requires only the father's *consistent engagement in*, not *completion of*, substance abuse treatment. Thus, the father showed that he consistently engaged in substance abuse treatment while incarcerated and that he appropriately sought to continue such engagement upon his transfer to a different correctional facility. Accordingly, the father made a sufficient evidentiary showing of a change in circumstances under the prior order. ***Matter of Rigdon v. Close***, 200 A.D.3d 1562 (4th Dept 2021)

International Travel

Family Court erred in granting the father's request to modify the custody and visitation order to permit him to travel internationally with the children, particularly to Ghana, which is not a party to the Hague Convention on Civil Aspects of International Child Abduction (1343 UNTS 89, TIAS No. 11670 [1980]; *see* 51 Fed Reg 10494 [1986]), as there is no sound and substantial basis in the record to support a finding that such unrestricted international travel is in the best interests of the young children. ***Matter of Naamye Nyarko B. v Goodwin Edwin C.***, 198 A.D.3d 453 (1st Dept 2021)

Publication of Pictures

Plaintiff mother brought an order to show cause seeking to impose a prior restraint upon defendant non-custodial father's First Amendment right and to remove from his website photographs of their son. Among other things, plaintiff requested an order directing defendant to take down his GoFundMe page that identifies their son's name and publishes his picture, and directing defendant to refrain from publicly posting on the internet or social media any information that identifies their son's name or likeness, or information that identifies plaintiff and the underlying divorce action. The court determined that plaintiff failed to meet the heavy burden of demonstrating the necessity of the imposition of a prior restraint upon defendant preventing him from publishing their son's pictures.

The court found nothing to suggest that the photographs of the parties' son pose a "clear and present danger of a serious substantive evil" or harm, although plaintiff found it troubling. Plaintiff failed to provide any proof of the harm that her son will experience if defendant is allowed to publish his pictures on the internet. ***K.C. v. S.J.***, NYLJ, 5/28/21, Supreme Court, Bx. Co., McShan, J.

Criminal Court Order of Protection; Visitation

Where a criminal court order of protection bars contact between a parent and child, the parent may not obtain visitation until the order of protection is vacated or modified by the criminal court. The criminal court has authority to determine whether its order of protection is subject to subsequent orders pertaining to custody and parental access and can decline to amend an order of protection to so provide. ***Matter of Schoepfer v Colon***, 198 A.D.3d 662, 152 N.Y.S.3d 350 (2d Dept. 2021)

Name Change

Granted mother's petition to change the surname and middle name of her daughter to her current married name. The father's objection was based on traditional gender biased values, which the court determined was unreasonable is that the parent should have a superior right to determine surnames. The court found the name change was in the child's best interest as she identified herself as a member of her stepfather's family and wished to have the same last name as her half siblings. Additionally, the court noted the father considerably undermined his position as he made it clear that he was willing to consent to the change in exchange for termination of his child support obligation. ***In re DZ***, 73 Misc 3d 775 [Sup Ct, Suffolk County 2021, Hudson, J.])

Mother's application to change surname of 13-year-old granted where child testified father was not part of his life, having a different name from his mother and the family he spent time with felt "weird: and he wanted Mother's surname for a "sense of community.". The father had minimal contact with the infant and he failed to identify any specific benefit to the infant keeping his surname, or a detriment to taking the mother's name. ***Matter of A. Sve***, NYLJ, 7/30/21 (Civil Court, Qns. Co., Wendy-Changyoung, J.)

First Amendment Argument

"Finally, although not addressed by Family Court or the attorney for the child, the mother's testimony at the hearing, as well as an exhibit admitted into evidence, reveal that she has a small confederate flag painted on a rock near her driveway. Given that the child is of mixed race, it would seem apparent that the presence of the flag is not in the child's best interests, as the mother must encourage and teach the child to embrace her mixed race identity, rather than thrust her into a world that only makes sense through the tortured lens of cognitive dissonance. Further, and viewed pragmatically, the presence of the confederate flag is a symbol inflaming the already strained relationship between the parties. As such, while recognizing that the First Amendment protects the mother's right to display the flag (*see generally People v Hollman*, 68 NY2d 202, 205, 500 N.E.2d 297, 507 N.Y.S.2d 977 [1986]), if it is not removed by June 1, 2021, its continued presence shall constitute a change in circumstances and Family Court shall factor this into any future

best interests analysis." ***Matter of Christie Bb v Isaiah Cc***, 194 A.D.3d 1130, 149 N.Y.S.3d 280 (3d Dept 2021)

DISCLOSURE

Family Court Disclosure; Child Support Proceeding

Where a respondent in a child support proceeding fails, without good cause, to comply with the compulsory financial disclosure mandated by Family Court Act §424-a, the court on its own motion or on application shall grant the relief demanded in the petition or shall order that, for the purposes of the support proceeding, the respondent shall be precluded from offering evidence as to respondents' financial ability to pay support. ***Rodriquez v. Starks***, 194 A.D.3d 1063, 149 N.Y.S.3d 474 (2d Dept. 2021)

Expert Testimony - CPLR 3101(d)(1)

Family Court did not err in permitting the mother's expert witness to testify at the hearing in the absence of notice to the father. CPLR 3101(d)(1)(i) provides that *upon request*, each party shall identify each person whom the party expects to call as an expert witness at trial. Here, the father's discovery requests contained no such request and thus the mother had no obligation to provide the father with notice of her expert witness. ***Pena v. Chadee***, 195 A.D.3d 1030, 146 N.Y.S.3d 794 (2d Dept. 2021)

Non-Party Subpoena and Deposition

Non-party directed to respond to document request in subpoena duces tecum and appear for an examination before trial as the wife was entitled to know how and why it was determined that plaintiff's partnership interest would be smaller than he had predicted and to probe whether this development had anything to do with his potential financial exposure in this action. So long as the disclosure sought is relevant to the prosecution or defense of an action, it must be provided by the nonparty. ***Gross v Hazan-Gross***, ___A.D.3d ___, 2022 NY Slip Op 00501 (1st Dept. 2022)

A court may quash a discovery subpoena served on a non-party during a trial when there is no compliance with CPLR 3102(d). The issue of what, if any, money, goods and services plaintiff receives from relatives and friends is a factor that the Court may consider under DRL 240(1-b)(b)(5)(iv)(D). As such, the issue raised is not irrelevant to the issues between the parties which include maintenance, child support and counsel fees. The question before the Court is whether a trial subpoena on a non-party for documents related to that issue is the appropriate source prior to establishing the factual predicate. As such, the Court will not quash the subpoena for S.M.'s testimony; however, the Court will limit the inquiry into S.M.'s financial support, if any, of plaintiff. ***Jennifer D. v Maurice D.***, 73 Misc 3d 1134 (Supreme Court, Kings Co., 2021, Sunshine, J.)

Spoliation

A party that seeks sanctions for spoliation of evidence must show [1] that the party having control over the evidence possessed an obligation to preserve it at the time of its destruction, [2] that the evidence was destroyed with a 'culpable state of mind,' and [3] 'that the destroyed evidence was relevant to the party's claim or defense such that the trier of fact could find that the evidence would support that claim or defense. The obligation to preserve evidence arises when a party is on notice that the matter will likely result in

litigation. Such an obligation to preserve evidence has been found, for example, when the party has immediate notice of an accident resulting in an injury. While a litigant is under no duty to keep or retain every document in its possession it is under a duty to preserve what it knows, or reasonably should know, is relevant in the action, is reasonably calculated to lead to the discovery of admissible evidence, is reasonably likely to be requested during discovery and/or is the subject of a pending discovery request. Indeed, the fact that relevant information is destroyed before a notice or order to produce is served does not preclude application of sanctions under CPLR 3126. ***Lewis v State of NY***, 73 Misc 3d 1232[A], 2021 NY Slip Op 51213[U], *2-3 [Ct Cl 2021])

ENFORCEMENT

Contempt; Child Inoculated

While the parties' separation agreement provided that "[t]he parties shall continue to cooperate and consult with one another to arrive at decisions which they believe are in the best interest of the child with respect to health." Despite this language, on two occasions, the plaintiff, without first consulting with the defendant, took the child, who had not received any vaccinations since the age of two, to get vaccinated, Defendant's application to adjudge plaintiff in contempt denied for two reasons: (1) the parties' agreement did not unequivocally prohibit the plaintiff from having the child inoculated; and (2) in light of the parties' express intention to maintain the child's enrollment in public education, and New York State's then newly enacted public school vaccine mandate requiring such inoculations in order for the child to continue to attend public school, the defendant cannot demonstrate that she was prejudiced by the failure of the plaintiff to consult with her prior to having the child inoculated. ***Heffer v. Krebs,*** 196 A.D.3d 684, 152 N.Y.S.3d 467 (2d Dept 2021)

Contempt – Burden of Proof

On motion to punish a party for civil contempt, the movant bears the burden of proving the contempt by clear and convincing evidence. ***Weiss v. Rosenthal***, 195 A.D.3d 730, 150 N.Y.S.3d 284 (2d Dept. 2021)

The father came forward with competent proof of an inability to pay and that the record does not establish by clear and convincing evidence the willful nonpayment of his obligation. ***Matter of Wessels v Wessels***, 200 A.D.3d 1178 (3d Dept 2021)

The family court's finding of willfulness s as to the father's nonpayment of support for the parties' child was proper under Family Ct Act § 454(3)(a) because the mother credibly testified to not consenting to the child living in Italy, no New York court order had granted the father custody, father entered into an agreement to satisfy arrears but never made such payments, father failed to return the child to the mother, and that he has been employed, full-time, since 2008, and without change in his financial circumstances since he had entered into the relevant agreement. The Court properly rejected the father's untenable position that he is not responsible to pay child support in accordance with the divorce judgment because he has been supporting the child while wrongfully, and unilaterally, deciding to retain custody of her in Italy, in contravention of New York Ct. orders and the Italian appellate court ruling. ***Matter of Melanie C. v Carlo B.***, 192 A.D.3d 624, 145 N.Y.S.3d 37 (1st Dept 2021)

At a hearing pursuant to Family Court Act § 454 to determine whether a respondent has 'willfully failed to obey a lawful order of support,' the burden is on the petitioner to establish that the respondent willfully violated the terms of the [order] by failing to pay the required support. Evidence that the respondent failed to pay child support as ordered constitutes prima facie evidence of a willful violation. If the petitioner makes this prima facie showing, the burden shifts to the respondent to present competent, credible evidence that his or her failure to pay support in accordance with the terms of the order

was not willful. ***Matter of Hanrahand v Hanrahand***, ___A.D.3d ___, 2022 NY Slip Op 00662 (2d Dept. 2022)

To prevail upon a motion for civil contempt, the movant need prove, by clear and convincing evidence, that (1) a lawful order of the court, clearly expressing an unequivocal mandate, was in effect, (2) the order was disobeyed and the party disobeying the order had knowledge of its terms, and (3) the movant was prejudiced by the offending conduct. To satisfy the prejudice element, it is sufficient to allege and prove that the contemnor's actions were calculated to or actually did defeat, impair, impede or prejudice the rights or remedies of a party. ***Stone v. Weinberg***, --A.D.3d --, 2022 NY Slip Op 00427 (2d Dept. 2022)

On motion to hold a party in civil contempt, the movant must demonstrate by clear and convincing evidence that a lawful order of the court, clearly expressing an unequivocal mandate, was in effect, that the order was disobeyed, and the party disobeying the order had knowledge of its terms, and that the movant was prejudiced by the offending conduct/ Although willfulness is not an element of this prima facie showing, the party alleged to be in contempt may offer as a defense evidence of his or her inability to comply with the order or judgment. ***Zeidman v Zeidman*** ___A.D.3d ___, 2022 NY Slip Op 00906 (2d Dept. 2022)

While the court found that the husband's unilateral withholding of payment of a court-appointed neutral evaluator violated a lawful order of the court in the parties' divorce action and that the husband withheld payment despite having full knowledge of the order, the court had to wait until after the trial on the financial issues between the parties to determine if the husband had financial resources to pay the outstanding sum due and owing to the evaluator before the court could hold the husband in contempt; ***Jennifer D. v Maurice D.***, 73 Misc.3d 1134 (Supreme Court, Kings County, 2021, Sunshine J.)

Plaintiff's motion to hold defendant in contempt for nonpayment of maintenance and child support obligations was granted as defendant's alleged financial hardship, including his business closure, voluntary bankruptcy and current salaried employment, was partly contrived to convey impression of adversity and evade responsibility for support. A party responsible for support may not remain voluntarily underemployed in an attempt to evade support responsibilities. ***M.L. v J.L.,*** 71 Misc.3d 1204[A], 142 N.Y.S.3d 788 (Sup Ct, Queens County 2021)

Statute of Limitations

A motion to enforce the terms of a separation agreement is not an action and thus not subject to the statute of limitations set forth in CPLR 213 (2). Additionally, CPLR 211 (e) provides that "[a]n action or proceeding to enforce any temporary order, permanent order or judgment of any court of competent jurisdiction which awards support, alimony or maintenance, regardless of whether or not arrears have been reduced to a money judgment, must be commenced within [20] years from the date of a default in payment." Thus, as Supreme Court correctly determined, CPLR 211 governs the timeliness of actions

upon a contractual obligation. Inasmuch as the present application is not an action, but rather a postjudgment motion to enforce the terms of the separation agreement brought under the index number of the original divorce action, CPLR 211 (e) is inapplicable to, and does not bar, the instant motion. ***Sangi v Sangi***, 196 A.D.3d 891, 151 N.Y.S.3d 503 (3d Dept 2021)

Although motions to enforce the terms of a stipulation in a divorce proceeding are not subject to the statute of limitations, when a party is seeking arrearages or a money judgment, the statute of limitations applies whether a party commences a plenary action or simply moves for that relief. Where plaintiff was seeking arrearages, or money damages, for the amounts that she did not receive because the QDRO was never received by her ex-husband's employer, the statute of limitations applies, and thus her claim is timely only with respect to pension payments made within six years prior to the filing of her motion. ***Mussmacher v Mussmacher***, 200 A.D.3d 1702 (4th Dept. 2021)

Receiver

Defendant appointed as receiver to effectuate the sale of the former marital residence where the record demonstrates that the plaintiff failed to cooperate in effectuating the sale in derogation of the parties' stipulation of settlement. ***Saks v Saks***, 199 A.D.3d 948 (2d Dept. 2021)

Sequestration

The motion court properly denied the part of plaintiff's motion seeking sequestration of defendant's share of retirement accounts pursuant to Domestic Relations Law § 243. Although plaintiff established some arrears, she failed to make "a showing of necessity, such as a consistent pattern of arrears or a willful violation of a court order directing payment of arrears" (*Sivigny v Sivigny*, 236 AD2d 205, 205, 653 N.Y.S.2d 328 [1st Dept 1997]), especially in light of the fact that her motion for add-on arrears and to hold defendant in contempt are pending determination after a hearing. ***Goldin v Levy***, 192 A.D.3d 478, 143 N.Y.S.3d 43 (1st Dept 2021)

Accrued Arrears

A court shall not reduce or annul child support arrears prior to the making of an application. Failure to file a petition for the vacatur or reduction of arrears renders the Family Court without subject matter jurisdiction to hear the matter. ***Matter of Michelle B. v Thomas Y.***, 73 Misc 3d 1238[A], Fam. Ct., Kings Co., Vargas, J.

Money Judgment

A party to a matrimonial action may make an application for a judgment directing the payment of arrears at any time prior to or subsequent to the entry of a judgment of divorce. Domestic Relations Law § 244. A hearing should be held where the opposing party raises a triable issue of fact as to the amount or legitimacy of the arrears demanded. ***Poirier v Demasi***, ___A.D.3d ___, 2022 NY Slip Op 00448, *1 (2d Dept. 2022)

Waiver

Nonparty appellant did not waive the common interest, work product and trial preparation privileges with respect to the documents subpoenaed. A finding of waiver cannot be based upon "mere silence or oversight," or upon "mistake, negligence or thoughtlessness". Waiver "must be explicit, unmistakable, and unambiguous," and "cannot be inferred by a doubtful or equivocal act. The burden of proving waiver rests with the party asserting it. ***Homapour v Harounian***, 200 A.D.3d 575 (1st Dept 2021)

EQUITABLE DISTRIBUTION

Valuation

Supreme Court erred in valuing the plaintiff's jewelry at $5,000, as no evidence exists in the record to support that valuation. ***Kiani v Kiani***, 197 A.D.3d 1168, 153 N.Y.S.3d 521 (2d Dept. 2021)

Whatever valuation method is used must take into consideration inhibitions on the transfer of the corporate interest resulting from a limited market or contractual provisions. ***Davenport v. Davenport***, 192 A.D.3d 987, 144 N.Y.S.3d 730 (2d Dept. 2021)

Void Marriage

As husband was already married when parties solemnized their marriage, parties' marriage is void as a matter of law. However, court can still adjudicate financial issues in wife's pendente lite application since DRL includes actions to declare a marriage void. ***T.C. v. M.C.,*** NYLJ, 6/28/21 (Supreme Court, Richmond Co., DiDomenico, J.)

Valuation Date

The valuation date of a marital asset may be set "anytime from the date of commencement of the action to the date of trial. Where defendant failed to present evidence as to whether the accounts of the parties were managed actively or passively after the date of commencement of the action, not error to treat the accounts as passive and divide the account balances as of the first day of trial. ***Sinnott v Sinnott***, 194 A.D.3d 868, 149 N.Y.S.3d 441 (2d Dept. 2021)

Valuation – Discount for Lack of Marketability

In valuing the appreciation of defendant's interest in a medical practice, the value should be discounted for his lack of control as a minority owner to transfer his interest, which results in a lack of marketability. However, the court below improperly applied a discount far exceeding the 15 – 20% discount that both experts agreed was appropriate for this lack of marketability. The Appellate Division applied a 20% discount. Moreover, the Appellate Division's took the two methods utilized by defendant's forensic expert, to wit: the reasonable compensation method, and the relative unit method, and averaged the two to fix a valuation. ***Davenport v. Davenport***, 192 A.D.3d 987, 144 N.Y.S.3d 730 (2d Dept. 2021)

Distribution

Proper exercise of discretion to award plaintiff 1% of defendant's retirement accounts where plaintiff made no contribution to the accounts, which accumulated funds while the parties were separated but prior to the commencement of the action. ***Cuomo v. Moss***, 199 A.D.3d 635, 157 N.Y.S.3d 475 (2d Dept. 2021)

Appellate Division affirmed award of 10% of the marital appreciation in plaintiff's interest in a medical practice in light of the brief duration of the marriage and the defendant's minimal contribution to the practice, as well as an award to defendant of 25% of the

stipulated value of the plaintiff's bank accounts, considering the parties' relative financial contributions and the short duration of the marriage. Defendant also wanted 25% of the stipulated value in certain business interest in which plaintiff's involvement was merely investing marital monies into the companies. Defendant awarded 40% of the marital residence value in light of her significant contributions to the construction, design and decoration of the home, and plaintiff is to receive a separate property credit for the significant premarital money they invested in the home. ***Davenport v. Davenport***, 192 A.D.3d 987, 144 N.Y.S.3d 730 (2d Dept. 2021)

In a 33-year marriage, and albeit the parties lived separate and apart for significant periods of time during the marriage, maintained separate finances with each amassing substantial marital assets, there being no evidence of economic fault, and defendant playing a significant role in raising the parties' daughter, there was no reason for defendant to receive less than 50% of the marital assets. While equitable distribution does not necessarily mean equal distribution, when both spouses have made significant contributions to a marriage of long duration, the division of marital property should be as equal as possible. ***Achuthan v. Achuthan***, 179 A.D.3d 751, 117 N.Y.S.3d 667 (2d Dept. 2020)

In affirming an equal division of marital assets in a 47-year marriage, the Court noted that while the parties maintained separate finances, under these circumstances, the economic decisions made by the parties should not be second-guessed by the court, citing Mahoney–Buntzman v. Buntzman, 12 NY3d 415, 421, 881 NYS2d 369. ***Parkoff v Parkoff***, 195 A.D.3d 93, 151 N.Y.S.3d 105 (2d Dept. 2021)

In consideration of the nonliquid nature of the Plaintiff's assets (enhanced earning capacity) and the substantial amount of the award, the court should have permitted the Plaintiff to pay the award in installments over a 10-year rather than a 5-year period, together with interest at the statutory rate of 9% per annum from the date of the order appealed from. ***Spinner v. Spinner***, 188 A.D.3d 748, 134 N.Y.S.3d 377 (2d Dept. 2020)

In 17-year marriage, with the record established that the wife made significant noneconomic contributions to the marriage by acting as the primary caregiver to the two children, both of whom had significant special needs, and thus enabling the husband to work outside the home and advance his career, the wife was awarded 50% of the value of the husband's pension fund. ***Levi v. Levi***, 186 A.D.3d 1628, 132 N.Y.S.3d 61 (2d Dept. 2020)

In view of defendant's direct contributions to the plaintiff's business, as well as her indirect contributions as a homemaker and primary caregiver for the parties' children in a long-term marriage, the trial court's award of 20% of the fair market value of plaintiff's interest in his law firm was deficient and is increased to 35%, which equals $759,500. ***Klestadt v. Klestadt***, 182 A.D.3d 592, 120 N.Y.S.3d 813 (2d Dept. 2020)

An award of one third of the value of the jewelry business constitutes an appropriate equitable distribution of that property. The defendant's own property (her engagement

ring) and the parties' joint property (their townhouse) were used to purchase the jewelry business. Moreover, the business benefitted from the defendant's indirect contribution as a stay-at-home parent, and such contribution entitled her to an equitable share in the business. ***Kamm v. Kamm***, 182 A.D.3d 590, 120 N.Y.S.3d 815 (2d Dept. 2020)

When both spouses equally contribute to a marriage of long duration, the division of marital property should be as equal as possible; however, equitable distribution does not necessarily mean equal distribution. Here, both parties were involved with MBCW (commercial building) during this 25-year marriage, and the equal distribution of the defendant's interest was a provident exercise of the Supreme Court's discretion. ***Keren v Keren***, ___A.D.3d ___, 2022 NY Slip Op 00412 (2d Dept. 2022)

Supreme Court providently exercised its discretion in awarding the cooperative apartment to the plaintiff, who was to have sole residential custody of the parties' four unemancipated children, while awarding the defendant his business. ***Mashieh v Mashieh***, 199 A.D.3d 911, 154 N.Y.S.3d 457 (2d Dept. 2021)

Whether marital property shall be distributed, or a distributive award shall be made in lieu of, or to supplement, facilitate or effectuate a distribution of marital property are matters committed to the discretion of the trial court in the first instance. When both spouses equally contribute to a marriage of long duration, the division of marital property should be as equal as possible. Here, both parties were involved with a lease commercial property which was marital property and the equally distribution of defendant's interest was a provident exercise of discretion. ***Keren v. Keren,*** --A.D.3d --, 2022 NY Slip Op 00412 (2d Dept. 2022)

Distribution – Marital Fault

By reason of defendant's sustained physical abuse of the plaintiff over the course of their marriage, defendant's egregious marital fault was a factor in equitable distribution resulting in an award to plaintiff of 75% of the net proceeds from the sale of the marital residence, 60% of the parties' investment and bank accounts and of the marital contributions to defendant's deferred compensation plan. ***Socci v. Socci***, 186 A.D.3d 1289, 127 N.Y.S.3d 896 (2d Dept. 2020)

Marital Residence – 5% Award

Where the marital residence was purchased in 1998 in the name of the wife and the husband's now deceased father, as joint tenants with right of survivorship, and the husband was under house arrest or imprisonment until March 2013, with the wife at all times paying the mortgage, the court below properly awarded the husband a 5% interest in the marital residence. Contrary to the husband's contention, the court was not required to provide mathematical calculations to explain how it reached its determination as to each party's distributive share of the equity in the marital residence. ***Jones v. Jones***, 182 A.D.3d 586, 120 N.Y.S.3d 831 (2d Dept. 2020)

Distribution; Pension Benefit

Supreme Court properly awarded plaintiff one half of defendant's New York State Teachers Retirement System pension benefits earned during the marriage and prior to the commencement of the action. The fact that Defendant's former wife received a portion of his pension benefit pursuant to a qualified domestic relations order entered in connection with his prior divorce, does not diminish the marital portion of defendant's pension benefit, or plaintiff's entitlement to a share of the benefits earned during the marriage. ***Palazolo v. Palazolo***, 200 A.D.3d 700 (2d Dept. 2021)

Account for Children

Supreme Court providently exercised its discretion in determining that a particular savings account was to be used for the children's college expenses and was not subject to equitable distribution. The testimony adduced at trial supports the court's determination that it was the parties' intent to use the funds in the subject account for the children's college expenses, and it was not an improvident exercise of discretion for the court to direct the parties to do so. ***Mahoney v Mahoney***, 197 A.D.3d 638, 152 N.Y.S.3d 727 (2d Dept, 2021)

Marital Property; Presumption

Property acquired during the marriage is presumed to be marital property and the party seeking to overcome such presumption has the burden of proving that the property in dispute is separate property. ***Silvers v Silvers***, 197 A.D.3d 1195, 153 N.Y.S.3d 548 (2d Dept. 2021)

Property acquired during marriage is presumed to be marital and party seeking to overcome presumption has burden of proving property in dispute is separate. Self-serving testimony, without more, is insufficient. ***Parkoff v Parkoff***, 195 A.D.3d 93, 151 N.Y.S.3d 105 (2d Dept. 2021)

Supreme Court properly determined that the marital residence, a cooperative apartment, was marital property. The defendant failed to rebut the presumption that the cooperative apartment, purchased during the marriage and maintained with marital funds, was marital property. ***Mashieh v Mashieh***, 199 A.D.3d 911, 154 N.Y.S.3d 457 (2d Dept. 2021)

Failure to Testify

Plaintiff, who did not testify at the trial, failed to meet his burden of establishing that any portion of the marital residence was separate property, or that certain other assets he claimed were marital assets were subject to equitable distribution. ***Handakas v. Handakas***, 196 A.D.3d 469, 146 N.Y.S.3d 836 (2d Dept. 2021)

Marital Debt

The burden of repaying marital debt should be equally shared by the parties, in the absence of countervailing factors, and any such liability should be distributed in accordance with general equitable distribution principles and factors. It is generally the responsibility of both parties to maintain the marital property and keep it in good repair

during the pendency of a matrimonial action. Insofar as the court specifically indicated that it sought to preserve the marital asset in directing the defendant to pay his 50% share of the mortgage, real estate taxes, and homeowner's insurance, we perceive no improvident exercise of its discretion. ***Barra v Barra***, 191 A.D.3d 831, 138 N.Y.S.3d 377 (2d Dept. 2021)

Marital Debts; Credit

Where a party has paid the other party's share of what proves to be a marital debt during the pendency of the action, including payments toward the mortgage on the marital residence, reimbursement is required. However, as a general rule, where the payments are made before either party is anticipating the end of the marriage, courts should not look back and try to compensate for the fact that the net effect of the payments, may, in some cases, result in the reduction of marital assets. Here, the plaintiff's payments toward the mortgage were made prior to the commencement of the action and thus, plaintiff is not entitled to a credit for those payments. ***Cuomo v. Moss***, 199 A.D.3d 635, 157 N.Y.S.3d 475 (2d Dept. 2021)

While expenses incurred after the commencement of an action for divorce are, in general, the responsibility of the party who incurred the debt, expenses incurred prior to the commencement of the action for divorce are marital debt to be equally shared by the parties upon an offer of proof that they represent marital expenses. However, a court had broad discretion in allocating assets and debts and liability of marital debts need not be equally apportioned but may be distributed in accordance with the equitable distribution factors set forth in Domestic Relations Law §236(B)(5)(d). Here, as the Husband has far greater earning capacity than the wife and the marital debt is relatively minimal in relation to his annual income, the Court providently made the Husband responsible for 100% of the marital debt. ***Bari v. Bari***, 200 A.D.3d 835 (2d Dept. 2021)

Payments made to reduce the principal on marital loans, to be paid from the other spouse's share of the net proceeds following the sale of each item, was error because the debt should have been equally shared. The burden of repaying marital debt should be equally shared by the parties, in the absence of countervailing factors, and any such liability should be distributed in accordance with general equitable distribution principles and factors. Where a party has paid the other party's share of what proves to be marital debt, reimbursement is required. ***Gargiulo v. Gargiulo***, 183 A.D.3d 803, 123 N.Y.S.3d 648 (2d Dept. 2020)

Carrying Charges; Credit

Generally, it is the responsibility of both parties to maintain the marital residence during the pendency of the matrimonial action. Here, defendant had exclusive occupancy of the residence during the proceedings, and he used marital funds to pay the carrying costs of the residence. The parties had agreed that each received identical sums from their joint account to cover the household expenses during the proceedings. Under the circumstances, Supreme Court providently awarded plaintiff a sum representing half of the marital funds defendant used to pay the carrying charges of the marital residence. ***Palazolo v. Palazolo***, 200 A.D.3d 700 (2d Dept. 2021)

Gift v. Loan

A party claiming that a transfer is a gift has the burden of proof by clear and convincing evidence that the gift was made with the requisite donative intent. Here, wife's mother did not intend to be repaid the $50,000 given to the parties and, even though she did, her intent was for those payments to go into 529 accounts for the children, not to receive them as cash payments. Supreme Court erred in ruling that the parties were responsible for repaying the loan to the wife's mother. ***Harris v. Schreibman***, 200 A.D.3d 1117 (3d Dept. 2021)

Non-Modifiability

Where parties were divorced prior to plaintiff's death and as the 457 Plan was not distributed prior thereto, defendant's argument that the parties' post-judgment relationship entitled him to an Order modifying equitable distribution failed, as it was well settled that courts cannot modify equitable distribution awards based on changes in circumstances that took place after the judgment was entered. Moreover, courts cannot modify orders for the purpose of evading IRS regulations and, though vacating the DRO would keep the 457 Plan from entering the probate process. V.F. v L.F., ___Misc 3d___, NYLJ, 2/25/22, 2022 NY Slip Op 22042 (Supreme Court, Nassau Co., Lorintz, J.)

Marital Waste

The party alleging that his or her spouse has engaged in wasteful dissipation of marital assets bears the burden of proving such waste by a preponderance of the evidence. There may be circumstances where equity requires a credit to one spouse for marital property used to pay off the separate debt of one spouse or add to the value of one spouse's separate property***. Silvers v. Silvers***, 197 A.D.3d 1195, 153 N.Y.S.3d 548 (2021)

The party alleging that his or her spouse has engaged in wasteful dissipation of marital assets bears the burden of proving such waste by a preponderance of the evidence. Where the alleged waste was from defendant's separate property, any monies spent from those companies would not be considered marital property and, hence, could not be dissipated by the defendant. ***Rosen v. Rosen***, 192 A.D.3d 710. 142 N.Y.S.3d 609 (2d Dept. 2021)

The party alleging that his or her spouse has engaged in wasteful dissipation of marital assets bears the burden of proving such waste by a preponderance of the evidence. Here, both parties submitted that the plaintiff used their accounts to pay marital expenses, and the defendant was unable to point to any exorbitant spending on the part of the plaintiff. Accordingly, there was no wrongful dissipation. ***Marino v. Marino***, 183 A.D.3d 813, 123 N.Y.S.3d 638 (2d Dept. 2020)

The court properly declined to consider the wife's use of her severance payment as wasteful dissipation of marital property as she used those funds for renovations to the marital residence, where both parties resided, food, outings with the children and other living expenses. ***Harris v. Schreibman***, 200 A.D.3d 1117 (3d Dept. 2021)

It was not an abuse of discretion to award $20,000 to wife as a wasteful dissipation credit based upon husband's expenditures of over $40,000 in hotels, spas, exotic massage parlors, escort services and other expenditures. ***Ramadan v. Radaman***, 195 A.D.3d 1174, 150 N.Y.S.3d 365 (3d Dept. 2021)

Where defendant made numerous withdrawals of marital funds prior to and after commencement of the action in violation of automatic stays, and without reason or explanation, defendant wastefully dissipated the marital asset of the parties' joint bank account and as a result of his wasteful dissipation of a marital asset, the Court finds that the plaintiff is entitled to repayment of 70 percent of the asset dissipated. ***C.C. v. R.C.***, NYLJ, 2/25/22 (Supreme Court, Richmond Co., Porzio, J.)

Commingling; Overcoming Presumption

Where separate property has been co-mingled with marital property (e.g., in a joint bank account), there is a presumption that the co-mingled funds constituted marital property. A party may overcome the presumption by presenting sufficient evidence that the source of the funds was separate property. Here, plaintiff inherited shares of stock from his mother which are placed in an investment account which also contained marital funds, but he sufficiently traced the source of the majority of the shares to his inheritance, so as to rebut the presumption that those shares were marital property. ***Palazolo v. Palazolo***, 200 A.D.3d 700 (2d Dept. 2021)

Separate Property v. Marital Property

The subject property was the separate property of the plaintiff where it was acquired after the parties' execution of a separation agreement that provided that each party shall hereinafter own independently of any claim or right of the other party, all of the items of real property to which he or she now or hereafter shall have legal title, and defendant did not challenge the plaintiff's testimony that she used separate funds from an inheritance to pay for the property. ***Daoud v. Daoud***, 198 A.D.3d 952, 157 N.Y.S.3d 33 (2d Dept. 2021)

Where a prior action for a divorce is withdrawn or discontinued, and the parties either reconcile or continue the marital relationship, and continue to receive the benefits of the relationship, property acquired after the withdrawal or discontinuance of the prior divorce action may be deemed marital property. In order to determine whether this standard has been met, inquiry must be made into the nature of the marital relationship within the context of the statutory scheme for equitable distribution. Equitable distribution reflects an awareness that the economic success of the partnership depends not only upon the respective financial contributions of the partners, but also on a wide range of nonremunerated services to the joint enterprise, such as homemaking, raising children, and providing the emotional and moral support necessary to sustain the other spouse in coping with the vicissitudes of life outside the home. ***Potvin v Potvin***, 193 A.D.3d 995, 147 N.Y.S.3d 584 (2d Dept. 2021)

Bonus payments, though paid at the commencement of the matrimonial action, may be viewed as marital property where they are compensation for past performance and not tied

to future performance. However, where a bonus is an incentive for future services to be rendered after commencement of an action, the bonus is separate property. Here, while the right to payments from his former employer came into existence prior to the commencement of the action, his receipt of the payments was contingent upon compliance after the commencement of the action with the restrictive covenants, an incentive to the husband to comply with the restrictive covenants. While they did not require him to do anything affirmatively, he was required to limit his business activities and thus his income, in order to continue to receive the payments tied to the restrictive covenant. ***Kaufman v. Kaufman***, 189 A.D.3d 31, 133 N.Y.S.3d 54 (2d Dept. 2020)

Marital property is to be viewed broadly, while separate property is to be viewed narrowly. Here, defendant's brother testified at the trial that he gifted the defendant his interest in MBCW. However, this assertion was not confirmed by any documentary evidence, and the Supreme Court found the defendant's brother's testimony to be incredible. Accordingly, the defendant did not meet his burden of establishing that his interest in MBCW was separate property. Defendant's brother testified at the trial that he gifted the defendant his interest in MBCW. However, this assertion was not confirmed by any documentary evidence, and the Supreme Court found the defendant's brother's testimony to be incredible. Accordingly, the defendant did not meet his burden of establishing that his interest in MBCW was separate property. ***Keren v Keren***, ___A.D.3d ___, 2022 NY Slip Op 00412 (2d Dept. 2022)

The parties' prenuptial agreement provided that the plaintiff waived all rights to the defendant's separate property, as well as to any property that the defendant may in the future purchase or exchange with the proceeds of his separate property. Error to award to the wife a percentage of the husband's successor business, acquired through exchanges of his premarital business, as the successor business constituted the husband's separate property. ***Rosen v. Rosen***, 192 A.D.3d 710, 142 N.Y.S.3d 609 (2d Dept. 2021)

Court did not err in concluding that plaintiff's 25% interest in Mehlenbacher Farms, LLC (LLC), was marital property. Plaintiff obtained his interest in the LLC during the marriage, and it was therefore his burden to rebut the statutory presumption that the interest was marital property. As separate property should be construed narrowly, despite he stated intention of plaintiff's parents to give him his interest as a gift, it is clear from the record that the LLC was formed by plaintiff, his brother, and his parents together and that nothing was actually delivered or transferred to plaintiff. ***Mehlenbacher v Mehlenbacher***, 199 A.D.3d 1304, 158 nys3ed450 (4th Dept 2021)

Wife's claim for a separate property credit toward the equity in the former marital residence in an amount equal to the debt forgiven by her father rejected. The court held that a gift to a husband and wife from either party's parents is treated as marital property for purposes of equitable distribution. Similarly, if the forgiveness of the debt was an advance against the wife's inheritance, the advance was transmuted when applied towards the satisfaction of a debt on a jointly owned asset. ***C.R. v. L. R.***, 71 Misc.3d 1229(A) (Supreme Court, Rockland Co., 2021, Marx, J.)

Lot him tery Winnings

The supreme court properly determined that lottery winnings were not a gift to the wife from her mother but were marital property under Domestic Relations Law § 236(B)(1)(c) subject to equitable distribution because by claiming the lottery winnings as income on their joint tax returns, the husband and the wife necessarily represented that such winnings were not a gift. Courts cannot, as a matter of policy, permit parties to assert positions in legal proceedings that are contrary to declarations made under the penalty of perjury on income tax returns. ***Hughes v Hughes***, 198 A.D.3d 1170, 156 N.Y.S.3d 444 (3d Dept 2021)

Separate Property Credit

The matrimonial court may, but is not required to, give a spouse who made a separate contribution to the creation of a marital asset a credit for such contribution before determining how to equitably distribute the remaining value of the asset. Alternatively, the court can consider, along with other factors, in determining the percentage of the asset to be distributed, the contributions so made. Under facts of case, where plaintiff wife only got 25% of an asset, to give the defendant an additional separate property credit for his contribution would be to give him the same credit twice. ***Kaufman v. Kaufman***, 189 A.D.3d 31, 133 N.Y.S.3d 54 (2d Dept. 2020)

Where a party contributes his or her separate property toward the purchase of a marital asset, such as a marital residence, the party should be given a credit for the amount so contributed prior to the equitable division of the asset. However, where separate property has been commingled with marital property, for example in a joint bank account, there is a presumption that the commingled funds constitute marital property. To overcome a presumption that commingled property is marital property, the party asserting that the property is separate must establish by clear and convincing evidence that the property originated solely as separate property and the joint account was created only as a matter of convenience, without the intention of creating a beneficial interest. ***Sinnott v Sinnott***, 194 A.D.3d868, 149 N.Y.S.3d 441 (2d Dept. 2021)

Even though spouse changed character of the property from separate to marital by placing title to marital residence in both names, separate property credit not precluded when separate property transmuted into marital property. Defendant purchased the marital residence in 1993 and transferred the property into both parties' names in 2006. Supreme Court awarded the plaintiff half of the stipulated appreciation in the value of the marital residence, in effect, determining that the defendant was entitled to a separate property credit for her contribution of separate property towards the creation of the marital residence as marital property. The Appellate Division affirmed. Even though the defendant changed the character of the property from separate property to marital property by placing the marital residence in both parties' names, a separate property credit is not precluded as a matter of law when separate property has been transmuted into marital property. ***Philogene v Philogene***, 195 A.D.3d 963, 146 N.Y.S.3d 495 (2d Dept.,2021)

Where one spouse contributed monies derived from separate property toward the acquisition of the marital residence, he or she generally will receive a credit for that contribution. The contributing spouse does not meet the burden of establishing the value of a separate property contribution if he or she offers only his or her own testimony in support of the claim or he or she does not trace the source of the alleged separate property. ***Ferrante v Ferrante***, 186 A.D.3d 566, 128 N.Y.S.3d 590 (2d Dept. 2020)

Defendant entitled to separate property credit for his use of $116,919.60 toward the down payment of the marital residence albeit he deposited the funds into a jointly owned bank account. The presumption of marital property was overcome as the deposit was a matter of convenience without the intention of creating a beneficial interest in his spouse. He placed the funds from the sale of separate property stock into the joint account as it was his only checking account, and he could not access the funds directly from the platform from which he sold the stocks. The funds remained in the joint account for only a matter of weeks before they were withdrawn for the purpose of the down payment. ***Lapoint v. Claypoole***, 195 A.D.3d 1541, 145 N.Y.S.3d 890 (4th Dept. 2021)

Although $84,000 of the down payment on the marital residence came from the parties' joint account and was thus presumptively marital property, husband sufficiently rebutted presumption as funds were easily traceable to his Egyptian bank account and given timing of transfers from Egyptian account to parties' joint account and purchase of marital residence, place of funds in joint account was done for convenience***. Ramadan v. Ramadan***, 195 A.D.3d 1174, 150 N.Y.S.3d 365 (3d Dept. 2021)

Separate Property Credit – Interest on Distributive Award

The former husband was entitled to a separate property credit in the amount of $118,000 relating to certain real property that he owned prior to the marriage, which he transferred to himself and the former wife, jointly, after the parties were married. The Appellate Division also affirmed the directive that the Husband pay 9% on the distribution award. ***D'Arrigo v D'Arrigo***, 185 A.D.3d 654, 126 N.Y.S.3d 734 (2d Dept. 2020)

Separate Property Debt

Where over $8,000 was paid from parties' joint account for wife's separate student debt, husband should have been given a credit of one-half of that amount. If marital assets are used to reduce one party's separate indebtedness, the other spouse can recoup his or her equitable share of the expended marital funds. ***Ramadan v. Ramadan***, 195 A.D.3d 1174, 150 N.Y.S.3d 365 (3d Dept. 2021)

Tax Debt

As the Plaintiff has shared in the benefits derived from the parties' failure to pay their taxes, she must also share in the financial liability arising out of tax liability. Based upon the foregoing, considering the equitable distribution factors, wasteful dissipation, the credibility of the parties, and the testimony of the Plaintiff's expert, the Court finds that the IRS federal tax debt and the New York State tax debt is the responsibility of both parties, jointly and severally, and the Court will not apportion liability to one party over the other. ***C.C. v. R.C.***, NYLJ, 2/25/22 (Supreme Court, Richmond Co, Porzio, J.)

Effect of Pendente Lite Award

It is permissible to adjust an equitable distribution award where it is determined after trial that a temporary maintenance award was excessive. However, while such a credit is permissible, it is not mandatory. ***Kaufman v. Kaufman***, 189 A.D.3d 31, 133 N.Y.S.3d 54 (2d Dept. 2020)

Appreciation of Separate Property

Where the marital residence was separate property, as it was purchased before the marriage, any appreciation in the value of separate property due to the contributions or efforts of the nontitled spouse will be considered marital property. This includes any direct contributions to the appreciation, such as when the nontitled spouse makes financial contributions towards the property, as well as when the nontitled spouse makes direct nonfinancial contributions, such as by personally maintaining, making improvements to, or renovating a marital residence. In addition, under certain circumstances, appreciation should, to the extent it was produced by efforts of the titled spouse, be considered a product of the marital partnership and hence, marital, However, "the appreciation remains separate property if it resulted purely from market forces, as opposed to the titled spouse's efforts, ***Garcia v Garcia***, 200 A.D.3d 652, 154 N.Y.S.3d 855 (2d Dept. 2021)

Non-Modifiability

An equitable distribution award cannot be modified, as an order of support can be modified, based upon a change of circumstances. Pursuant to the judgment of divorce, the proceeds from the sale of the jewelry and personal property were to be distributed equally. Based upon the information submitted by the parties to the Supreme Court, and the fact that some of the property at issue was no longer in the possession of the parties or available to them, the court effected as equal a distribution as possible, in a manner which, based upon the figures presented, was favorable to the defendant. ***Maddaloni v Maddaloni***, 194 A.D.3d 705, 149 N.Y.S.3d 97 (2d Dept. 2021)

Valuation Dates

As soon as practicable after a matrimonial action has been commenced, the trial court shall set the date or dates the parties shall use for the valuation of each asset (Domestic Relations Law § 236 [B] [4] [b]). The trial court has broad discretion in selecting valuation dates and may select any date between the date of commencement of the action and the date of trial. Nevertheless, it was not an abuse of discretion for the supreme court to determine that, at this juncture, setting dates would be impractical, particularly given that the proof before the court was limited to the husband's affidavits, tax documents and financial submissions, which the court found "suspect". ***Carter v. Fairchild- Carter***, 199 A.D.3d 1291, 159 N.Y.S.3d 182 (3d Dept 2021)

QDRO

Lower court improperly found that defendant should have amended the DRO in 2011 when he first was notified by the NYS Local Retirement System that the DRO was deficient

on how additional disability payments, if approved at retirement, would be split between the parties. At that time, defendant was not eligible for and had not applied for disability retirement. When his disability application was approved in February 2019, the defendant

became aware of the plaintiff's increased distribution and promptly moved to amend the DRO. Although there was an 8-year lapse, the application was not untimely as plaintiff utterly failed to make a showing of prejudice. ***Taberski v. Taberski,*** 197 A.D.3d 871, 153 N.Y.S.3d 263 (4th Dept 2021)

EVIDENCE

The family court providently exercised its discretion in permitting the subject child to testify in camera with the parties' attorneys present as the court properly balanced the respective interests of the parties and reasonably concluded that the child would suffer emotional trauma if compelled to testify in front of the father or by utilizing electronic means. Moreover, because the father's attorney was present during the child's testimony and cross-examined him on the father's behalf, the father's constitutional rights were not violated by his exclusion during the child's testimony in chambers. ***Matter of Alivia F. (john F.)***, 194 A.D.3d 709, 148 N.Y.S.3d 481 (2d Dept 2021)

Great deference should be given to the credibility determinations of the Support Magistrate, who is in the best position to assess the credibility of the witnesses. ***Matter of Baeza v Baeza-Contreras***, 198 A.D.3d 749, 152 N.Y.S.3d 633 (2d Dept. 2021)

Police Reports and Hearsay

Absent a proper foundation, a party's admission contained in an uncertified police accident report is inadmissible. The use of a statement recorded in a police accident report involves two levels of hearsay, each of which is required for admissibility. First, the report itself must be admissible. A properly certified police accident report (CPLR 4518[c]) is admissible where the report is based upon the officer's personal observation and while carrying out police duties. Second, the statement recorded must satisfy a hearsay exception. Although a party's admission is an exception to the hearsay rule, the admission cannot be received in evidence where the business record containing the purported admission is not itself in admissible form. ***Yassin v. Blackman***, 188 A.D.3d62, 131 N.Y.S.3d 53 (2d Dept. 2020)

Informal Judicial Admission

An admission in an original answer does not lose its effect as an admission of fact when the answer is amended to deny the initial admission. Rather, the initial formal judicial admission is converted into an informal judicial admission, which may be offered as prima facie evidence of the fact admitted. Thus, the plaintiff may offer the initial admissions as prima facie evidence, although the defendants will be entitled to offer evidence of the circumstances surrounding the original admissions and the amendment. ***Re/Max of New York, Inc. v. Weber,*** 117 A.D.3d910, 112 N.Y.S.3d 769 (2d Dept. 2019)

Expert Testimony; Forensic Evaluation

A court is not automatically required to accept the recommendation of a court-appointed forensic evaluator but must consider all of the relevant evidence. Moreover, in considering a forensic evaluator's recommendation, the court must consider the quality of the evaluator's methods and report. ***Ambrose v. Ambrose***, 176 A.D.3d1148, 113 N.Y.S.3d 106 (2d Dept. 2019)

Although a psychologist testified that the children were alienated from their father, she did not conduct a forensic evaluation, she acknowledged having continued to provide therapy to the father, relating to his situation with the children after she terminated the court-

ordered family therapy sessions, and she did not indicate that social worker's program was necessary. Additionally, the court should not have considered the social worker's report. The parties were not given the opportunity to review the report or cross-examine the social worker on it. ***Suarez v. Suarez***, 176 A.D.3d 830, 112 N.Y.S.3d 218 (2d Dept. 2019)

Custody Determination

A court's final custody determination must be based on admissible evidence and not on information provided at court appearances by persons not under oath. ***Fouyalle v Jackson***, 187 A.D.3d 907, 130 N.Y.S.3d 706 (2d Dept. 2020) (The court's mere reliance upon "adequate relevant information," as opposed to admissible evidence, was erroneous.)

The Family Court, in making its determination that the father alienated the child from the mother, improperly relied on inadmissible information that had been provided at court conferences in earlier proceedings before a different judge. The court also improperly relied on hearsay statements and conclusions by an expert, whose credibility was not tested by either party, from an earlier forensic evaluation, and on statements and conclusions by two therapists, whose opinions and credibility were not tested by either party, made at a conference before a different judge. ***McNichol v. Reid***, 176 A.D.3d 713,112 N.Y.S.3d 204 (2d Dept. 2019)

Supreme Court erred when in making its custody and parental access determination, relied on the hearsay statements and conclusions of the forensic evaluator, whose opinions and credibility were untested by either party. ***Brin v. Shady***, 179 A.D.3d 760, 116 N.Y.S.3d 688 (2d Dept. 2020)

Corroboration of Child's Hearsay Statement

Contrary to the Family Court's determination, the testimony of the petitioner's expert witnesses, including the validating expert witness, provided sufficient corroboration of the subject child's numerous and consistent out-of-court statements regarding the father's sexual abuse of her, and together with the testimony of the petitioner's caseworker, established by a preponderance of the evidence that the father sexually abused the child. ***Matter of Tazya B. (Curtis B.)***, 180 A.D.3d 1039, 120 N.Y.S.3d 79 (2d Dept. 2020)

Judicial Notice

Court takes judicial notice of the CDC website, in as much as the mother has not contested the father's rendition of the CDC information on potential complications in the administration of the COVID vaccine to young children. ***J.F. v. D.F.***, 74 Misc.3d 175 (Supreme Court, Monroe Co., 2021, Dollinger, J.)

In awarding the defendant an equitable share of the plaintiff's pension and retirement accounts, the court relied upon the plaintiff's statement of net worth with attached documents, which were not admitted into evidence at trial. However, there is no merit to the plaintiff's claim that the court erred in taking judicial notice of her statement of net worth and its attachments, which had been filed with the court. ***Garcia v Garcia***, 200 A.D.3d 652, 154 N.Y.S.3d 855 (2d Dept. 2021)

Uncontroverted Testimony

The father failed to appear and testify before the Support Magistrate and cannot now challenge the mother's uncontroverted testimony by way of objections to seek clarification of the specified language in the judgment of divorce. ***Matter of Ritossa v Ritossa***, 200 A.D.3d 783, 155 N.Y.S.3d 126 (2d Dept. 2021)

Excited Utterance

A recording and transcript of the mother's 911 call during the incident in question, during which the agitated and at times incoherent mother states that she is keeping her distance from the father, and nothing clearly indicating a physical attack can be heard was properly obtained via subpoena and considered for the truth of the mother's statements therein under the excited utterance exception to the hearsay rule. ***Matter of Walter Q. v Stephanie R.,*** ___A.D.3d ___, 2022 NY Slip Op 00222, *2 (3d Dept. 2022)

Frye Hearing

A court need not hold a ***Frye*** hearing where it can rely upon previous rulings in other court proceedings as an aid in determining the admissibility of the proffered testimony. Absent a novel or experimental scientific theory, a *Frye* hearing is generally unwarranted. ***Guerra v Ditta***, 185 A.D.3d 667, 127 N.Y.S.3d 148 (2d Dept 2020

In determining the admissibility of expert testimony, New York follows the rule of *Frye* that expert testimony based on scientific principles or procedures is admissible but only after a principle or procedure has gained general acceptance in its specified field. The burden of proving general acceptance rests upon the party offering the disputed expert testimony. A Frye inquiry is not concerned with the reliability of a certain expert's conclusions, but instead with whether the experts' deductions are based on principles that are sufficiently established to have gained general acceptance as reliable. General acceptance does not necessarily mean that a majority of the scientists involved subscribe to the conclusion, but rather that those espousing the theory or opinion have followed generally accepted scientific principles and methodology in evaluating clinical data to reach their conclusions. The general acceptance of novel scientific evidence may be established through texts and scholarly articles on the subject, expert testimony, or court opinions finding the evidence generally accepted in the relevant scientific community. ***Farrell v. Lichtenberger***, 194 A.D.3d 1013, 146 N.Y.S.3d 314 **(2d Dept. 2021)**

Spoliation – Spyware; Inference

A proper sanction in a matrimonial litigation where plaintiff installed spyware on the other party's phone, invoked the Fifth Amendment protections on the issue, and intentionally destroyed evidence as to what the spyware actually intercepted, was to infer that the plaintiff violated the defendant's attorney-client privilege, and that plaintiff's causes of action in the complaint relating to the financial issues of the case other than child support should be stricken. A party that seeks sanctions for spoliation of evidence must show that the party having control over the evidence possessed an obligation to preserve it at the time of its destruction, that the evidence was destroyed with a 'culpable state of mind,' and 'that the destroyed evidence was relevant to the party's claim or defense such that the trier

of fact could find that the evidence would support that claim or defense. Where the evidence is determined to have been intentionally or wilfully destroyed, the relevancy of the destroyed documents is presumed. Where plaintiff violated the defendant's attorney-client privilege, the preclusion of documents is not an appropriate alternative sanction because the plaintiff will always be privy to any litigation strategy of the defendant that he gained through secretly intercepting her privileged communications. ***C. C. v. A. R.*** , 192 A.D.3d 654, 143 N.Y.S.3d 404 (2d Dept. 2021)

Telephonic Hearing

In a proceeding pursuant to Family Court Act article 6, the family court did not err in denying mother's request for an adjournment of the custody and visitation hearing because the mother failed to demonstrate that she suffered any prejudice as a result of not attending the hearing in person inasmuch as she appeared by telephone, she declined the opportunity to testify, and her attorney fully represented her interests at the hearing. ***Matter of Dixon v Crow***, 192 A.D.3d1467, 144 N.Y.S.3d 766 (4th Dept. 2021)

Attorney-Client Privilege – Dual Representation

Where Husband and Wife saw the same attorney to, inter alia, create a 2013 revocable trust, and then in 2016, prior the commencement of the divorce action, the Husband saw the same attorney to create a 2016 trust which was funded by assets previously held in the 2013 Trust, the Wife was entitled to subpoena the file of the trust attorney relative to the 2013 trust, as the joint representation as to the same matter precluded imposition of the attorney-client privilege. However, the privilege could be invoked with respect to the attorney's file relative to the 2016 trust, as the attorney's representation of the wife ended in 2013, and the services provided to the Husband in 2016 did not constitute the same matter as the services provided to the parties in 2013. ***Feighan v. Feighan***, 180 A.D.3d 873, 118 N.Y.S.3d 674 (2d Dept. 2020)

Right of Confrontation

In a child abuse proceeding, the court did not violate the respondent's Sixth Amendment right of confrontation by permitting the child to testify via Skype. The father was present in the courtroom during the testimony, and the father's attorney cross-examine the child on the father's behalf. ***Matter of Ariana M.***, 179 A.D.3d923, 117 N.Y.S.3d 215 (2d Dept. 2020)

Legislative Change – Expansion of Party-Admission Exception; Agency

Effective December 31, 2021, CPLR 4549 expands the party admission exception to the hearsay rule by adding a second category of statements outside this exclusion:

> A statement offered against an opposing party shall not be excluded from evidence as hearsay if made by a person whom the opposing party authorized to make a statement on the subject *or by the opposing party's agent or employee on a matter within the scope of that relationship and during the existence of that relationship.* (Emphasis added)

FAMILY OFFENSE

Aggravating Circumstance

As the record demonstrated that the father caused the mother physical injury, the court's finding that aggravating circumstances were present will not be disturbed. ***Batts v. Muhammad***, 198 A.D.3d 750, 156 N.Y.S.3d 231 (2d Dept. 2021)

Harassment

The father had no basis to disturb the trial court's determination on order of protection because under Penal Law § 240.26, the father committed the family offense of harassment in the second degree since the father regularly accused the mother of cheating on him, questioned her about having multiple boyfriends, repeatedly called her while she was at work, and asked the parties' children about what men they saw coming in and out of the house. Also, the mere fact that the mother did not seek medical treatment after the father allegedly punched her did not discredit her testimony. ***Matter of Livesey v Gulick***, 194 A.D.3d 1045, 149 N.Y.S.3d 479 (2d Dept 2021)

Evidence

The Family Court was correct in noting that the child's out-of-court statements regarding the father's alleged harassment could not be admitted under the statutory hearsay exception of Family Court Act § 1046(a)(vi), and that the child could not be permitted to testify in camera outside the presence of the respondent or his counsel. The court erred, however, in concluding that there was no other way for the petitioner to present competent evidence of the allegations—for instance, by having the child, who was 17 years old at the time the petition was filed, testify in open court ***Matter of O'Connor v O'Connor***, ___A.D.3d ___, 2022 NY Slip Op 00667 (2d Dept. 2022)

Constitutionality

The determination that respondent committed the family offense of aggravated harassment in the second degree based on Penal Law § 240.30(1)(a) as it existed before amendment in July 2014 must be vacated because the statute was held to be unconstitutionally vague (*see People v Golb*, 23 NY3d 455, 466-467, 991 N.Y.S.2d 792, 15 N.E.3d 805 [2014], *cert denied* 574 US 1079 [2015]). ***Matter of Giovanni De M. v Nick W.***, 200 A.D.3d 517 (1st Dept 2021)

Intent Element

The evidence supported a finding that appellant committed the family offense of harassment in the second degree, as she engaged in a course of conduct which was intended to and did alarm or seriously annoy the petitioner and which served no legitimate purpose. The intent element of the offense is properly inferred from the appellant's conduct and the surrounding circumstances. Appellant's contention that her conduct was protected by the First Amendment was rejected. ***Matter of Plissner v. Louie***, 194 A.D.3d 820, 143 N.Y.S.3d 913 (2d Dept. 2021)

Intimate Relationship

The Family Court also should have conducted a hearing prior to determining that it lacked subject matter jurisdiction on the ground that the parties did not have an intimate relationship within the meaning of Family Court Act § 812(1)(e). The court's determination, after brief questioning of the petitioner, without affording the petitioner the opportunity to testify or proffer any evidence as to whether the relationship she had with the respondent constituted an intimate relationship within the meaning of Family Court Act § 812(1)(e), did not constitute a hearing, ***Matter of Minor v Birkenmeyer***, 200 A.D.3d 1044 (2d Dept. 2021)

Here, it is undisputed that the parties are not spouses, former spouses, or parent and child. Thus, the Family Court would have jurisdiction over this proceeding only if the parties are "members of the same family or household" (*id.*). The Family Court Act defines "members of the same family or household" as, inter alia, "persons who are not related by consanguinity or affinity and who are or have been in an intimate relationship regardless of whether such persons have lived together at any time". ***Matter of Kane v Tung***, 194 A.D.3d 718, 143 N.Y.S.3d 590 (2d Dept 2021)

Family Offense – Collateral Estoppel

Summary judgment is an appropriate vehicle for resolving family offense "proceedings where no triable issues of fact exist," and the mother argued that such was the case here based upon the father's criminal conviction and principles of collateral estoppel Collateral estoppel comes into play when four conditions are fulfilled: (1) the issues in both proceedings are identical, (2) the issue in the prior proceeding was actually litigated and decided, (3) there was a full and fair opportunity to litigate in the prior proceeding, and (4) the issue previously litigated was necessary to support a valid and final judgment on the merits. It is undisputed that the criminal trial afforded the father a full and fair opportunity to litigate the issue presented in this proceeding. ***Matter of Stephanie R. v Walter Q.***, ___A.D.3d ___, 2022 NY Slip Op 00219 (3d Dept. 2022)

Jurisdiction

Family Court could exercise subject matter jurisdiction in family offense proceeding notwithstanding that the offenses occurred out of state, ***Matter of Phillip D.S. v Shamel B.***, 199 A.D.3d 538, 159 N.Y.S.3d 5 (1st Dept 2021)

Duration of Order

In determining the length of the order of protection to impose, the court was not required to consider the fact that a temporary order of protection had been in effect for about two years. ***Matter of Sophia M. v James M.***, 195 A.D.3d 538, 150 N.Y.S.3d 262 (1st Dept 2021)

MAINTENANCE

Purpose

As the action was commenced after January 23, 2016, it is governed by recent amendments to the calculation of postdivorce maintenance set forth in Part B of section 236 of the Domestic Relations Law. Where the payor's annual income exceeds the statutory income cap of $184,000 (*see* Domestic Relations Law § 236[B][6][b][4]), the court shall determine the guideline amount of postdivorce maintenance by performing the calculations set forth in Domestic Relations Law § 236(B)(6)(c), and then shall determine whether to award additional maintenance for income exceeding the cap by considering the factors set forth in Domestic Relations Law § 236(B)(6)(e)(1) and setting forth the factors it considered (*see* Domestic Relations Law § 236[B][6][d][1]-[3]). The overriding purpose of a maintenance award is to give the spouse economic independence, and it should be awarded for a duration that would provide the recipient with enough time to become self-supporting. ***Mahoney v Mahoney***, 197 A.D.3d 638, 52 N.Y.S.3d 727 (2d Dept. 2021)

defendant

Error for Supreme Court to impute an annual income of $80,000 to the plaintiff when calculating her maintenance award. In a 28-year marriage, and notwithstanding her college degree and various certifications, the 55-year-old plaintiff had been a stay-at-home mother and homemaker for almost 10 years, and never earned more than $19 per hour from employment upon returning to work outside the home. Defendant was the primary wage earner for the family and earned a substantial income. Plaintiff's business was not a financial success. Accordingly, there was no basis for an imputation of $80,000 of income and the court should have imputed an annual income to the plaintiff of only $35,000. ***Weiss v. Nelson***, 196 A.D.3d 722, 152 N.Y.S.3d 143 (2d Dept. 2021)

Temporary Maintenance

Proper to award temporary maintenance based on the parties' 2019 income tax returns and not to impute income to plaintiff based on plaintiff's mother's monetary gifts due to the significant drop in plaintiff's income in 2020 due to the pandemic. ***Moreira v Moreira***, ___A.D.3d ___, 2022 NY Slip Op 00013, *1 [2022])

Defendant failed to show exigent circumstances that would warrant disturbing the pendente lite award. Defendant's argument that it was inappropriate for the court to "require" him to "spend down his finite assets in furtherance of the support of his children, his own support, or his own professional fee expenses," is without merit. Defendant failed to demonstrate that his assets are indeed "finite." The record reflects defendant's ability to earn significant sums (the 2017 tax return shows that he earned more than $3.4 million that year), and suggests no reason that he will not be able to do so again. ***Steinberg v Steinberg***, 194 A.D.3d 588, 150 N.Y.S.3d 5 (1st Dept 2021)

Husband's application to terminate pendente lite maintenance denied. It is well established that any perceived inequities in the pendente lite award can be best remedied by a speedy trial', at which the parties' financial circumstances can be fully explored. Court will not sanction plaintiff's attempt to obfuscate his financial circumstances with the concomitant

delay while simultaneously attempting to avoid his pendente lite obligation. Temporary maintenance can continue during the pendency of the proceeding and a temporary maintenance award shall not prejudice the rights of either party regarding a postdivorce maintenance award. ***Emmanuel D. v. Ximena D.***, NYLJ, 12/17/21 (Supreme Court, Kings Co., Sunshine, J.)

Temporary Maintenance – Duration – FCA v. DRL

While the spousal support statute in the FCA mirrors the temporary maintenance statute in the DRL in many respects, there is a significant difference in the two statutes with respect to duration (compare FCA §412 with DRL §236[B][5-a]). DRL §236[B][5-a][f] expressly states "the court shall determine the duration of temporary maintenance by considering the length of the marriage." DRL §236[B][5-a][g] further provides that "temporary maintenance shall terminate no later than the issuance of the judgment of divorce or the death of either party, whichever occurs first." The FCA, on the other hand, does not relate the duration of spousal support to the length of the marriage. Rather, the FCA provides that unless modified upon a showing of a substantial change in circumstances, any order of spousal support issued pursuant to FCA section 412 shall continue until the earliest of one of the following: a written or oral stipulation or agreement between the parties; the issuance of a judgment of divorce or other order in a matrimonial proceeding; or the death of either party (see FCA §412[10]). ***JJ v. TW***, 70 Misc.3d 1225(A), 141 N.Y.S.3d 299

Nondurational

In long term marriage where wife had been out of the workforce for over 30 years at husband's request, wife granted nondurational maintenance of $25,000 per month for five years; then $20,000 per month for five years; and then $12,000 per month until the remarriage of the wife or the death of either party. ***Tuchman v. Tuchman***, 201 A.D.3d 993, 157 N.Y.S.3d 775 (2d Dept. 2022)

Military Pension

The trial court erred in its calculation of post-divorce maintenance under Domestic Relations Law § 236 (B)(6) because although it properly determined that the husband's military pension was separate property not subject to equitable distribution, the pension should have been included as income for purposes of determining post-divorce maintenance, so the calculation of the amount of maintenance under the guidelines was incorrect. ***Iannazzo v Iannazzo***, 197 A.D.3d 959, 152 N.Y.S.3d 756 (4th Dept 2021)

Modification; Hearing

Absent a prima facie demonstration of entitlement to a modification of a maintenance obligation, the party seeking the modification has no right to a hearing. ***Allen v. Allen***, 195 A.D.3d 669, 145 N.Y.S.3d 362 (2d Dept. 2021)

Diminution of Income

The trial court did not err by awarding the wife maintenance of $1,963 per month for three years and 10 months under Domestic Relations Law § 236 because, although the wife was earning substantially less money than she did in her previous employment, the record reflected that she lost her job through no fault of her own and was reluctant to take a position that would require her to commute into New York City or travel a lot, taking her away from the children. For the same reason, the husband ran for an was elected to a judgeship, paying less than his former earnings at a NYC law firm. The court noted it would be unjust and inappropriate for the wife to be penalized for making the decision to earn less money for the same reason as the husband. ***Harris v Schreibman*** 200 A.D.3d 1117 (3d Dept. 2021)

PROPERTY

Tenants in Common

Where husband and wife owned property as tenants in common by virtue of their divorce and wife thereafter, by quitclaim deed, conveyed to Husband only any interest she might have had in the father's 50% undivided interest in the subject property, not her undivided 50% interest in the subject property, the partnership that purchased the Husband's interest could not convey the property as it owned only a 50% undivided interest in the property. ***Deckoff v. W. Manning Family Limited Partnership***, 193 A.D.3d 812, 142 N.Y.S.3d 91 (2d Dept. 2021)

Tenants by Entirety; Marital Residence

Prior to entry of a judgment altering the legal relationship between spouses by granting divorce, separation or annulment, courts may not direct the sale of marital property held by spouses as tenants by the entirety, unless the parties have consented to sell. Moreover, courts must respect conditions placed on a party's consent to the sale of such property and lack the authority to direct a sale where those conditions have not been met. ***Taglioni v Garcia***, 200 A.D.3d 44, 157 N.Y.S.3d 7 (1st Dept 2021)

Joint Ownership after Divorce

The parties provided for joint ownership of real property after the divorce, with the nature of the ongoing joint ownership being limited and based solely on the parties' agreement to avoid jeopardizing the existing mortgage on the property. The Husband also gave up any right to continue to use the property or to share in any proceeds of the sale. He also agreed not to take any action that could interfere with Wife's exclusive use and occupancy of the said property, including the sale of the said property. As such, the stipulation of divorce divested the Husband of his rights in the subject property. Under CPLR article 52, the Husband's judgment creditor may only seek to enforce its money judgment against a judgment debtor's property. "Property" under CPLR 5201(b), whether realty or personalty, is defined broadly as an interest that is present or future, vested or contingent. However, the determining factor as to whether a judgment debtor's interest can constitute property vulnerable to a judgment creditor is whether it "could be assigned or transferred" (CPLR 5201[b]). In the stipulation of divorce Husband gave up any right to assign or transfer to a third party an interest in the subject property. The subject property is therefore beyond the reach of the judgment debtor. ***Tiozzo v Dangin***, 197 A.D.3d 435, 153 N.Y.S.3d 19 (1st Dept 2021)

Engagement Ring

New York case law that holds that when both parties are unmarried and there is no impediment to their marriage an engagement ring remains the donor's property until such time as the donor and recipient marry. In those cases, wherein neither party is married when the engagement ring (or any other transfer) is given in contemplation of marriage the donor may seek to recover the ring pursuant to Civil Service Law § 80-b. In those cases,

the courts have long held that actions are permitted for the recovery of chattel when the sole consideration for its transfer was a contemplated marriage which has not occurred. ***Jennifer D. v Maurice D.***, 73 Misc 3d 1134 (Supreme Court, Kings County 2021, Sunshine, J.)

PROCEDURE; MISCELLANEOUS

Appeal; Appendix Method

The record on appeal when using the appendix method must contain those portions of the record necessary to permit the court to fully consider the issues which will be raised by the appellant and the respondent, including material excerpts from transcripts of testimony, papers in connection with a motion, and critical exhibits. Here, appellant omitted from his appendix, among other things, critical exhibits from the trial, and thus the appeal is dismissed. ***Skalska v Grubeki,*** 201 A.D.3d 764, 156 N.Y.S.3d 900 (2d Dept. 2021)

Adoption

Pursuant to Domestic Relations Law §110, "[a]n adult unmarried person, an adult married couple together, or any two unmarried adult intimate partners together may adopt *another person* [emphasis added]." This language does not contemplate a husband adopting his wife or a wife adopting her husband. James D. does not have standing to adopt Diane B., his wife, nor is Diane B. a person who may be adopted by James D., her husband. ***Matter of Diane B.***, 71 Misc 3d 1228[A], 2021 NY Slip Op 50517[U], *2 [Sur Ct, Essex County 2021])

Annulment

The trial court erred in granting a husband an annulment of the parties' marriage under Domestic Relations Law § 144(2) because, while the husband's case of fraud in the inducement was premised upon his claim that the wife induced him to marry through false representations of love and affection for the sole purpose of obtaining an immigration benefit, his proof fell far short of demonstrating a fraudulent premarital intent on the part of the wife, and the court relied too heavily upon the wife's belated filing of a family offense petition in another county and took a negative inference against the wife for purportedly exploring relief under the Violence Against Women Act. An action for annulment based upon fraud in the inducement must be proven by clear and convincing evidence. ***Travis A. v Vilma B.***, 197 A.D.3d 1401, 153 N.Y.S.3d 674 (3d Dept 2021)

Abatement of Action

A divorce action abates upon the death of either party to the action because the marital relationship ceases to exist at that time. When abatement occurs, the court lacks jurisdiction to act. The abatement rule also typically applies to ancillary issues, such as maintenance and attorneys' fees sought in a divorce action, which are necessarily dependent on the existence of a divorce action and, with respect to those issues, applies regardless of which spouse—payee or payor—has died. There are, however, some exceptions to the rule that divorce actions abate upon the death of a party. Specifically, courts have recognized that abatement does not occur when a party's rights have vested prior to the death or when all that remains to be done in the action following a party's death is for the court to effectuate a ministerial act. ***Bomer v Dean***, 195 A.D.3d 1518, (4th Dept 2021)

Hearing in Aid of Disposition of Motion

Where a stipulation unambiguously provided that the parties were to work together with a jointly selected parent coordinator and consultation with the coordinator is necessary before returning to court and that absent an emergency, neither shall file a petition in court without engaging in consultation with the parent coordinator, in view of the parties disputed allegations, including the extent of defendant's participation in parent coordination the, the alleged conduct of plaintiff's current spouse in the presence of the children, and issues of parenting time, Supreme Court providently directed a hearing to aid in the disposition of defendant's motion. ***Castro v, Kaminski,*** 197 A.D.3d 609, 153 N.Y.S.3d 89 (2d Dept. 2021)

Motion to Dismiss

In deciding a motion to dismiss a petition for failure to establish a prima facie case, the court must accept the petitioner's evidence as true and afford the petitioner the benefit of every favorable inference that can reasonably be drawn therefrom. ***Mondschein v. Mondschein***, 195 A.D.3d1025, 151 N.Y.S.3d 134 (2d Dept. 2021); see also, ***Prince v. Ford***, 195 A.D.3d 724,145 N.Y.S.3d 377 (2d Dept. 2021)

To succeed on a motion to dismiss based on documentary evidence (CPLR 3211(a)(1)), the documentary evidence that forms the basis of the defense must be such that it resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim. Contracts are among the documents that qualify as documentary evidence. Here, the documentary evidence was the retainer agreement between the attorney and the client, with the client's claims being conclusively disposed of by the retainer agreement itself. ***Dubon v. Drexel***, 195 A.D.3d 991, 151 N.Y.S.3d 126 (2d Dept. 2021)

Notice of Motion

A notice of motion shall specify the time and place of the hearing on the motion, the supporting papers upon which the motion is based, the relief demanded and the grounds therefor, CPLR 2214(a), but there is no requirement that the notice of motion list the statute or regulation that is the basis of the motion as long as some grounds are mentioned. Where there is no misunderstanding or prejudice, a court may grant relief that is warranted by the facts plainly appearing on the motion papers on both sides. ***Rosenheck v Schachter***, 194 A.D.3d 1144, 149 N.Y.S.3d 571 (3d Dept 2021)

Successor Judge

Judiciary Law §21 does not preclude a successor Judge from determining a motion argued before another Judge so long as purely legal questions are involved. However, when a Judge acts as a fact finder and is required to weigh the credibility of witnesses, Judiciary Law § 21 precludes a successor Judge from continuing a hearing or trial or rendering a determination on the issues involved when the testimony of these witnesses was only heard by the initial Judge. ***Gary G. v Elena A.G.***, 72 Misc 3d 1201[A], 2021 NY Slip Op 50564[U], *3 (Sup Ct, Kings County 2021, Sunshine, J.)

Support Magistrate; Objections

Objections to an order of the Support Magistrate must be filed within 35 days after the date the order was mailed to the objection party. ***Jones v. Jones***, 198 A.D.3d 779, 152 N.Y.S.3d 626 (2d Dept. 2021);

Reargument

A motion for leave to reargue shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion but shall not include any matters of fact not offered on the prior motion" (CPLR 2221[d][2]). Supreme Court properly granted reargument where the prior order overlooked the fact that Defendant had prevailed on all of the substantive relief and thus pursuant to the parties' stipulation of settlement, as the "successful" party, Defendant was entitled to an award of reasonable attorney's fees. ***D'Ablemont v D'Ablemont***, 197 A.D.3d 1091, 153 N.Y.S.3d 494 (2d Dept. 2021)

Motion to Dismiss

A motion brought under CPLR 3211 (a) (7) addresses the sufficiency of a pleading. The court must accept the facts as alleged in the complaint as true, accord the plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory. When documentary evidence utterly refutes Plaintiff's factual allegations, the standard morphs from whether the Plaintiff stated a cause of action to whether it has one. ***Kaufman v Boies Schiller Flexner***, 2021 NY Slip Op 31340[U] [Sup Ct, NY County 2021])

Default

Father's failure to appear at the hearing constituted a default and thus his appeal from the order entered upon his default must be dismissed as no appeal lies from an order made upon the default of the appealing party. ***Sardella v. Merkle***, 199 A.D.3d 689, 153 N.Y.S.3d 896 (2d Dept. 2021)

A motion to vacate a default judgment of divorce pursuant to CPLR 5015(A)(1) must be made within one year after service of a copy of the default judgment with notice of entry. Although the court retains inherent authority to vacate its own judgment or order in the interest of justice, even when the statutory period has expired, the failure to demonstrate a reasonable excuse for a lengthy delay in moving to vacate the judgment and to make a showing of a meritorious cause of action, results in denial of the application ***Vandamme v. Curran***, 200 A.D.3d 1641, 155 N.Y.S.3d 894 (4th Dept. 2021)

Default – Disruptive Behavior

The father's disruptive behavior over the course of these proceedings, and specifically, during the conference on January 27, 2021, was grossly disrespectful to the Supreme Court and precipitated his removal from the virtual courtroom. Therefore, the court acted properly in excluding the father from further participation in the proceedings, as the father's conduct was sufficient to constitute a knowing and willful default. ***Matter of Smith v Bullock***, ___A.D.3d ___, 2022 NY Slip Op 00671, *1 [2022])

Service of Process

Regardless of whether service was made pursuant to CPLR 308 (2) or (4), both subdivisions require that the initial act, i.e., the delivery or affixing of the summons, respectively, be made at the party's actual dwelling place or usual place of abode, CPLR 308(2)(4). A dwelling place is one at which the party to be served is actually residing at the time of delivery, and the usual place of abode is a place at which the party lives with a degree of permanence and stability and to which he or she intends to return. Both subdivisions thereafter require the requisite documents to be mailed to the party's last known residence or actual place of business, CPLR 308(2) or (4), jurisdiction is not acquired pursuant to CPLR 308 (2) or (4) unless there has been strict compliance with both the delivery and mailing requirements. ***Matter of William A. (jessica F.)***, 192 A.D.3d 1474, 144 N.Y.S.3d 263 (4th Dept 2021)

Pursuant to the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents (20 UST 361, TIAS No. 6638 (1969), of which both the United States and Italy are signatories, requests for service of documents must be sent to a central authority within the receiving state, which then serves the documents by a method prescribed by the internal law of the receiving state or by a method designated by the requester and compatible with that law. New York requires that, in an action for divorce, the summons and a copy of the complaint be personally served upon the defendant or, alternatively, a copy of the summons be served on the defendant pursuant to an order directing the method of service in accordance with the provisions of CPLR 308, Domestic Relations Law § 232 (a). As set forth in CPLR 308 (5), if service is impracticable under CPLR 308 (1), (2) and (4), then personal service shall be made in such manner as the court, upon motion without notice, directs. Although impracticality does not require a showing of actual attempts to serve parties under every method in the aforementioned provisions of CPLR 308, the movant is required to make a competent showing as to actual efforts made to effect service. Absent showing of impracticability a court is without power to direct expedient service pursuant to CPLR 308(5). ***Joseph ll. v Luisa JJ.***, 201 A.D.3d 43 (3d Dept 2021)

Service on the husband in Colorado of the order to show cause and accompanying papers on a Sunday was defective because under CPLR 313, the wife was required to serve him in accordance with New York State laws, and General Business Law § 11 is clear that service of any process on a Sunday was absolutely void for any and every purpose whatsoever. ***V.D. v P.D.***, 73 Misc 3d 307 (Sup Ct, Nassau County 2021, Lorintz, J.)

Untimely Motion

Family Court erred in considering the mother's motion to preclude the father from offering into evidence certain materials because it was untimely. Pursuant to CPLR 2214(b), a notice of motion and supporting affidavits shall be served at least 8 days before the time at which the motion is noticed to be heard, 5 days must be added to any relevant time period measured from the date of service was service is effectuated by mail. ***Matter of Streiff v. Streiff***, 199 A.D.3d 1370, 158 N.Y.S.3d 472 (4th Dept. 2021)

Sanctions and Counsel Fees

Award of counsel fees and sanctions against mother affirmed where mother engaged in a comprehensive pattern of harassment against the father and his wife, by among other things, actively frustrating and impairing the father's efforts to maintain a relationship with the parties' child, and by repeatedly making false accusations of sexual abuse against the father and his wife which resulted in both criminal and child protective investigations being initiated against them. These allegations were thoroughly investigated and determined to be unfounded. Nevertheless, the mother persisted in repeating these allegations in subsequent unfounded claims. She also obstructed the father and his wife's visitation with the child in violation of court orders and threatened and harassed them. The mother also filed numerous factual and legally baseless motions to hold the father's wife and the attorney for the child in contempt of court. Under the circumstances, particularly where the mother exhibited a pattern of bad faith conduct throughout the proceedings despite repeated warnings not to do so, the sanctions imposed by the Family Court were entirely proper. ***Matter of Kyriacos L. v Hyunjung K.***, 194 A.D.3d 650, 144 N.Y.S.3d 561 (1st Dept 2021])

Habeas Corpus

As there was no other custody order in place, and the father had no greater right to the custody of the children than the mother, the children were not being illegally detained by the mother, and thus the father cannot establish a right to habeas corpus relief. ***Toussaint v. Doucey***, 199 A.D.3d 693, 158 N.Y.S.3d 122 (2d Dept. 2021)

Authority of Court

Where Attorney for the Child filed a petition seeking temporary relief regarding custody, the court's order, which awarded sole legal and physical final custody to the mother was in error as the father was not on notice that the court would issue a final custody determination. ***Matter of M.T. v. DeSabato***, 198 A.D.3d 791, 156 N.Y.S.3d 271 (2d Dept. 2021)

Referee's Authority

A referee derives his or her authority from an order of reference by the court, and the scope of the authority is defined by the order of reference. CPLR 4311. A referee who attempts to determine matters not referred to him or her by the order of reference acts beyond and in excess of his or her jurisdiction. Where the parties did not consent to the determination of any issues by the referee, and the order of reference directed the referee to hear and report, CPLR 4317(a), the referee had the power only to hear and report his or her findings. Neither CPLR 4201 nor 4320(a) authorized her to impose a penalty on the husband for failing to appear or preclude him from presenting evidence prior to the close of the wife's case. ***Pulver v Pulver***, 197 A.D.3d 672, 153 N.Y.S.3d 120 (2d Dept. 2021)

Right to Counsel

The parent of any child seeking custody or contesting the substantial infringement of his or her right to custody of such child must be advised before proceeding that he or she has the right to be represented by counsel of his or her own choosing, of the right to have an adjournment to confer with counsel, and of the right to have counsel assigned by the court

in any case where he or she is financially unable to obtain the same. Family Ct Act § 262(a)(v), Judiciary Law § 35(8). A party may waive the right to counsel, provided he or she makes a knowing, voluntary, and intelligent waiver of that right. ***Wondemagegehu v. Edem***, 199 A.D.3d 871, 154 N.Y.S.3d 276 (2d Dept. 2021)

A party in a proceeding pursuant to Family Court Act article 8 has the right to be represented by counsel. While the right may be waived, the waiver must be knowing, voluntary, and intelligent, and the court must conduct a searching inquiry to assure a proper waiver. ***Matter of Minor v Birkenmeyer***, 200 A.D.3d 1044 (2d Dept. 2021)

Jurisdiction

The family court erred in adding a mother's former boyfriend as a necessary party under CPLR 1003 because the court plainly did not have the authority to make him a named party to the filiation proceeding, the court failed to obtain jurisdiction over him, no petition, summons, or supplemental summons was filed against or served upon him, no party has moved to add him as a necessary party, and there had been no stipulation to that end. ***Matter of Schenectady County Dept. of Social Servs. v Noah DD.***, 200 A.D.3d 1509 (3d Dept. 2021)

The court noted husband has not resided in NYS for many years and wife never resided there. While they were unable to satisfy DRL §230 residency requirements, the court opined that NYS remained husband's domicile during his military service in order to maintain jurisdiction in this matter. Under the Servicemember's Civil Relief Act, a member of the military did not lose their domicile or legal residence in a state when they were absent from it due to military orders. Husband testified that he maintained a residence at his grandmother's address in NY, registered to vote in NY, and voted via absentee ballot--he was called for jury duty in 2018 despite not being physically present in the state. After his August 2021 retirement, husband testified he intended to return to NY. The court concluded husband did not sever ties to NY, thus the SCRA protected his right to seek a divorce in NY due to his continued domicile in the state. ***Cassano v. Cassano***, NYLJ, 7/7/21 (Supreme Court, Richmond Co., Porzio, J)

The motion court correctly determined that it did not have personal jurisdiction over defendant. Contrary to plaintiff wife's contention, the post-nuptial agreement executed by the parties in New York in 2015 does not substantially comply with Domestic Relations Law (DRL) § 236(B)(3) and therefore fails to constitute a transaction of business for long-arm jurisdictional purposes. The certificates of acknowledgement in the post-nuptial agreement do not contain language confirming that the notary personally knew the parties or had ascertained through some form of proof that the parties were those described in the agreement, rendering the agreement invalid. Notably, although plaintiff argues that she should have been permitted to cure the defect, she offered no evidence that, although the requisite language was omitted, the acknowledgment was properly made. ***Karam v Karam***, 197 A.D.3d 1041, 151 N.Y.S.3d 884 (1st Dept 2021]

Paternity

Best interests of child required father be equitably estopped from seeking genetic marker testing and denying paternity of child where respondent was named as child's father on birth certificate and was married to child's mother at time of birth, although the marriage was annulled 12 years later. Respondent assumed role of a parent to child from birth and allowed child to believe he was his father for the next 11 years. Additionally, child fostered relationship with paternal grandparents. Respondent's reason in seeking the testing, i.e., to remove any doubt in his mind regarding paternity, was insufficient. ***Amber N. v. Andrew S.***, 200 A.D.3d 466, 155 N.Y.S.3d 77 (1st Dept. 2021)

Putative father's request for a genetic marker test should have been granted in the absence of any indication he played a significant role in raising, nurturing or caring for the child, there was no showing of a recognized and operative parent-child relationship wherein the status interests of the child needed to be protected by imposing equitable estoppel, and child would not suffer any irreparable loss of status or other physical or emotional harm if genetic market test were ordered. ***Montgomery Co. DSS o/b/o Donavin E. v. Trina G.***, 195 A.D.3d 1069, 149 N.Y.S.3d 667 (3d Dept. 2021)

Decision v. Order

Where an order is inconsistent with the underlying decision, the decision controls (Matter of ***Cardona v McNeill***, 199 A.D.3d 1002, 154 N.Y.S.3d 817 (2d Dept 2021)

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