NYSBA FAMILY LAW SECTION UPDATE, MARCH 2025

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Adoption - Registration of Foreign Order – Lost Immigrant Visa and Passport, Proved by Replacement Certificate of Citizenship

In ***Matter of Lily***, 2025 Westlaw 322145 (2d Dept. Jan. 29, 2025), petitioner adoptive mother of the subject child born in China in September 2007, who adopted the child in China on June 11, 2008, appealed from an April 2024 Surrogate's Court Order, which dismissed her June 2023 petition seeking registration of a foreign adoption order and an order of adoption. The petition: (1) included a copy of a replacement Certificate of Citizenship issued by US Citizenship and Immigration Services in April 2023, which confirmed that the child became a US citizen on June 20, 2008; (2) annexed copies of the child's birth certificate, adoption registration certificate, and Chinese passport; and (3) stated that the child's original Certificate of Citizenship and Chinese Passport that contained her immigrant visa had been lost. The Appellate Division framed the issue, "apparently one of first impression for an appellate court in this state," as "whether Domestic Relations Law §111-c permits New York State to register a foreign order of adoption if the applicant is no longer in possession of the required immigrant visa." The Second Department concluded: "under the particular circumstances of this case, in which the petitioner provided an official Certificate of Citizenship that proved the adopted child was granted the appropriate immigrant visa at the time of her adoption, the registration of a foreign adoption order and order of adoption should be granted." The Second Department reversed, on the law and the facts, and remitted to Surrogate's Court to issue a registration of foreign adoption order and an order of adoption.

Agreements - Oral Modification Disallowed; Deed Voided

In ***Moreno-Chavez v. Cantarero***, 2025 Westlaw 395794 (2d Dept. Feb. 5, 2025), the former wife (wife) and grantee wife's family member (grantee), defendants in the former husband's (husband) June 2017 action, seeking a judgment declaring a May 2017 deed to the grantee was void, appealed from an August 2022 Supreme Court order which, among other things, granted the husband's motion for summary judgment and declared the subject deed to be null and void. The Second Department affirmed, and remitted to Supreme Court for entry of a judgment declaring the deed to be null and void. The husband and wife signed a separation agreement in May 2014, stating they would not sell the former marital residence for less than $700,000. The residence was sold to the family member grantee for $360,000 pursuant to the aforesaid May 2017 deed. The husband signed the sale contract and the closing documents including the deed, but he claimed that the contents of the documents were fraudulently represented to him and that he is unable to read the English language. The husband contended that the sale violated the separation agreement's prohibition of oral modifications. The Appellate Division held that the husband "established his prima facie entitlement to judgment as a matter of law by demonstrating that the separation agreement contained a no-oral-modification clause and that an alleged oral agreement between the [husband] and the former wife was not in writing and was without consideration."

Agreements - Prenuptial – Valuation Cutoff Date Controls

In ***Dwyer v. Dwyer***, 2025 Westlaw 516140 (1st Dept. Feb. 18, 2025), the husband appealed from a March 2024 Supreme Court order, which granted the wife's cross motion to set an asset valuation cutoff date of August 10, 2023. The First Department reversed, on the law, denied the wife's motion and set the valuation date as August 1, 2013, the date the husband filed for divorce. The parties, while represented by counsel, entered into a prenuptial agreement, which unambiguously and "specifically set a trigger event for determination of the parties' interest in appreciation in value of premarital property as of the date of the parties' separation or pending divorce." The Appellate Division held that the contractual terms, in the absence of any "intimations of fraud, duress or overreaching *** must be observed." The Court observed that "[a]lthough this will likely result in a greater financial disparity than if the trigger date was set by the motion court, 'any such inequality is simply not a basis for vitiating their freely-negotiated agreement (citations omitted).'"

Child Support - Waiver – Written Agreement Upheld

In ***Matter of Hanford v. Hanford***, 234 AD3d 965 (2d Dept. Jan. 29, 2025), the father appealed from an April 2024 Family Court order denying his objections to a February 2024 Support Magistrate order which, after a hearing upon the mother's 2022 petition, found that he violated the child support provisions of the parties' separation agreement incorporated into a 2016 judgment of divorce, and directed him to pay arrears of $93,612.45. The agreement contained a clause which prohibited modifications or waivers unless the same were in a writing "duly subscribed and acknowledged with the same formality as" the separation agreement. The mother did not dispute that in April 2017, the parties reached an agreement by email to reduce the amount of child support, which reduced amount the father paid until September 2022. The Second Department modified, on the law and the facts, by granting the father's objection and remitting to Family Court for a new determination of arrears. The Appellate Division noted that "[t]here is a distinction between a modification agreement and a waiver" but "[a]n agreement which does not satisfy the prerequisites of a legally binding modification agreement may nonetheless constitute a valid waiver, which cannot be withdrawn once the parties have performed in accordance with its terms." The Court reasoned further that "a contractual provision which sets forth requirements for a legally enforceable waiver may itself be waived." The Second Department concluded: "the mother's testimony that she agreed to the reduced amount of child support, coupled with the mother's acceptance of the reduced payments for five years, demonstrates that she intentionally abandoned the right she possessed to receive child support at the rate set forth in the separation agreement for the years preceding her violation petition"; and "the mother's express waiver of her future child support payments was valid and enforceable (citations omitted) until the mother validly withdrew it by filing her violation petition."

Custody – Modification – Joint to Sole – Father's Relocation, Inability to Communicate; Trial Delay Not Unfair to Father

In ***Matter of Mercedes E.H. v. Dexter R.N.***, 2025 Westlaw 596860 (1st Dept. Feb. 25, 2025), the father appealed from a December 2023 Family Court Order which, after a hearing, granted the mother's petition to modify a September 2016 Order (joint custody) by awarding her

sole legal and physical custody of the child and, among other things, two weekends per month to the father. The First Department affirmed, holding that while the trial was protracted, the father "was not denied a fair trial" and noting: "Although the COVID-19 pandemic exacerbated delays, *** most of the delay in completing the custody modification hearing was occasioned by the father's actions in, among other things, refusing to proceed unless the judge recused herself, being unavailable for appearances for months at a time, requesting adjournments, changing counsel, and delaying completion of the final forensic report." The Appellate Division found that the deterioration of the parents' relationship constituted changed circumstances and their "inability to reach a consensus or communicate on issues related to the child renders joint custody inappropriate." The Court concluded that "because the child attended school in the Bronx and the father had voluntarily moved to Orange County, Family Court's award to the father of alternating weekends with the child, rather than three weekends per month, was warranted."

Custody - Modification – Mother to Father – Father More Willing to Coparent, Mother's Behavior, Short Time Since Last Order

In ***Matter of Ashley UU. V. Ned VV.***, 2025 Westlaw 626403 (3d Dept. Feb. 27, 2025), the mother appealed from a January 2023 Family Court order which, after a 5-day fact-finding hearing and a *Lincoln* hearing, among other things, granted the father's September 2021 petition to modify a June 2021 consent order (joint legal, primary to mother) by awarding him primary physical custody with 3 weekends per month plus other time to the mother. The Third Department affirmed, rejecting the mother's argument that the father did not prove changed circumstances during the approximately 3-month period between the June 2021 order and his modification petition, while noting that "Family Court aptly determined, due to animosity between the parties, their communication had broken down to such an extent that even routine matters were extremely difficult for the parties to discuss[,] *** which led to the father missing a significant amount of time with the child." The Appellate Division cited Family Court's finding of "untoward acts during exchanges of the child, one of which led to the child being exposed to physical danger." (Internal quotation marks omitted). The Third Department observed that Family's Court's 33-page decision contained "an extremely detailed factual and legal analysis of the evidence presented ***." The Court concluded that Family Court's custody award to the father considered, among other factors: "the mother *** used her role as the primary physical custodian in a rash manner to the detriment of the father's ability to participate in the child's life and in major decisions relating to it"; and "the mother's inability to discern how her behavior negatively impacts the child, which weighs in favor of the father being awarded primary physical custody."

Custody - Sole – Domestic Violence, Inability to Communicate, Needs of Child Not Put First, Pro Se Litigant Held to Same Standards of Proof

In ***M.B. v. F.B.***, 2025 Westlaw 516107 (1st Dept. Feb. 18, 2025), the husband appealed from a November 2022 Supreme Court judgment which, after a hearing, awarded the wife sole legal and physical custody of the parties' child, granted him liberal overnight visitation, and issued a 2-year stay-away order of protection in the wife's favor. The First Department affirmed, holding that "the court's evidentiary rulings did not improperly prevent the husband from putting on a case," while noting: "the courts may afford a pro se litigant some latitude, a pro se litigant 'acquires no greater right than any other litigant and is held to the same standards of proof as those who are

represented by counsel' (citation omitted)"; "[t]he courts are not obliged to indulge the excesses of a pro se litigant at the expense of decorum, judicial economy and fairness to opposing parties"; and "[p]roceeding pro se is not a license to ignore court orders … or malign officers of the court." As to the merits, the Appellate Division held that the sole custody determination was properly based upon a finding that joint custody was not appropriate, determining that: "the husband engaged in acts of domestic violence against the wife, often in the child's presence"; the parties "were unable to communicate about the child or resolve even minor disagreements without the court's intervention" and "the husband was incapable of putting the child's needs above his own."

Custody - Third Party – Grandmother – Extraordinary Circumstances – Domestic Violence

In ***Matter of Sevilla v. Torres***, 2025 Westlaw 427604 (4th Dept. Feb. 7, 2025), the mother appealed from a September 2022 Family Court order which, following a hearing upon her petition seeking modification of a prior order (joint custody, primary to maternal grandmother), found that the maternal grandmother established the existence of extraordinary circumstances (domestic violence against mother by her husband), and awarded the grandmother sole legal and physical custody of the subject child. The Fourth Department affirmed, holding that as to domestic violence, the grandmother established "that the child had been present during more than one incident between the mother and her husband, that the mother had a pattern of leaving the marital home after an incident and then returning a short time later, that the police had been called to the marital residence on multiple occasions, that the mother called the child a liar after he disclosed the extent of the abuse to the grandmother, and that he had been negatively impacted by the dynamics of the marital home." Regarding the child's best interests, the Appellate Division found that Family Court's determination "is supported by a sound and substantial basis," noting the mother: "has only sporadically visited the child"; "has not communicated with the grandmother about the child or his care, does not provide financial support for the child, and has not stayed informed about the child's health." The Court concluded that the grandmother has provided the child with a stable home and "the mother refuses to admit that she is a victim of domestic violence ***."

Custody - UCCJEA – Home State – NY Jurisdiction Declined – Temporary Absence from California, Party Mispresented Facts

In ***Matter of Maurice C.C. v. Michelle A.***, 2025 Westlaw 626391 (1st Dept. Feb. 27, 2025), the father appealed from a November 2023 Family Court order which, after a hearing, determined that NY lacked subject matter jurisdiction under the UCCJEA to determine the father's October 2022 petition, because the home state of the parties' child was California, where the child was born in June 2021. The child "lived with respondent mother in California until early June 2022, when the child arrived in New York to live with petitioner father for an agreed-upon period of one year." The Appellate Division found that "based on [the father's] misrepresentation that the mother might immediately abscond with the child, the court issued an order temporarily awarding him custody and enjoining the mother from removing the child from this State." The First Department affirmed, holding "Family Court properly determined that California was the child's home state ***" and "properly treated the child's visit to New York from October 31, 2021 to mid-January 2022 as a temporary absence from California in calculating the period in which the child lived in that state," (internal quotation marks omitted), citing DRL 75-a(7). The Appellate Division noted: the mother's testimony that "during that two-and-one-half month visit to New York, she intended to

return to California with the child, as evidenced by, among other things, her renewal of her lease in California and her maintaining the child's enrollment in daycare there"; and "the father acknowledged the visit was intended to be a temporary vacation." The Court concluded that "because the child had not lived in New York for six consecutive months before the petition was filed, and had lived in California with the mother for more than six consecutive months following her birth in that state," NY lacked subject matter jurisdiction.

Custody - Visitation – Suspended - Child's Wishes (13 y/o), Domestic Violence, Forensic Opinion, Neglect Finding

In ***Matter of K.M.P. v. A.D.***, 2025 Westlaw 516100 (1st Dept. Feb. 18, 2025), the father appealed from a March 2024 Family Court Order which, after a hearing, granted the mother's modification petition and suspended his visitation with the parties' then 13-year-old child. The First Department affirmed, finding: "from the time of the child's birth, her relationship with the father had been marked by incidents of aggression and domestic violence, which ultimately culminated in him attacking her in May 2018"; during "the pendency of the neglect case, the father refused to participate in any of the services ordered by the court and consistently denied ever hitting the child"; and after "the neglect case concluded, he made no effort to foster or maintain a relationship with the child for the next three years." The Appellate Division further observed: "The forensic evaluator also noted the father's lack of insight into the impact his actions had on the child and her ongoing fear of him *** and further concluded that, given the father's refusal to take responsibility for his behavior and his continued attempts to blame the mother and the court system for his lack of relationship with the child, resuming visitation would pose a significant risk that he would react aggressively to a stressor and would further traumatize her." The First Department concluded that Family Court "was entitled to place great weight on the child's wishes due to her age and maturity," while noting that she "had consistently expressed a strong preference not to have contact with her father."

Enforcement - Child Support – Willful Violation Found; Inability to Pay Not Established – Payor Used Monies for Sports Betting

In ***Matter of Katlyn D. v. Robert C.***, 2025 Westlaw 626425 (3d Dept. Feb. 27, 2025), the father appealed from an October 2023 Family Court order, confirming a Support Magistrate order which, after a hearing, found that he willfully failed to obey an order of child support, recommended a 30-day suspended jail sentence if the father paid $2,000, and granted the mother a money judgment. The Third Department affirmed, holding that "the father's conclusory and unsubstantiated assertions *** were insufficient" to meet his burden "to provide some credible and competent proof of inability to make the required payments." The Appellate Division noted that the father produced incomplete bank records, which "were limited to the first page of each statement submitted and showed only a few transactions, as well as the beginning and ending balance[,]" but which records "revealed several transactions related to sports betting, calling into question the veracity of the father's assertion that he lacked the funds to pay his support obligations."

Family Offense - Aggravating Circumstances; Aggravated Harassment 2d, Harassment 2d, Stalking 4th – Found; Failure to Testify – Adverse Inference

In ***Matter of Samah DD. v. Mark VV***., 2025 Westlaw 554478 (3d Dept. Feb. 20, 2025), respondent appealed from a July 2022 Family Court order which, following a fact-finding hearing at which he did not testify, found that he committed Aggravated Harassment 2d, Harassment 2d, and Stalking 4th against petitioner, with whom, from approximately September 2018 to February 2019, he was "engaged in a long-distance relationship that largely entailed communication through social media as well as three in-person meetings." Family Court found that existence of aggravating circumstances and issued a 5-year order of protection. The Third Department affirmed, finding, among other things: "respondent had secretly recorded a sexual encounter with petitioner at a hotel without her knowledge or consent and *** disseminated that recording via social media to petitioner's family and friends"; "in the immediate aftermath of the breakup, respondent called [petitioner] approximately 50 times over the next two days and threatened to raid her home, emphasizing his connection with law enforcement"; respondent "logged into her social media and posted photos without her consent, made comments on social media postings reflecting his desire for revenge on petitioner for ending their relationship and drove by her work on two occasions while recording himself making threats"; "respondent made statements on social media that reflected his awareness of the cultural implications of his postings and how they could jeopardize petitioner's safety, and those fears were borne out as petitioner received various threats from third parties as a result of the postings"; and in violation of PL 120.45(2), "it is clear that [respondent] persisted with his conduct even after he was advised by petitioner's family member to stop." The Appellate Division held that "Family Court properly drew a negative inference against respondent from his failure to testify at the fact-finding hearing" and that the finding of aggravating circumstances was supported by the evidence, noting that "respondent was seemingly undeterred by the temporary orders of protection." The Third Department noted in conclusion that "the written order of protection does not include the finding of aggravating circumstances as required by Family Ct Act §842; accordingly, we modify the order protection to reflect the findings made herein."

Family Offense - Aggravating Circumstances; Disorderly Conduct, Harassment 2d – Found

In ***Matter of Naas v. Wurth***, 234 AD3d 1289 (4th Dept. Jan. 31, 2025), respondent appealed from a March 2023 Family Court order which, after a hearing, found that he committed disorderly conduct and harassment 2d against petitioner, and upon a determination of aggravating circumstances, issued a 5-year order of protection. The Fourth Department affirmed, holding that disorderly conduct (PL 240.20[1]) was established by evidence that at a marina, "respondent ran after petitioner, *** struggled with her for control over her keys, and that, during this struggle, petitioner honked her horn and flashed her high beams," rejecting respondent's defense that the marina was private property. The Appellate Division noted that for purposes of FCA 812(1), disorderly conduct includes conduct <u>*not*</u> in a public place, while observing that "the incident attracted the attention of at least two other people present at the marina, and respondent concedes that it was 'common practice for people to sleep on their boats at the marina.'" As to harassment 2d (PL 240.26[1]), the Fourth Department held that the same was proved by evidence that "respondent repeatedly confronted petitioner at the marina, despite her refusal to engage; that he followed her to her car; and that he attempted to prevent her from leaving the parking lot by trying

to take her keys and by grabbing her arm and leg," with respondent's intent to annoy or harass petitioner being inferred from his actions when he "physically grabbed her in an attempt to prevent her from leaving ***." The Court concluded that the finding of aggravating circumstances was properly "based upon respondent's repeated violations of a prior order of protection."

Neglect - Nonrespondent Custodial Parent May Not Be Subjected to ACS and Court Supervision

In ***Matter of Sapphire W. (Kenneth L.)***, 2025 Westlaw 395816 (2d Dept. Feb. 5, 2025), in an August 2023 Article 10 proceeding filed against the father pertaining to the subject child born in 2022, the nonrespondent mother appealed from an August 2023 Family Court order, which placed her under ACS and Family Court supervision, and directed her to cooperate with ACS in certain respects. The Second Department framed the issue, one "of first impression in New York," as "whether the Family Court may place a nonrespondent custodial parent under the supervision of *** ACS and the court, and direct the parent to cooperate with ACS in various ways, in circumstances where the respondent parent resides elsewhere and the child has not been removed from the nonrespondent parent's home." The Appellate Division: (1) considered "the well-established 'interest of a parent in the companionship, care, custody, and management of his or her children'" citing Stanley v. Illinois, 405 US 645, 651 (1972); and (2) determined, that given "the lack of any statutory authority permitting the challenged directives, we answer this question in the negative." The Second Department reversed, on the law, and concluded that "Family Court improperly placed the mother under the supervision of ACS and the court, and directed her to cooperate with ACS in certain respects."

Procedure - Appeal – Family Court – Informative Article

For an informative article covering: Aho and CPLR 5501, Child's Age, Evidence, Preservation, Standard of Review, Stays of Enforcement and Vacatur, see Cynthia Feathers, "Family Court Appeal Decisions: Hidden Secrets, Rare Gems," NY Law Journal Feb 24, 2025.

Procedure - Virtual Appearance Denial Upheld

In ***Matter of Malbranche v. Mullins***, 2025 Westlaw 610606 (2d Dept. Feb. 26, 2025), the mother appealed from a January 2024 Family Court order which, upon her failure to appear at a hearing, modified a November 2012 Supreme Court order by awarding the father sole legal custody and decision-making authority with respect to the parties' child. The Second Department dismissed the appeal, except for its review of Family Court's denial of mother's attorney's request to allow the mother to attend the hearing virtually, which was the subject of contest in the trial court. The Second Department affirmed insofar as reviewed, holding "the mother's contention that the Family Court improvidently exercised its discretion in denying her attorney's application is without merit (citations omitted)."

LEGISLATIVE AND COURT RULE ITEMS

Assigned Counsel – Proposed Supreme Court Rule

22 NYCRR §202.16 **would be amended**, to add a new subdivision (p), "to create a separate

rule on eligibility for publicly funded counsel in contested matrimonial actions"; and "the new matrimonial rule largely tracks the Family Court rule [22 NYCRR §205.19], but has certain additional provisions, including but not limited to: (1) requiring the court to consider the ability of the spouse of a party to pay for counsel under Domestic Relations Law §237(a); (2) requiring *** the submission of a net worth statement and other documentation absent good cause shown; and (3) allowing the court to consider all assets, liabilities and income." (Memorandum of David Nocenti, Esq., Counsel, NYS State Unified Court System dated January 31, 2025). For the complete text and proposed new rule, see RequestForPublicComment-ContestedMatrimonialActions-013125.pdf which can be accessed at the page Rules - Requests for Public Comment | NYCOURTS.GOV **Public Comment is requested by March 28, 2025.**

Custody and Visitation – Kyra's Law

This legislation has been reintroduced February 27, 2025 (prior history, 2021-2022: A.5398, 2023-2024: A.3346), and **would amend** the DRL, the FCA and the CPLR, according to the Assembly Memorandum in Support, "[t]o protect children by ensuring courts promote the safety of children in child custody and visitation proceedings." At present, this is a one-house bill. See A.6194 by going to https://www.assembly.state.ny.us/leg/ and typing A6194 in the search box.

Name Change of Child – Jurisdiction Extended to Family Court

Civil Rights Law §60(2) has been **added, effective April 1, 2025,** to provide:

> An application may be made in family court seeking a name-change of a child under the age of eighteen as part of a pending, related proceeding. Such application may be made by any of the parties to the proceeding or by the attorney for the child. An application for a name-change made in family court shall only be granted where it is on consent of all parties.

Conforming amendments have been made to Civil Rights Law §62, Family Court Act §115(c), which lists proceedings over which Family Court has jurisdiction, and Family Court Act §439(b), to confer jurisdiction therefor upon Support Magistrates. A.10198, S.09424, signed December 13, 2024, Laws of 2024, Ch. 568.

Poverty Guidelines and Self-Support Reserve

Effective March 1, 2025 in NY (see LDSS 4515, Child Support Standards Chart), the poverty income guidelines amount for a single person as reported by the United States Department of Health and Human Services is set at $15,650. 42 USC 9902(2), 90 Federal Register 5917-01, 2025 Westlaw 224799 (Jan. 17, 2025). https://aspe.hhs.gov/topics/poverty-economic-mobility/poverty-guidelines The self-support reserve is set at 135% of the poverty income guidelines amount and is therefore $21,128 as of March 1, 2025. Family Court Act §413(1)(b)(6).

Statements of Proposed Disposition and Statements of Net Worth – Proposed Rule and Form Changes

22 NYCRR §202.16(h) **would be amended**, among other things, to: (1) permit Statements of Proposed Disposition to be filed 5 days before the pre-trial conference, rather than with the Note of Issue for plaintiff and within 20 days thereafter for defendant as presently mandated; (2) require the submission of a statement of background facts, a statement of agreed facts, a statement of resolved issues, and a statement of contested and resolved issues; and (c) require a completed equitable distribution spreadsheet. (Memorandum of David Nocenti, Esq., Counsel, NYS State Unified Court System dated January 31, 2025).

The Statement of Net Worth form required by 22 NYCRR §202.16(b) **would be amended**, "to update the language and use simpler English that will be more understandable to self-represented litigants." (Memorandum of David Nocenti, Esq., Counsel, NYS State Unified Court System dated January 31, 2025).

For the complete text and both of the above rule and form change proposals, see RequestForPublicComment-ContestedMatrimonialActions-013125.pdf which can be accessed at the page Rules - Requests for Public Comment | NYCOURTS.GOV **Public Comment is requested by March 28, 2025.**