NYSBA FAMILY LAW SECTION, Matrimonial Update, June 2019

Matrimonial Update

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Agreements - Interpretation – Arbitration

In Rosen v. Rosen, 2019 Westlaw 2030218 (2d Dept. May 8, 2019), the wife appealed from a July 2017 Supreme Court order, which granted the husband's motion to compel arbitration of her claims for child support enforcement and modification, and to stay proceedings pending such arbitration. The Second Department reversed, on the law, denied the husband's motion to compel arbitration of the enforcement claim and to stay arbitration, and remitted for a new determination of the husband's motion to compel arbitration of the modification claim and to stay proceedings thereon. The parties married in 2002 and have 2 children. A May 2014 arbitration agreement submitted certain issues to a Rabbinic Court, which rendered a decision later incorporated into the parties' stipulation and December 2014 judgment of divorce. The stipulation provided for biweekly child support of $1,003. In December 2017, the wife filed a Family Court petition seeking modification and enforcement of child support, prompting the husband's above-mentioned motion in Supreme Court. Finding that the stipulation was ambiguous as to whether the agreement to arbitrate child support modification

issues before a Rabbinic Court was subject to a two-year limit, the Appellate Division determined that Supreme Court should have held a hearing to consider extrinsic evidence on that issue. However, the Second Department found that the stipulation did not require arbitration of child support enforcement issues.

Child Support - Imputed Income, Social Security Taxes; Equitable Distribution - Business – Share of Capital Contributions

In Johnson v. Johnson, 2019 Westlaw 2127532 (3d Dept. May 16, 2019), the husband appealed from an August 2017 Supreme Court judgment which, after trial of the wife's December 2015 divorce action, awarded the wife $17,031, representing 50% of capital contributions from marital assets to 2 marital businesses and child support of $723.33 per month. The parties were married in 2003 and have one child born in 2002. The husband contended on appeal, among other things, that Supreme Court erred by imputing income for purposes of maintenance and child support, and in awarding the wife 50% of the contributions to the marital businesses. Supreme Court considered the wife's 2016 W-2 statements, which indicated that her 2016 gross income was $31,360, and the husband's 2016 tax return, which indicated that his 2016 reported gross income was $39,093. The court then imputed income to the wife based on her projected 2017 income of $57,200 and to the husband based on $60,282 he took from the marital businesses in 2016, less FICA taxes from the wife's and

husband's incomes of "7.65% and 15.3% respectively" and concluded that the wife's CSSA income was $52,824.20 and the husband's CSSA income was $51,058.85, pro rata shares of 50.85% and 49.15%, respectively. The Appellate Division held that "where as here, a party pays for personal expenses through a business account, the court has the authority to impute income" and may also do so "where there is clear and undisputed evidence of a party's actual income during the pendency of the proceeding." The Third Department noted that "the CSSA allows statutory deductions for FICA taxes 'actually paid,'" but Supreme Court reduced the husband's 2016 income by 15.3% and determined that his income was $51,058.85, despite the fact that the husband "actually paid" self-employment FICA taxes of $6,162 in 2016. The Appellate Division found that the wife's CSSA income was $52,824.40 as determined, the husband's CSSA income was $60,282, less $6,162, and that the combined parental income was $106,944, 49% attributable to the wife and 51% to the husband. The basic child support obligation (17%) is $18,180 and the husband's presumptively correct share is $9,272 per year or $773 per month. The Appellate Division found that: it was "not disputed that marital funds were used to create both businesses and that both were marital property"; "in the absence of any expert evidence, the court properly declined to value and distribute a share of the marital businesses" and there was "no

abuse of discretion in the court's award to the wife representing her contributions from marital assets to start the businesses."

Child Support – UIFSA –Modification–Choice of Law Clause Invalid

In Matter of Brooks v. Brooks, 171 AD3d 1462 (4th Dept. Apr. 26, 2019), the mother appealed from an August 2017 Family Court order denying her objections to a Support Magistrate order, which, upon her 2016 petition, modified a registered 2011 New Jersey judgment of divorce which incorporated an agreement permitting modification every two years and which stated: "notwithstanding the future residence or domicile of each party, this Agreement shall be interpreted, governed, adjudicated and enforced in New Jersey in accordance with the laws of the State of New Jersey." The mother contends on appeal that Family Court improperly denied her objections, upon the ground that the Support Magistrate erred in applying New Jersey law in calculating the father's modified child support obligation for the parties' children. The Fourth Department reversed, on the law, granted the mother's objections and remitted to Family Court. Family Court concluded that pursuant to the choice of law provisions of Family Court Act §580-604, "the law of the issuing state (in this case, New Jersey) governs the nature, extent, amount and duration of current payments under a . . . support order [that has been registered in New York]." The Appellate

Division noted that where, as here, the parents reside in this state "and the child does not reside in the issuing state, a tribunal of this state has jurisdiction to enforce and to modify the issuing state's child support order in a proceeding to register that order," citing FCA §580-613 [a] and 28 USC §1738B [e][1] and [i]. The Fourth Department, agreeing with the mother, held that "New York law must be applied to determine the father's child support obligation here inasmuch as the statute further provides that '[a] tribunal of this state exercising jurisdiction under this section shall apply . . . the procedural and substantive law of this state to the proceeding for enforcement or modification' (Family Ct Act §580-613[b])." The Court further noted that the choice of law provisions of FCA §580-604 do not control "inasmuch as that section applies to proceedings seeking to enforce prior child support orders or to calculate and collect related arrears and does not apply to proceedings, as here, seeking to modify such an order." The Fourth Department concluded: "the Support Magistrate erred in determining that the choice of law provision in the separation agreement controls over the statute. Although courts will generally enforce a choice of law clause 'so long as the chosen law bears a reasonable relationship to the parties or the transaction' (citations omitted), courts will not enforce such clauses where the chosen law violates 'some fundamental

principle of justice, some prevalent conception of good morals, [or] some deep-rooted tradition of the common weal' (citations omitted). *** Under New York law, child support obligations are required to be calculated pursuant to the Child Support Standards Act (citation omitted)" and parents are obligated until a child's age 21.

Counsel Fees - Agreement

In Wolman v. Shouela, 171 AD3d 664 (1st Dept. Apr. 30, 2019), the husband appealed from a January 2018 Supreme Court order which directed him to pay the wife's counsel fees in the sum of $325,000. The parties' agreement provides: "the Husband shall pay all of his and the Wife's reasonable counsel fees in connection with" his motion to modify visitation. The First Department affirmed, rejecting the husband's argument that he "was entitled to a hearing on the issue of reasonable counsel fees because the billing statements submitted in support of the wife's motion for counsel fees were not reasonably detailed." The Appellate Division found that Supreme Court, "being fully familiar with all of the underlying proceedings, appropriately determined that the fees sought were reasonable by reviewing the detailed billing statements and the motion papers *** [and] reflected a significant reduction to the amount originally sought by the wife." The First Department declined to consider the husband's arguments that "some billing entries were

improperly or excessively redacted and that the charges regarding photocopying were not reasonable, because those issues were not raised before the motion court." The Court refused "to consider the husband's arguments, raised for the first time on appeal, that counsel fees should not have been awarded to the wife because her motion failed to comply with 22 NYCRR 1400.2 and 1400.3 and Domestic Relations Law §237(b)."

Custody - Hague Convention – Return to Habitual Residence

In Eidem v. Eidem, NY Law Journ. May 3, 2019 (S.D.N.Y., Sullivan, J., Apr. 29, 2019, Docket No. 18-CV-6153), the father was a citizen of Norway and the mother was born in NY, holding dual citizenship in Norway and the US. The parents lived together in Norway from 2005 to 2013 and married in June 2008. There were two children, born in August 2008 and December 2010. Among other things, the older child has special medical needs and the younger child "has had difficulties with verbal skills." The mother filed for separation in June 2013 and the parties were divorced in Norway in 2014. The parties had a written agreement providing for joint custody, "permanent place of abode" with the mother, and visitation to the father every other Wednesday and Thursday, alternate weekends from Friday to Monday, and alternating holidays. In the summer of 2016, the father signed "a letter of parental consent" allowing the mother to take the children to the US for 1 year, to return before the

August 2017 start of school in Norway. The children had never traveled outside of Norway prior to the summer of 2016, except to visit Sweden. The father visited the children in NY in December 2016 and began coordinating the children's return to Norway in January 2017. The mother had decided by April 2017 that she was not returning to Norway and misled the father, by telling him that she had purchased return tickets for August 8, 2017. The father and paternal grandfather went to the airport, but the children were not on the flight; only after the plane landed did the mother admit that "she had lied about purchasing airline tickets and explained that she was going to keep the children in the United States." The mother then cut off all contact between the father and children. The father tried calling at least a dozen times, to no avail. On July 6, 2018, the father filed his petition for return of the children and the Court held a hearing on October 9, 2018. The mother brought the children to the hearing, and to prior proceedings, for no apparent reason, and the Court "expressed concern that [the mother] was using the children to bolster her arguments regarding the traumatic effect of the litigation on them." The mother testified that a babysitter had unexpectedly cancelled the morning of the hearing; the mother's counsel then sought to withdraw and the Court held a hearing on October 17, 2018, at which time the mother "admitted she had perjured herself at the

October 9 hearing." The mother's counsel was permitted to withdraw from representing her. Following post-trial submissions, the Court held a conference in November 2018, during which the mother stated that "she does not currently intend to return to Norway with the children if the Court orders their return to Norway." The Court postponed its decision, due to surgeries upon the older child in late 2018 and through March 2019. The parties made further submissions in April 2019 as to their respective abilities to access and provide medical care for the older child and his ability to travel safely to Norway, and to attend to the children's other special needs. Finding, among other things, that "the last shared intent of the parties was clearly for the children to be habitual residents of Norway," and that "[n]early all the children's extended family resides in Norway, including their maternal grandmother and paternal grandparents," and rejecting the mother's "grave risk of harm" defense, the Court ordered the children to be returned to Norway no later than June 29, 2019.

Custody - Modification – Alcohol Use; Care of Child; Domestic Violence; Joint to Sole; Social Media and Texting

In Matter of Jennifer D. v. Jeremy E., 2019 Westlaw 2031519 (3d Dept. May 9, 2019), the mother appealed from a July 2017 Supreme Court order, which, following a hearing, modified a May 2015 consent order (joint legal custody and shared placement) so

as to grant the father sole legal custody of a child born in 2009. The Third Department affirmed, noting that "it was undisputed that the mother and the father were no longer able to constructively communicate regarding the child [,]*** transportation arrangements often resulted in verbal conflict and, although both parents supported counseling for the child, they could not cooperate and each separately arranged for the child to see different providers[,]" thus supporting Supreme Court's conclusion that "joint custody was no longer feasible ***." As to modification, the Appellate Division cited "the mother's transient living situation and persisting lack of employment" in support of the award of sole custody to the father, "noting that the mother "had moved at least six times since the prior order and did not have a lease agreement for her current residence, where she and the child shared a bedroom." The Third Department further found: "The mother did not dispute having made inappropriate posts to her social-networking account regarding alcohol and drug abuse and violence toward children. She further admitted to having sent affectionate text messages to her former paramour while he served time in jail for reckless endangerment related to his 2016 attack upon her." The Court noted the father's allegations that "the mother abused alcohol and drugs and failed to properly clean and clothe the child," and that "the mother's former paramour also testified on the

father's behalf, alleging that the mother used drugs and alcohol in the presence of the child and did not care for the child." The father and his wife share a home where he has lived for 3 years, along with the child's paternal grandmother. The Appellate Division concluded that "a sound and substantial basis exists to support Supreme Court's determination that the best interests of the child are served by awarding sole custody to the father," along with visitation to the mother 3 weekends per month and in alternating weeks during the summer recess.

Custody - Modification – Dental Needs Not Addressed

In Matter of Kinne v. Byrd, 171 AD3d 1495 (4th Dept. Apr. 26, 2019), the mother appealed from a March 2018 Family Court order, which modified a prior order by awarding the father primary physical custody of the child. The Fourth Department affirmed, finding that testimony established that "the mother failed to seek any dental treatment for the child until he was four years old and suffering from a severe toothache (citations omitted). When the child was eventually examined by a dentist in August 2016, it was determined that he was at high risk for tooth decay and needed tooth extractions, crowns, and 'pulpal therapy.' The mother nonetheless failed to seek any treatment for the child's pressing dental problems during the ensuing months. By the time the father became aware of the child's significant dental needs in May 2017, the child was suffering

from a toothache that made it difficult for him to eat. We thus conclude that there was a change in circumstances based on the mother's demonstrated lack of concern for the child's dental needs and her failure to timely obtain necessary dental treatment (citation omitted)." The Appellate Division concluded that "Family Court properly determined that it is in the best interests of the child to modify the parties' existing custody arrangement by awarding the father primary physical custody of the child" and that the Court's decision was based upon a "careful weighing of [the] appropriate factors . . . , and . . . has a sound and substantial basis in the record."

Custody – Modification – Passport Authority; Visitation with Grandmother

In Cohen v. Cohen, 2019 Westlaw 2113003 (2d Dept. May 15, 2019), the father appealed from a March 24, 2014 Supreme Court order, which designated the mother as the sole custodial parent of a child born in 2001 for passport and travel purposes, and denied his motion to direct the mother to allocate 1/3 of the child's travel time to Israel to visiting with the paternal grandmother and to direct visitation between the paternal grandmother and the child when she visited the US. The parties were married in 2001 and entered into a consent custody order in December 2011. The mother alleged that the father unreasonably blocked passport issuance for the child unless the mother agreed

to have the child spend half of his time with the father's family members in Israel, while not contributing to the child's expenses. The Second Department affirmed, holding that the father "failed to make the requisite showing" to warrant modification of the prior order, while noting that the visitation schedule contained in the December 2011 consent order did not contain any provision for visitation with the paternal grandmother. The Court concluded that while the mother opposed the father's request to allocate 1/3 of the child's trip to Israel to visiting the paternal grandmother, "the record does not demonstrate that she refused meaningful contact between the paternal grandmother and the child."

Custody-Modification–Post-Petition Events; Treating Psychiatrist Testimony

In Matter of Lela B. v. Shoshanah B., 2019 Westlaw 2031412 (1st Dept. May 9, 2019), respondent appealed from a June 2018 Family Court order which, after a hearing, eliminated her Wednesday overnight visitation with the parties' child and modified the holiday and access schedule. The First Department affirmed, stating: "While the better practice would have been for the Family Court to appoint a neutral forensic given the circumstances of this case, including the different views as to the reasons for the child's psychological difficulties, it was not reversible error for the court to allow the child's treating

psychiatrist to testify and make recommendations for modification of the access schedule (citations omitted). The treating psychiatrist had the relevant credentials, met with and interviewed both parents, and performed a thorough assessment of the child." The Appellate Division rejected respondent's argument that "the treating psychiatrist's neutrality was compromised because he had been retained by petitioner," noting "sufficient evidence in the record, in addition to the treating psychiatrist's testimony, to support the court's determination that Wednesday overnights were a cause of the child's symptoms." The First Department noted that while "respondent's expert disagreed with, and criticized, the treating psychiatrist's separation anxiety diagnosis, his testimony was based solely on his review of trial transcripts, and he did not have the benefit of in-person interviews with the child or his parents." The Court found that Family Court's "determination to give greater weight to the treating psychiatrist's testimony is entitled to deference and should not be disturbed on appeal." The Appellate Division rejected respondent's argument "that the JHO erred in admitting evidence of events that postdated pleadings from 2014 and 2015," given that the hearing was held pursuant to its prior orders requiring a hearing, including a June 20, 2017 order, Matter of Lela G. v Shoshanah B., 151 AD3d 593 (1st Dept. 2017), and noting that "respondent herself relied on recent evidence

about the child in support of her arguments."

Custody - UCCJEA – Home State Jurisdiction

In Matter of Nemes v. Tutino, 2019 Westlaw 1872475 (4th Dept. Apr. 26, 2019), the father appealed from a November 2017 Family Court order, which denied his motion to vacate a February 2017 order of the same court pursuant to CPLR Rule 5015(a)(4) upon the ground of lack of subject matter jurisdiction. The parties are the parents of a child born in New Jersey on February 18, 2015 and who lived with both parents in NJ until the mother relocated to NY on July 15, 2015, according to her petition for sole custody filed January 8, 2016. The father's cross-petition, also seeking sole custody, alleged that the mother moved to NY on an unspecified date in August 2015. The parties appeared in Family Court 6 times between February and November 2016. The father did not appear on the 7th court date and Family Court dismissed his cross-petition for failure to appear and granted the mother sole legal and physical custody and visitation in NY as agreed, not to include overnight visitation. The Fourth Department reversed, on the law, granted the father's motion to vacate the February 2017 order and dismissed the petition and cross-petition. The Appellate Division stated: "Instead of claiming home state jurisdiction under Domestic Relations Law §76(1)(a), the mother essentially argues that the court had subject matter jurisdiction over this

proceeding under the safety net provision of section 76(1)(d), which confers jurisdiction to make custody determinations when, insofar as relevant here, no court of any other state would have jurisdiction under the criteria specified in [section 76(1)] (a).' We reject the mother's reliance on section 76(1)(d). Under the special UCCJEA definition of 'home state' applicable to infants under six months old (Domestic Relations Law §75-a[7]; NJ Stat Ann §2A:34-54), New Jersey was the child's 'home state' between the date of his birth (February 18, 2015) and the alleged date of his move to New York (July 15, 2015). Because the UCCJEA confers continuing jurisdiction on the state that 'was the home state of the child within six months before the commencement of the proceeding' if a parent lives in that state without the child (Domestic Relations Law §76[1][a]; NJ Stat Ann §2A:34-65[a][1]), it follows that New Jersey retained continuing jurisdiction of this matter until January 15, 2016, i.e., six months after the child's alleged move to New York on July 15, 2015 and one week after the instant proceeding was commenced on January 8, 2016 (citations omitted). Thus, New York lacked jurisdiction under section 76(1)(d) because New Jersey could have exercised jurisdiction under the criteria of section 76(1)(a) on the date of this proceeding's commencement (see NJ Stat Ann §2A:34-65[a][1] [identical New Jersey provision to Domestic Relations Law §76(1)(a)]). After all, section 76(1)(d) applies

only when no state could have exercised jurisdiction under the criteria of section 76(1)(a) at the commencement of the proceeding, and that is simply not the situation here." The Court noted further: "Although this case reflects a fact pattern of first impression in New York (see B.B. v A.B., 31 Misc3d 608, 612 [Sup Ct, Orange County 2011] [so noting]), our interpretation of the interplay between sections 76(1)(a) and 76 (1)(d) is consistent with the Washington State Court of Appeals' decision in In re McGlynn (154 Wash App 1020 [Ct App 2010]). As far as we can discern, McGlynn is the only foreign case to squarely address the precise fact pattern at bar." The Court concluded: "Finally, the mother argues that the court had subject matter jurisdiction because 'New York was the state in which the child was present at the commencement of the proceedings.' But that contention is interdicted by Domestic Relations Law §76(3), which says that the subject child's '[p]hysical presence . . . is not necessary or sufficient to make a child custody determination.' Indeed, by examining the court's jurisdiction through the lens of the child's physical presence instead of his 'home state,' the mother would have us resurrect a jurisdictional modality that has been defunct for over 40 years."

Disclosure - Denied – Agreement Not Set Aside

In Langer v. Langer, 63 Misc3d 1208(A) (Sup. Ct. Nassau

Co., Dane, J., Mar. 26, 2019), the parties were married in December 1996 and entered into a written agreement in November 2013, following the husband's commencement of a divorce action in June 2013, which agreement resolved custody of 3 children (born in 1998, 1999 and 2000) and all financial issues. Both parties were represented by "seasoned matrimonial counsel." In July 2017, the husband filed his Compliant, an RJI and request for preliminary conference. The wife, who was a stay at home mother, moved in November 2018 for an order permitting her to serve disclosure demands covering the 5 years prior to November 2013 and the time period subsequent thereto. The husband cross-moved for, among other things, summary judgment, granting him a divorce and incorporation of the agreement, counsel fees and sanctions. The agreement waived the right to disclosure, provided for approximately $3.2 million dollars in equitable distribution to the wife, $7,540 per month in child support, based upon the husband's stated income of $312,000 per year, and $12,500 per month in maintenance for 9 years. Supreme Court found that it must consider the grounds to set aside an agreement when determining the wife's requests for disclosure, and found on the facts presented that: (1) there was no duress or overreaching in the negotiation of the agreement; (2) that the husband's alleged failure to make full disclosure does not, standing alone, constitute fraud or overreaching; (3) while

there is precedent to allow disclosure of a party's financial circumstances at the time of the agreement, the wife waived the same in the agreement; (4) in the absence of a statement of net worth from the wife, the Court could not find the maintenance provisions to be unfair, unreasonable or unconscionable; and (5) given the agreement's terms for child support, maintenance and equitable distribution, the Court could not say that the same was unconscionable. As to the parties' motions, Supreme Court, among other things: (1) denied the wife's motion for disclosure, unless and until the agreement is set aside (providing a good review of the law in this area); (2) extended her time to challenge the agreement to April 29, 2019; (3) directed that she answer Plaintiff's Complaint by the same date; (4) denied the husband's request for counsel fees, upon the ground that neither party had provided a statement of net worth; and (5) denied the husband's application for sanctions.

Equitable Distribution - Conditioned Upon Get Delivery – Reversed

In Cohen v. Cohen, 2019 Westlaw 2112972 (2d Dept. May 15, 2019), the husband appealed from a second amended January 2015 Supreme Court Judgment, upon a July 2012 decision after trial and a March 2014 order, which directed him provide the wife with a Get prior to receiving any distribution of marital property. The Second Department modified, on the law, stating: "We

disagree with the Supreme Court's determination directing the defendant to provide the plaintiff with a Get. Domestic Relations Law §253 does not provide that a defendant in an action for divorce, where the marriage was solemnized by a member of the clergy or a minister, must provide the plaintiff with a Get. Since the court should not have directed the defendant to provide the plaintiff with a Get, the penalties imposed due to the defendant's failure to do so must be vacated (citations omitted).” Note that this decision may be at odds with the Court’s prior decisions in Pinto v. Pinto, 260 AD2d 622 (2d Dept. 1999) and Schwartz v. Schwartz, 235 AD2d 468 (2d Dept. 1997).

Paternity - Equitable Estoppel – Against Husband

In Matter of Onorina C.T. v. Ricardo R.E., 2019 Westlaw 1925619 (2d Dept. May 1, 2019), the child appealed from a February 2018 Family Court order which, after a hearing, dismissed the mother’s petition seeking to adjudicate Ricardo as the father of the child born in July 2012. The mother was married to Jorge at the time of the child’s conception and birth. The mother’s petition alleged that “the husband was the petitioner’s sex trafficker and that she conceived the child while he was out of the country.” The mother alleged that Ricardo, who is named on the child’s birth certificate, is the father, and that he has supported the child and raised the child

as his own since birth. Ricardo testified that he began an intimate relationship with the mother in 2011 and when she informed him in October 2011 she was pregnant, she came to live with him. Ricardo testified that he was present for the child's birth and has raised the child from birth as his son. The husband testified that he returned to the US in September 2011 and had relations with the mother until November 2011, when she told him she was pregnant with another man's child, and she left to live with Ricardo. Petitioner and Ricardo requested that the husband be estopped from asserting paternity. Family Court found that the mother failed to rebut the presumption of legitimacy and dismissed her petition, without determining the issue of equitable estoppel. The Second Department reversed, on the law, granted the mother's petition and adjudicated Ricardo to be the father of the child. The Appellate Division held: "Even if the presumption of legitimacy applies, the Family Court must proceed to an analysis of the best interests of the child before deciding whether to order a test (citation omitted)." The Second Department agreed with Family Court that the mother "failed to rebut the presumption of legitimacy by clear and convincing evidence" but concluded that Family Court "should not have refused to consider the issue of equitable estoppel raised by the petitioner and Ricardo R.E. in response to the husband's assertion of paternity." The Appellate Division noted that

whether equitable estoppel "is being used in the offensive posture to enforce rights or the defensive posture to prevent rights from being enforced, [it] is only to be used to protect the best interests of the child." The Second Department therefore determined that it is "in the child's best interests to equitably estop the husband from asserting paternity," given that, among other things, "Ricardo R. E. lived with the child since his birth, supported the child financially, was actively involved in his care, and established a loving father-son relationship with the child over the first three years of his life before the husband asserted paternity." With regard to the husband, the Appellate Division found that he "was aware that he could potentially be the child's biological father before the child's birth, was not involved in the child's prenatal care or present at his birth, and had never met or attempted to contact the child after his birth. He was employed, but never paid child support, and provided no financial support." The Court concluded: "Genetic testing is not in the child's best interests (citations omitted). To permit the husband to assume a parental role at this juncture would be unjust and inequitable."

Maintenance – Deviation from Guidelines–Income Tax Consequences

In Wisseman v. Wisseman, 63 Misc3d 819 (Sup. Ct. Dutchess Co., Rosa, J., Mar. 15, 2019), the parties were married in July 2006 and have two children ages 12 and 8. The mother has a

paralegal certificate, some work history and otherwise stayed home with the children, and a stipulated annual income of $30,000. The husband works as a highway superintendent and the parties stipulated that his annual income was $70,800. The parties agreed that the presumptive maintenance guidelines amount was $512.54 per month and that the husband would pay maintenance for 2 years, but they could not agree upon the amount the husband would pay, given the non-deductibility of maintenance. The parties further stipulated to federal tax rates of 22% for the husband and 12% for the wife. Each party argued for a reduction of maintenance by his and her respective tax rate. After a hearing, Supreme Court decided to reduce the presumptive award by 12%, to $451.04 per month, based upon "application of the guidelines as intended by the New York State Legislature prior to the federal change in the relevant tax law, impacted only by a reduction concomitant with the wife's tax bracket and what she would have been obligated to include as taxable income. Until this court is guided by a higher authority or legislative change it finds that such deviation under these circumstances is just and proper."

Procedure - Discontinuance Vacated; Sanctions

In Verdi v. Verdi, NY Law Journ. May 6, 2019 (Sup. Ct. Suffolk Co., Joseph, A.J., Apr. 29, 2019, Index No. 291-2018), the parties were married in June 2016, had no children, and

plaintiff filed a divorce action on January 19, 2018. A preliminary conference was held on October 15, 2018. A status conference was held on December 7, 2018 and the action was scheduled for trial on February 26, 2019. The preliminary conference stipulation and order stated that Plaintiff would serve a verified complaint "on or before November 1, 2018 and said date shall be the date used to determine the timeliness of a Notice of Discontinuance." Plaintiff filed a Notice of Voluntary Discontinuance on February 21, 2019, served the same by mail upon Defendant's counsel on the same date, and then also served the same Notice via fax at 4:06 p.m. on Friday, February 22, 2019, which the Court noted was "2 business days before trial." Defendant's counsel appeared on the trial date on February 26, 2019, and advised the Court that Defendant had not yet been served with a Verified Complaint, although the Court file contained a copy of Plaintiff's Complaint and an Affidavit attesting to service thereof upon Defendant's counsel on January 2, 2019. The Court then advised Defendant's counsel that under the circumstances then existing, the CPLR 3217(a)(1) discontinuance was valid. Defendant filed a motion on March 13, 2019, seeking to vacate the notice of voluntary discontinuance, which Supreme Court granted, finding that the preliminary conference stipulation and order operated as a waiver of Plaintiff's right to discontinue by notice, once 20 days passed

following November 1, 2018, and further determining that Defendant had shown that "discontinuing the action would cause economic harm to the Defendant as the 'cut off date' for equitable distribution would be extended." Supreme Court: set the action for trial on June 5, 2019; granted the Defendant an extension of time to answer the complaint (CPLR 3012[d]); and awarded Defendant $1,970 in counsel fees and expenses pursuant to 22 NYCRR 130-1.1(a), finding that "the filing of the Notice of Discontinuance by the Plaintiff was only undertaken to delay or prolong the resolution of this litigation."

Procedure - Sanctions - Motions to Dismiss DRL 170(7) Complaint

In Patouhas v. Patouhas, 2019 Westlaw 2202430 and 2202428 (2d Dept. May 22, 2019), in two separate decisions, the Second Department, on its own motion, directed the parties to show cause why sanctions and/or costs, including appellate counsel fees, should not be awarded against the defendant-appellant husband *pro se*, on his appeals from: (1) a June 2016 Supreme Court order, which denied his motion to dismiss pursuant to CPLR 3012(d) for failure to serve a complaint; and (2) a March 2017 order of the same court, which denied his motion to dismiss pursuant to CPLR 3211(a)(2) [lack of subject matter jurisdiction]. The Second Department affirmed on both appeals. The wife served a summons upon the husband on March 1, 2016 stating DRL 170(7) as the ground for divorce and he served a

notice of appearance and demand for complaint on March 10, 2016. The wife's attorney sent a letter on April 1, 2016, noting ongoing settlement discussion, and requesting disclosure. The husband moved to dismiss on April 20, 2016 and the wife served her complaint on April 26, 2016. Supreme Court, as above stated, denied the husband's motion to dismiss, noting the short delay and that the wife had a meritorious cause of action. The husband thereafter moved to dismiss for lack of subject matter jurisdiction. The Second Department held that the wife's statement under oath as to the irretrievable breakdown of the marriage "concerns the merits of the divorce action, not the court's competence to adjudicate it."

LEGISLATIVE AND COURT RULE ITEMS

Extreme Risk Orders of Protection & Firearms

New CPLR Article 63-A is added, CPL §530.14 is amended and Penal Law §265.45 is amended, **effective August 24, 2019**. Article 63-A creates a procedure for requesting and issuing temporary and final extreme risk protection orders and surrendering or removing firearms possessed by a person subject to such orders. CPL §530.14 is amended to provide that, before ordering the return of firearms to a person who had been subject to removal of firearms due to the issuance of an order of protection, a county licensing officer must provide notice and an opportunity to be heard to the District Attorney, the County Attorney, the

protected party, and every licensing officer responsible for the issuance of a firearms license to the person. PL §265.45 is amended to include a person subject to an extreme risk protection order to the enumerated persons residing with a firearm owner, which triggers the requirement that the firearm owner's rifles, shotguns and firearms be securely locked in an appropriate safe storage depository or rendered incapable of being fired by use of a gun locking device appropriate to that weapon. A.2689/S.2451, Laws of 2019, Chapter 19, signed 02/25/2019.

Revenge Porn – New Crime and Private Right of Action

Passed Assembly and Senate on February 28, 2019: If signed, Penal Law §245.15 is added, CPL §530.11 and FCA §812 are amended, and Civil Rights Law §52-b is added, effective 60 days after signing. New Penal Law §245.15 creates the new crime of "unlawful dissemination or publication of an intimate image," a class A misdemeanor. The amendments to CPL §530.11 and FCA §812 provide the family court and criminal courts with concurrent jurisdiction over proceedings that would constitute unlawful dissemination or publication of an intimate image between spouses or former spouses, parents and children or members of the same family or household, by adding the new crime to the list of family offenses. New Civil Rights Law §52-b creates a private right of action for an individual to pursue damages and

injunctive relief against someone who unlawfully disseminates or publishes an intimate image. According to the memorandum in support of the bill: "The private right of action is designed to work in conjunction with the criminal law, and does not require that a criminal conviction or charge be obtained in order to proceed. An individual can also commence a special proceeding to obtain a court order to have an intimate image permanently removed from the internet." A.5981/S.1719C.

Statement of Client's Rights and Responsibilities – No Fee

Following the February 15, 2019 enactment of the revised Statement of Client's Rights and Responsibilities set forth in 22 NYCRR §1400.2, by an order dated April 16, 2019, the Appellate Division has amended, **effective June 1, 2019**, the version of the same statement for when the representation is without fee.