NYSBA FAMILY LAW SECTION, Matrimonial Update, February 2018

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Agreements - Set Aside – Unfair & Unconscionable

In Tuzzolino v. Tuzzolino, 156 AD3d 1402 (4th Dept. Dec. 22, 2017), the husband appealed from a July 2016 Supreme Court judgment, which, in his October 2015 divorce and rescission action, incorporated the parties' October 2013 separation agreement and a July 2014 modification agreement, and denied his motion to set aside the agreements. The Fourth Department, holding that the agreements were "unconscionable and were the product of overreaching" by the wife, reversed, on the law, granted the husband's motion, and remitted for further proceedings. The parties were married in 1978. The Appellate Division found that at the time of the agreements, the wife was represented by counsel and the husband was not, "which, while not dispositive, is a significant factor for us to consider," and that the agreements "did not make a full disclosure of the finances of the parties." The Court further noted that the wife had a master's degree in business administration, was a professor at a SUNY college, and would receive two pensions, neither of which was valued. Further, there was a gross disparity between the parties' incomes and despite the length of the marriage, while the modification agreement provided for

maintenance to the husband, he was also required to transfer his interest in the residence to the wife, which resulted in the wife's assets being worth about $740,000 and the husband's property being valued at approximately $77,000.

Agreement - Upheld

In Suchow v. Suchow, 2018 Westlaw 280866 (3d Dept. Jan. 4, 2018), the husband appealed from an October 2016 Supreme Court order, which denied his motion made in his February 2015 divorce action, seeking summary judgment and incorporation of the parties' 2012 separation agreement. The Third Department reversed, on the law, granted the husband's motion and remitted to Supreme Court for entry of a judgment of divorce. The parties were married in 1982 and negotiated the agreement through counsel and a social worker, who acted as a facilitator, over a period of 11 months. The wife, who, according to the Appellate Division, received "meaningful benefits in the form of four vehicles, property in Las Vegas, and a total distributive award of $570,000, $405,000 of which was to be remitted upon signing of the agreement," challenged the agreement upon the grounds of fraud and duress, after all $570,000 were paid to her. The Court held that the wife "ratified the agreement and is estopped from challenging it."

Child Support - CSSA – Equally Shared Custody & Imputed Income; Equitable Distribution – Separate Property – Appreciation Burden

In Betts v. Betts, 156 AD3d 1355 (4th Dept. Dec. 22, 2017), the wife appealed from a February 2016 Supreme Court judgment which determined the issues of child support and equitable distribution. On appeal, the Fourth Department affirmed, holding that where neither party has custody of the children for a majority of the time, the party with the higher income, here, the wife, is deemed to be the noncustodial parent for child support purposes. The Appellate Division also upheld Supreme Court's determination to impute income to the husband in the sums of $32,000 for 2013 and $33,500 for 2014, finding the same to be based "upon his employment history and earning capacity as a truck driver." With respect to equitable distribution, the court rejected the wife's contention that she should have been granted a distributive award of more than $5,000 for her contributions to the husband's separate property (farm property and business), finding that the wife "did not meet her burden of establishing the manner in which her contributions resulted in an increase in value of the separate property or the amount of any increase that was attributable to her efforts."

Child Support - Needs-Where No Disclosure; Preclusion FCA 424-a

In Matter of Villafana v Walker, 2018 Westlaw 443985 (2d Dept. Jan. 17, 2018), the father appealed from a September 2016 Family Court order, which denied his objections to a June 2016 Support Magistrate Order, made after a hearing, and which set

his child support obligation for 2 children at $277 per week. The Second Department affirmed, noting that at the first appearance held in March 2016, the Support Magistrate directed the father to provide a financial disclosure affidavit and advised him that absent full financial disclosure, child support would be determined based upon the children's needs. The Support Magistrate issued a preclusion order in May 2016. The Appellate Division held that Family Court properly issued a preclusion order, FCA 424-a(b), and based child support on the children's needs, FCA 413(1)(k).

Custody - Modification – Joint to Sole

In Matter of Gangi v. Sanfratello, 66 NYS3d 622 (2d Dept. Jan. 10, 2018), the mother appealed from an August 2016 Family Court order, which, after a hearing, modified a June 2014 consent order providing for joint legal custody, with primary physical custody to her, so as to award the father sole legal and physical custody. The Second Department affirmed, finding: "Here, there was testimony at the hearing that the parties had failed to follow various terms of the order of custody, and had repeatedly engaged in heated verbal disputes in the presence of the child. In addition, since the time of entry of the order of custody, the child had been absent from school numerous times, his grades had dropped, and he had exhibited signs of depression. In light of this testimony, the Family Court

properly determined that joint custody was no longer appropriate because the parents were unable to sufficiently communicate and cooperate on matters concerning the child (citations omitted). In addition, contrary to the mother's contention, the court's determination that the child's interests would be best served by awarding the father sole legal and physical custody of the child has a sound and substantial basis in the record and, therefore, will not be disturbed."

Custody - Modification – Mother Arrested; Communication Breakdown

In Matter of Damiano v. Guzzi, 2018 Westlaw 280869 (3d Dept. Jan. 4, 2018), the mother appealed from an October 2016 Family Court order, which granted the father's petitions for modification of a 2014 consent order, under which she had sole legal and physical custody of their daughter born in 2013, by awarding joint legal custody with primary placement to the father. The Third Department affirmed, holding that the changed circumstances, which included "communication difficulties that the father asserted were impairing his visitation and the mother's arrest and ongoing interactions with the criminal justice system [,] *** warranted a best interests analysis." The Appellate Division noted that the father was living in an apartment attached his mother's residence (she assisted in child care) and that he "maintained the house and grounds while he

searched for stable employment." The Court found that the mother, "in contrast, was unemployed, dependent upon distant relatives for financial support and facing an uncertain legal future with the potential to impact any child in her care," and also cited Family Court's determination that the mother was "entirely incredible" when she "feigned a lack of recall as to basic details surrounding her legal difficulties."

Custody - Visitation – Modified to Therapeutic

In Matter of LaChere v. Maliszweski, 2018 Westlaw 343775 (2d Dept. Jan. 10, 2018), the father appealed from a November 2016 Family Court order, which, after a hearing upon the mother's August 2015 petition, modified an August 2012 stipulated order (which provided her with 90 minutes per week of unsupervised visitation and 10 hours per week of supervised visitation), to the extent of awarding the mother therapeutic visitation with the parties' two children, born in 2005 and 2007. In 2013, the mother was convicted of criminal contempt in the second degree and the Court issued a 5 year stay away order of protection in favor of the children, "subject to any custody or visitation order of the Supreme Court or the Family Court." The Second Department affirmed. The Appellate Division found that the mother "voluntarily entered an 11-month drug and alcohol rehabilitation program, that after she successfully completed that program she began participating in outpatient

treatment and counseling, and that she was currently residing in a ‘sober housing’ facility where she had consistently tested negative on random drug tests *** and “had readily participated in therapy.” The Court concluded that Family Court’s determination was supported by the record and that while the children’s views “should be considered, they are not controlling.”

Enforcement - Visitation – Contempt

In Matter of Peay v. Peay, 156 AD3d 1358 (4th Dept. Dec. 22, 2017), the mother appealed from an April 2016 Family Court order, which found her to be in contempt of court. The Fourth Department modified, on the law, only to the extent of adding a decretal paragraph pursuant to Judiciary Law 770, stating that the mother’s conduct “was calculated to, or actually did, defeat, impair, impede, or prejudice the rights or remedies” of the father. The Appellate Division held that the father met his burden on the contempt issue by “clear and convincing evidence,” based upon his testimony that “the mother failed to bring one or more of the children for visitation on four scheduled dates in 2015, i.e., May 16, May 27, June 10, and June 13” and that “the father did not see the children between June 6, 2015 and March 8, 2016, the date of the hearing.”

Family Offense - Aggravating Circumstances; Duration of Supreme Court Orders

In Olson v. Olson, 2018 Westlaw 542043 (1st Dept. Jan. 25, 2018), the husband appealed from an August 2016 Supreme Court order which, after a hearing, granted the wife a final 5 year order of protection upon a finding of aggravating circumstances. The First Department affirmed, holding that the IDV Part's findings that the husband committed third-degree assault and second-degree harassment, "which caused the wife physical injury on two separate occasions, were supported by the record" and "warranted the issuance of a five-year final order of protection in plaintiff's favor as reasonably necessary to provide meaningful protection to plaintiff," citing Family Court Act §§827[a][vii] and 842. The Appellate Division rejected the husband's contention that the existence of a temporary order of protection should have led the court to issue a shorter duration order, and noted further that Domestic Relations Law §§240 and 252 "do not, under these circumstances, prescribe any time limit for its duration."

Family Offense - Assault 3d; Aggravating Circumstances

In Matter of Antoinette T. v. Michael J.M., 2018 Westlaw 413521 (1st Dept. Jan. 16, 2018), the father appealed from a September 2016 Family Court order which determined, after a hearing, that he had committed attempted assault in the third degree and that there were no aggravating circumstances, and issued a 2 year order of protection. The First Department

modified, on the law and the facts, finding that respondent had committed assault in the third degree and that aggravating circumstances exist, and granted a 5 year order of protection. The Appellate Division note that the element of "physical injury" is defined as "impairment of physical condition or substantial pain" (Penal Law §10[9]) and that “substantial pain” requires "more than slight or trivial pain *** [and] need not, however, be severe or intense to be substantial." The Court found that petitioner’s testimony showed “that on February 1, 2009, respondent inflicted a physical impairment and substantial pain upon petitioner when he punched her in the head and face with a closed fist, causing bruising and pain that lasted for two days and which she testified left a permanent mark on her nose. In a separate series of incidents, on June 6, 2010, respondent punched petitioner several times in her face and once on her left shoulder resulting in intense pain to the face and left shoulder. Later, respondent pushed petitioner down five concrete stairs, causing severe pain for approximately 24 hours, and requiring an overnight hospitalization where she was prescribed pain medication.” The First Department concluded that “Family Court also improvidently exercised its discretion in declining to find aggravating circumstances based on physical injury (Family Ct Act §827[a][vii]),” which, in their view, warranted a 5 year order of protection.

Family Offense - Harassment 2d; Intimate Relationship

In Matter of Lorin F. v. Jason D., 156 AD3d 548 (1st Dept. Dec. 28, 2017), respondent appealed from a November 2016 Family Court order which, after a hearing, determined that he committed the family offense of harassment in the second degree. The First Department affirmed. While the Court noted that respondent's contention that there was no "intimate relationship," is unpreserved for appellate review, the Appellate Division found that “both parties testified that they were in a relationship on and off for at least four years, leaving no doubt that their relationship was intimate.” The First Department determined: “Although the Family Court did not specify which family offense respondent committed, the parties addressed the offense of harassment in the second degree (Penal Law §240.26[3]) in their summations, and respondent concedes that ‘it can be inferred’ from the court's findings of fact, which refer to elements of that offense, that the court found he had committed that offense.” The Appellate Division concluded that “a preponderance of the evidence supports a determination that respondent committed the family offense of harassment in the second degree,” concluding that “respondent's conduct was not an isolated incident, but a course of conduct over a period of time involving threats and demands for money, followed by postings of pictures on different sites.”

Paternity - Artificial Insemination; Equitable Estoppel; Presumption of Legitimacy

In Matter of Christopher YY v. Jessica ZZ, 2018 Westlaw 541768 (3d Dept. Jan. 25, 2018), the petitioner sperm donor appealed, by permission, from a November 2015 Family Court order which, after a hearing, denied the mother and her spouse's motion to dismiss his April 2015 paternity petition, upon the grounds of the presumption of legitimacy and equitable estoppel, and ordered genetic testing. The respondent mother and her wife were married prior to the mother giving birth to the subject child in August 2014. The child was conceived through informal artificial insemination in respondents' home using petitioner's sperm. There was a written agreement drafted by petitioner, that was signed by respondents and petitioner in the presence of his partner. There were no formalities or legal advice, and the agreement stated that petitioner "volunteered to donate his sperm so that respondents could have a child together, expressly waived any claims to paternity with regard to any child conceived from his donated sperm and further waived any right to custody or visitation, and respondents, in turn, waived any claim for child support from petitioner." Petitioner did not see the child until she was one or two months old. The Third Department reversed, on the law and the facts, holding: "As the child was born to respondents, a married couple, they have

established that the presumption of legitimacy applies, a conclusion unaffected by the gender composition of the marital couple or the use of informal artificial insemination by donor." As to the issue of equitable estoppel, the Appellate Division stated: "Having led respondents to reasonably believe that he would not assert — and had no interest in acquiring — any parental rights and was knowingly and voluntarily donating sperm to enable them to parent the child together and exclusively, representations on which respondents justifiably relied in impregnating the mother, it would represent an injustice to the child and her family to permit him to much later change his mind and assert parental rights."

Administrative Order - Hourly Rates – Judiciary Law 35 & County Law 722-c

Pursuant to Administrative Order AO/446/17, dated December 19, 2017 and **effective January 1, 2018**, the hourly rates for court appointed non lawyer professionals pursuant to Judiciary Law 35 and County Law 722-c, last adjusted in 1992, were set as follows: physicians and psychiatrists ($250), certified psychologists ($150), certified social workers ($75) and licensed investigators ($55).

Maintenance Guidelines

The income cap is adjusted to $184,000, effective January 31, 2018. OCA calculators have been revised accordingly.