NYSBA FAMILY LAW SECTION, Matrimonial Update, January 2018

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Child Support - Suspension – Denied

In Matter of Harry T. v. Lana K., 2017 Westlaw 6375542 (1st Dept. Dec. 14, 2017), the mother appealed from an April 2017 Family Court order, which denied her affirmative defense of alienation, after excluding the testimony and written report of a neutral forensic psychologist appointed during prior custody proceedings, and granted the father's support petition. On appeal, the First Department affirmed, noting that the mother "never offered it [the forensic report] into evidence at trial" and that the report was "completed more than two years before trial and prior to the parties' stipulation changing primary physical custody from respondent [mother] to petitioner," such that it would not be relevant to the child support proceeding. The Appellate Division concluded that a suspension of child support was not warranted, since the mother failed to show "deliberate frustration of and active interference with [her] visitation rights."

Counsel Fees – After Trial; Divorce – Grounds; Equitable Distribution – Debt; Maintenance – Durational

In *Johnston v. Johnston*, 2017 Westlaw 6519486 (3d Dept. Dec. 21, 2017), the wife appealed from a January 2017 Supreme

Court judgment, which, after trial, decided the issues of counsel fees, equitable distribution and maintenance. The parties were married in September 1989 and have two children, born in 1991 and 1995. The wife commenced the divorce action in April 2014 seeking a judgment of separation. The husband counterclaimed for divorce on irretrievable breakdown or abandonment, and the wife asserted a "counterclaim" for divorce on adultery or constructive abandonment. Supreme Court granted the husband a divorce on his no-fault counterclaim, awarded the wife $5,000 in counsel fees, $3,000 per month in maintenance until she begins to receive the husband's retirement benefits, the death of either party, the wife's remarriage or a subsequent modification by the court, and directed an equal sharing of the home equity loan which encumbered the marital residence, and gave the husband a credit for payments made over and above rent received. The Third Department affirmed. As to the divorce, the Appellate Division held that "having determined that the husband established irretrievable breakdown pursuant to Domestic Relations Law §170(7), Supreme Court was under no obligation to grant the wife a judgment of divorce on the ground of adultery or constructive abandonment." The Court noted that "the parties had been renting out the marital residence for $1,300 per month" and that Supreme Court "awarded the husband a credit for one half of the payments that he made during the pendency of the

action toward the portion of the mortgage that was not covered by the rental income." The Third Department rejected the wife's assertion that Supreme Court erred by concluding that the home equity loan taken on the marital residence was a marital debt and that the parties should equally share its repayment upon the sale of the residence, given "the absence of any evidence that the husband used the home equity loan to pay off his separate liabilities." With regard to maintenance, the Third Department noted that Supreme Court considered "the parties' long-term marriage, the 'comfortable lifestyle' that they enjoyed throughout the marriage, their respective property, income and potential earning capacities and its distributive award of marital property and debt." The trial evidence established that the husband had been the primary wage earner and the wife managed the home, was the primary caretaker and educator of the children, who were home schooled for a majority of their childhoods. The Appellate Division held that Supreme Court "properly imputed an annual income of $30,000 to the wife based on her age, health, attainment of an Associate's degree in theology from an unaccredited institution and her work history, which included eight years of full-time employment at the United States Post Office prior to the marriage and two years of full-time employment at the United States Consulate General in Kazakhstan during the marriage." The Appellate Division upheld

the $5,000 counsel fee award, holding that "Supreme Court appropriately considered, among other things, the $8,000 that the husband paid to the wife in interim counsel fees, the amount of temporary maintenance and child support received by the wife, and 'the tremendous expenditures made by the husband to keep the family and the marital residence afloat during the pendency of [the action].'" The Court concluded: "To the extent that the wife asserts that the proceedings were unfair because the husband allegedly spent more in legal fees, we note that the wife was free to use her temporary maintenance to supplement the interim and postjudgment counsel fee awards."

Custody - Forensic Discounted; Primary Custody Reversed

In Matter of Montoya v. Davis, 2017 Westlaw 5894114 (3d Dept. Nov. 30, 2017), the mother and the attorney for the now 11 year old child appealed from a May 2017 Family Court order which, after a hearing, modified a January 2012 default order granting custody to the mother and limiting the father to therapeutically supervised visitation. The father had 3 therapeutic visits before he filed a modification petition in October 2015. The order appealed from granted the father sole legal and primary physical custody and suspended the mother's parenting time with the child for a period of no less than six months. The Third Department modified, on the law by reversing the award of sole legal and primary physical custody to the

father, awarding the parties joint legal custody, with primary physical custody to the mother, and a detailed schedule of time to the father. The Appellate Division found: "*** although paid to conduct a neutral forensic custodial evaluation, the forensic evaluator failed to remain objective, abdicated her role as a neutral evaluator and, ultimately, became an overly zealous advocate for the father. *** [T]he forensic evaluator consistently denigrated the mother and her husband and offered broad-sweeping characterizations of the parties, which appeared to be mostly informed by the father's version of events and point of view. *** In contrast, the forensic evaluator regularly praised and defended the father, painting his failings — including his inconsistent and limited presence in the child's life over a period of at least three years — as being completely at the hands of the mother and through 'no fault' of the father." The Court further noted: "In its decision and order, Family Court recognized that the testimony given by the forensic evaluator 'demonstrated[,] at times[,] a little less than neutral tone' and that it was apparent from her testimony that she was 'challenged in her dealings' with the mother and her husband. Nevertheless, Family Court wholly adopted the forensic evaluator's factual assertions, opinions, conclusions and recommendations, without any perceivable independent consideration given to the best interests of the child. In doing

so, the court improperly delegated its fact-finding role and ultimate determination to the forensic evaluator."

Enforcement - Foreign Order – Registration Vacated – No Personal Jurisdiction

In Matter of Lorandos v. Karakatsiotis, 2017 Westlaw 6029513 (2d Dept. Dec. 6, 2017), the mother appealed from a November 2016 Family Court order, which denied her objections to an August 2016 Support Magistrate order, vacating her May 2016 registration of a 1995 default child support order issued by the First Instance Court of Athens, Greece, upon the ground of lack of personal jurisdiction. The Second Department affirmed, noting: "In order for the decree of a foreign court to be accorded recognition in this State, the court must have had in personam jurisdiction over the parties." The Appellate Division held that "Family Court properly denied the mother's objections to the Support Magistrate's order, which found that the Greek court failed to follow the requirements of the Hague Convention [on Service Abroad of Judicial and Extrajudicial Documents, 20 UST 361, TIAS No. 6638 (1969)] regarding personal jurisdiction. Hence, the foreign order was not entitled to comity by the courts of this State."

Equitable Distribution - Separate Property – Insurance Proceeds – Jewelry

In Anonymous v. Anonymous, 2017 Westlaw 6001739 (1st Dept. Dec. 5, 2017), the husband appealed from a February 2017 Supreme Court order, which granted the wife's application for a declaratory judgment that she is entitled to retain as her separate property the insurance proceeds issued to replace the loss of her separate property jewelry, and directed the husband to cooperate so that such proceeds are paid directly to the wife. The First Department affirmed, holding that Supreme Court "properly determined that the wife was entitled to the insurance proceeds paid to the parties by joint check, notwithstanding that the claim was filed under a joint insurance policy." The Appellate Division noted that the insurance monies "were indisputably to compensate her for the loss of her separate property, as defined by the parties' prenuptial agreement," which stated that "any jewelry gifted by the husband to the wife constitutes the wife's separate property and not marital property."

Family Offense - Harassment 2d – Found

In Matter of Edward R. v. Elizabeth T., 2017 Westlaw 6001678 (1st Dept. Dec. 5, 2017), respondent appealed from an April 2016 Family Court order which, following a hearing, found that she had committed harassment in the second degree against petitioner and granted a two-year order of protection in favor of petitioner. The First Department affirmed, holding: "A fair

preponderance of the evidence supports Family Court's finding that respondent committed the family offense of harassment in the second degree" as defined by Penal Law §240.26(3). The Appellate noted that "Petitioner was shocked, embarrassed and alarmed to be the subject of several emails sent by respondent, which placed his job in jeopardy and served no legitimate purpose, particularly considering that they were sent years after the parties' relationship had ended."

Family Offense - Intimate Relationship; Harassment 2d and Menacing 3d

In Matter of Kristina L. v. Elizabeth M., 2017 Westlaw 6519537 (3d Dept. Dec. 21, 2017), respondent appealed from an October 2016 Family Court order, which found that she had committed the family offenses of Harassment in the Second Degree and Menacing in the Third Degree and granted a one year order of protection in favor of petitioner. The Third Department affirmed, rejecting respondent's contention that petitioner failed to establish that the parties were in an "intimate relationship" as defined by Family Court Act 812(1)(e). The Appellate Division found: "[I]n February 2016, petitioner moved into respondent's apartment for a period of two to three months. While the parties' testimony differed as to how petitioner came to reside with respondent, both testified that they had agreed that petitioner would live with respondent rent-free in exchange

for acting as a nanny to respondent's seven-year-old daughter and helping with household chores. Specifically, petitioner was responsible for bringing the child to and from school and caring for the child overnight when respondent's job required her to travel. There was also some evidence that petitioner would cook meals and put the child to bed on nights when respondent was home. Additionally, the evidence adduced at the hearing, including text messages between the parties, demonstrated that the parties were each familiar with personal details relating to the other. Significantly, respondent testified that bringing petitioner into her home was both a business transaction and an act of friendship. Although the parties' relationship certainly encompassed a business component, the parties' preexisting friendship, together with the frequency of their interactions while living together, on both a personal level and with respect to the child, take their relationship out of the categories of 'casual acquaintance' or 'ordinary fraternization between two individuals in business' that are excluded from the statutory definition of 'intimate relationship' (citations omitted). Considering the personal and close nature of the parties' relationship over a period of roughly six months, the frequency of their contact and the fact that respondent entrusted petitioner to act as a live-in nanny to her child, the evidence supports Family Court's determination that the parties were in

an ‘intimate relationship.’” As to the evidence regarding menacing, the Third Department found the same to be sufficient, noting that Family Court found respondent was not a credible witness and reviewing the testimony that “respondent became irate that her vacuum cleaner was not working well and, in her rage, threw it down some stairs. Petitioner stated that respondent then became upset with her about the condition of the home and, during a confrontation in the kitchen, threw a coffee mug in her direction. Petitioner testified that she avoided contact with the mug, which hit a door and broke, by moving to the side and that, had she not done so, it would have hit her in the face. According to petitioner, her encounter with respondent was an ‘intimidating situation.’” With respect to harassment in the second degree, the Appellate Division cited as sufficient the evidence, that among other things, respondent sent petitioner text messages which alarmed her and which included: “You are a filthy human being and the police will punish you just like they punished your mother."

Family Offense – Violation of Temporary Order

In Matter of Lisa T. v. King E.T., 2017 Westlaw 6454309 (Dec. 19, 2017), the Court of Appeals held, with two Judges dissenting, that where Family Court finds, following a hearing, that a respondent has violated a temporary order of protection, it may issue a new and final order of protection pursuant to

Family Court Act §§846 and 846-a as a disposition of such violation, even though the underlying family offense petition is dismissed.

Pendente Lite - Temporary Maintenance Guidelines (Former); Carrying Charges; Reduced on Appeal; Remittal on CSSA

In Rouis v. Rouis, 2017 Westlaw 6519456 (3d Dept. Dec. 21, 2017), the husband appealed from an April 2016 Supreme Court order, which granted the wife's September 2015 motion for pendente lite relief. The parties were married in 1993 and have two children born in 1997 and 1999. The husband moved out of the home and the wife commenced the divorce action in August 2014. Supreme Court granted the wife temporary maintenance ($1,958 per month) and child support ($2,720 per month) and required the husband to pay the carrying costs and upkeep of the marital residence ($4,859 per month), private school for the younger child ($848 per month), health insurance for the family ($1,921 per month), interim counsel fees ($10,000) and the wife's vehicle and fuel costs ($644 per month). The appeal was argued on November 15, 2017 and the parties informed the Appellate Division that the trial commenced in October 2017, but a final decision is not expected for several months. Departing from the general rule that the best remedy for any claimed inequity in a temporary order is a speedy trial, the Third Department stated: "However, given that Supreme Court's combined monthly awards

amount to an annual award of $155,400 plus $10,000 in interim counsel fees, to be paid from the husband's annual gross income of $183,300.50 (for purposes of maintenance) as calculated by the court based upon his 2013 tax return, we agree that the temporary awards are excessive and should be modified." The Appellate Division noted that Supreme Court "essentially credited the husband for one half of the carrying costs on the home ($2,429.50 per month) by reducing the presumptive maintenance award by that amount, resulting in a temporary maintenance award of $1,958 per month. *** When the wife's vehicle expenses are added ($644 per month), this results in a total combined monthly award of $7,461, plus tuition ($848 per month) and child support, discussed below." The Court recognized that the husband correctly argued "that the statutory formula used to calculate the presumptive temporary maintenance award was intended to cover *all* of the nonmonied spouse's needs and basic living expenses, including the carrying charges on the home and her vehicle expenses (citations omitted)." The Third Department found that "the combined award for maintenance, carrying costs and the expenses of the wife's vehicle ($7,461 per month) — which is $3,073.50 per month *in excess of* the presumptive maintenance award ($4,387.50 per month) (without considering health insurance costs, child support or tuition) — is excessive. Accordingly, we deem it appropriate to reduce the

husband's obligation to pay the carrying costs on the marital home by approximately one half of that excess amount, or $1,540 per month, to $3,319 per month. The temporary maintenance award of $1,958 is not changed.” As to temporary child support, the Court held that “Supreme Court miscalculated the parties' pro rata shares of child support. *** Accordingly, the matter must be remitted for immediate recalculation of the husband's temporary child support obligation. *** Finally, we note that the excess payments made by the husband under the court's temporary order may be considered at trial ‘in appropriately adjusting the equitable distribution award’ (citation omitted).”