NYSBA FAMILY LAW SECTION, Matrimonial Update, June 2017

By Bruce J. Wagner
McNamee, Lochner, Titus & Williams, P.C., Albany

Agreements – Set Aside – Overreaching

In Flikweert v. Berger, 2017 Westlaw 1946006 (3d Dept. May 12, 2017), the husband appealed from a December 2015 Supreme Court order, which denied his motion to partially set aside the parties' September 15, 2015 separation agreement, as to equity incentive units awarded to the wife in August 2013, in a company with which she began employment in February 2012. The agreement provided that "[t]he wife expects to receive consideration" for her equity interest, and agreed to pay the husband 10% thereof and to furnish “all reasonable and necessary documents or information to value the consideration of the [o]wnership [i]nterest." However, after the agreement was signed, the wife informed the husband that she received $230,000 for her equity interest on September 1, 2015, and paid him 10% thereof. The Third Department reversed, holding that the wife “had both a statutory and contractual obligation to inform the husband that the sale had occurred before the agreement was finalized on September 15, 2015,” and noted that another provision of the agreement stated that the parties "have fully and completely disclosed their finances." The Court concluded that the September 1, 2015 sale effectively rendered the clause which

contemplated an exchange of documents for valuation purposes academic, because the value had been determined by the payment the wife received, and that “the wife's withholding of the sale information was inequitable and overreaching because it undermined the negotiations as to how this marital asset should have been distributed between the parties.” The Third Department invalidated the 10% payment provision and remitted to Supreme Court “to solely address the appropriate equitable distribution of the funds.”

Child Support - CSSA – Over $141,000; Equitable Distribution – Enhanced Earnings; Maintenance

In Ball v. Ball, 2017 Westlaw 2269407 (3d Dept. May 25, 2017), both parties appealed from an October 2015 Supreme Court judgment, which determined, among other things, child support, equitable distribution and maintenance. The parties were married in 1992 and have four children (born in 1993, 1999, 2003 and 2007) and the wife commenced the divorce action in May 2013. The parties had equally shared physical custody of the 3 youngest children and the oldest child was deemed emancipated. The combined parental income was $203,400. Supreme Court limited application of the CSSA to the then $141,000 statutory cap, and after finding the husband’s presumptive obligation to be $2,317.10 per month, reduced the same by 50%; as to income over the cap, Supreme Court deemed an award thereon to be

"unnecessary," considering these factors: (1) based on the equitable distribution award, the husband would be responsible for paying a mortgage; (2) the husband supported the oldest child; (3) the husband paid for the children's health insurance; (4) each party could claim a tax deduction; and (5) "the record reflects that both parents are . . . willing to contribute the amount of their respective child support obligations, and to maintain appropriate accommodations for their children at their respective residences." The Third Department modified, by applying the CSSA to the first $170,000 of the combined parental income, which computed to $2,835 per month payable by the husband, holding: “the cited factors are either unrelated to the statutory factors or fail to support Supreme Court's implicit determination that application of the statutory percentage or the statutory factors to the income in excess of the statutory cap was unjust or inappropriate. Further, the cited factors fail to support the court's determination to reduce the husband's support obligation by one-half prospectively. For example, while the court emphasized the husband's obligation to pay the mortgage on his home and the parties' apparent ability to maintain appropriate residences, the costs associated with providing shelter, food and clothing to children while exercising parenting time are not factors that justify a deviation.” The Appellate Division agreed that Supreme Court

properly rejected both the wife’s claim that she was entitled to a distributive share of the husband's enhanced earnings as a judge and the husband's claim that he was entitled to a distributive share of the wife's Master's degree. The Third Department noted that “the husband earned his law license prior to the marriage and worked as a lawyer from 1989, first as an associate and partner in a small firm and then as a solo practitioner. In 2007, he began working as a part-time City Court Judge until 2010, when he gave up his practice to start a 10-year term as a full-time City Court Judge.” The Court concluded that “the election to a judicial position is not like a license or degree that enables a person to engage in a certain, presumably more lucrative career (citation omitted) nor can it be characterized as ‘celebrity goodwill,’ even though the husband happened to earn more money as a full-time City Court Judge than he did while he was engaged as a solo practitioner.” With regard to the wife’s Master's degree and teaching certificate, the Third Department found: “The wife completed her degree part time over a period of years during the evening and on weekends. The wife's father paid the wife's tuition and, while the husband testified that he cared for the children in the evenings while the mother was at class, this cannot be said to be a duty he would not have otherwise performed. Under the circumstances, we are unable to conclude

that Supreme Court's determination that the husband was not entitled to a share in the value of the wife's Master's degree was an abuse of discretion." The Appellate Division agreed with the wife that Supreme Court erred by failing to equitably distribute certain credit card debt, which was in the wife's name with the husband was an authorized user, and modified to hold that each party had to pay 50%. The Appellate Division upheld the denial of spousal maintenance, "because the record reflects that the wife is an educated and capable person who is able to support herself."

Child Support – CSSA–Over $141,000 ($800,000); Counsel Fees – After Trial; Equitable Distribution – Proportions (70%/30% and 90%/10%); Separate Property Credit Denied

In Klauer v. Abeliovich, 149 AD3d 617 (1st Dept. Apr. 25, 2017), the parties were married in December 2008, had one child born in 2010 and the wife commenced the divorce action in May 2011. The wife's income was approximately $1.8 million dollars per year and the husband earned $217,826 (about 10.5% of the CSSA income). Both parties appealed from an October 2015 Supreme Court order, which confirmed a referee report in part and rejected the same in part, and which: granted the wife a separate property credit of $350,000; divided certain marital property 70% to the wife and 30% to the husband (certain artwork was divided 90%/10%), and awarded the husband $500,000 in

counsel fees. The First Department modified, on the law and the facts, to eliminate the separate property credit of $350,000, to award interest on the distributive award pursuant to CPLR 5002, remitted for a determination of equitable distribution regarding $1,350,000 in additional profit earned from a condo sold after the court's order, and with respect to child support, to remit the matter to Supreme Court regarding the husband’s obligations with respect to summer and/or any other extracurricular activities not specifically agreed to, and how such expenses are to be allocated between the parties, if at all. The Appellate Division held that Supreme Court correctly chose to set basic child support upon the parties' combined income above $141,000, specifically, on income up to $800,000, given the “very comfortable standard of living, which included residence in a luxury apartment, a garaged car at their disposal, a full-time nanny, regular use of a weekend sitter, and dinners outside the home.” On the issue of summer and/or extracurricular activities, the First Department held: “Unlike health care and child care expenses, these ‘add-on’ expenses are not separately enumerated under the CSSA and it is usually anticipated that they will be paid from the basic child support award ordered by the court.” With regard to the separate property credit, the Appellate Division held that the wife is not entitled to a separate property credit for the $350,000

downpayment or the additional sum of $932,000 the parties applied towards the purchase price of a certain coop, given that even if those monies had “once been separately titled accounts or her separate premarital assets they lost that character once she committed them to the purchase of the coop in both their names and thereafter used a significant portion of the sales proceeds to purchase another apartment in both their names.” The Court upheld the 70%/30% division of the net proceeds from the sale of a certain condo, noting that “Supreme Court considered and properly balanced the parties' respective, uneven, contributions, both economic and noneconomic, that made it possible for them to acquire the marital residence, a luxury condominium apartment.” As to certain artwork, the First Department held that a 90%/10% division in the wife’s favor “reflects the respective parties' involvement in the acquisition and disposal of artwork throughout the marriage and use of marital assets to make some of the purchases; it also takes into account plaintiff's more substantial contributions, relative to defendant's, as well as the short duration of the marriage.” With respect to counsel fees, the Appellate Division held that Supreme Court property rejected the referee’s conclusion “that neither side has demonstrated an entitlement to legal fees” and ordered the wife to pay the husband’s legal fees of $373,000 in twelve equal installments (in addition to $127,000 in temporary

fees she already paid), given that the wife earns “close to ten times the amount” than the husband and that each party has incurred approximately $1 million in legal fees. The First Department concluded that the counsel fee award “balances the inequities in their income and takes into consideration the equitable distribution that defendant will receive, as well as the relative merits of the legal arguments that were advanced during the course of the proceeding.”

Child Support - Modification; College Room & Board Credit

In Sanders v. Sanders, 2017 Westlaw 1656925 (2d Dept. May 3, 2017), the father appealed from May 2014 Supreme Court orders, which granted the father’s motion for downward modification of his child support only to the extent of reducing such obligation by college room and board payments he made for the parties’ child, and denied his motion for, among other things, a hearing on a further reduction of child support. The Second Department upheld both determinations. The parties were divorced in 1998, and their incorporated stipulation required the father to pay child support and that both parties contribute to college costs in proportion to their respective CSSA incomes. The Appellate Division held that the father did not allege any substantial and unanticipated change of circumstances, stating: “The fact that the child began college in 2012 cannot be considered an unanticipated change in circumstances (citations

omitted) and the father set forth no other basis warranting a downward modification of child support."

Custody – Joint – Educational Decisions

In Matter of Elizabeth S. v. Edgard N., 2017 Westlaw 2231090 (1st Dept. May 23, 2017), the father appealed from an October 2015 Family Court order which, after a trial, awarded the parties joint legal custody, with primary physical custody and final educational decision-making authority to the mother. The First Department affirmed, finding a sound and substantial basis in the record for primary physical custody, given that the child had been with the mother since he was 10 months old, pursuant to a voluntary arrangement under which he was thriving. With regard to educational decision-making to the mother, the Appellate Division found that a "spheres of influence" order was proper, given the parties' acrimonious relationship, noting that the mother had exhibited a "resourceful and proactive approach to the child's education" and had "demonstrated willingness to keep the father fully informed of her decision making on such issues and to solicit his input as appropriate."

Custody – Sole – to Father

In Matter of Charles I. v. Khadejah I., 2017 Westlaw 1500111 (3d Dept. Apr. 27, 2017), a February 2016 Family Court order, made after a 2 day trial and *Lincoln* hearings, awarded sole and primary physical custody of the parties' 3 children

(born in 2002, 2006 and 2011) to the father. The Third Department affirmed, stating: “In our view, both parents' testimony was frequently evasive and defensive, both parents had obvious shortcomings and neither had an ideal plan for the children. The parties' continuing inability to communicate, a fact not disputed by the mother, supported the court’s determination that joint legal custody was not feasible.”

Custody - Third Party – Standing Granted

In Matter of Greeley v. Tucker, 2017 Westlaw 1822423 (4th Dept. May 5, 2017), the father appealed from an August 2015 Family Court order which, after a hearing, granted custody of the subject children to their maternal grandmother. The Fourth Department affirmed, rejecting the father’s contention that the grandmother failed to establish the requisite extraordinary circumstances. The Appellate Division found: the hearing evidence “established that, since the father and respondent mother separated in 2007, the father never had primary physical placement of the children and did not file a petition for custody for another seven years. Twice since then, when the mother was unable to have primary physical placement of the children, the father consented to award the grandmother custody of the children. During that time, he played a minimal role in the children's lives and made no contact with them for as long as 1½ years at a time. The grandmother, by contrast, has

provided them with a stable home, where they reside with their mother, half brother, and uncle." While the Fourth Department agreed with the father that Family Court failed to make a best interests determination, upon their own examination of the record, "in the interests of judicial economy and the children's wellbeing," the Court concluded that it was in the children's best interests to award the grandmother primary physical custody. The Appellate Division noted that with the grandmother, who is employed full-time as a registered nurse, "the children have their own bedrooms, whereas the father over the years has resided with a series of paramours and has acknowledged that he does not have a plan if his current living situation changes."

Custody – Supervised Visitation; Parenting Class

In Matter of Allen v. Boswell, 149 AD3d 1528 (4th Dept. Apr. 28, 2017), the father appealed from a September 2015 Family Court order, which directed that his visitation be supervised and that he complete a parenting class as a prerequisite for future modification. The Fourth Department modified, on the law, by striking the parenting class provision to the extent of being a prerequisite for modification, and directed the father to complete the class as a ***component*** of supervised visitation. The Appellate Division noted the mother's testimony that the father physically assaulted her in the children's presence during a visitation exchange, and that persons in a nearby parking lot

had to intervene; the Court found that the father "demonstrated poor impulse control during trial." With respect to the parenting class, the Fourth Department held that "a court may include a directive to obtain counseling as a *component* of a custody or visitation order," but "does not have the authority to order such counseling as a prerequisite to custody or visitation."

Custody - Third Party – Standing

In Matter of Jennifer BB v. Megan CC, 2017 Westlaw 1713018 (3d Dept. May 4, 2017), the parents appealed from a December 2015 Family Court order which, following a hearing and a finding of extraordinary circumstances sufficient to confer standing, granted the maternal aunt's petition for custody of one of their children (born in 2012). The parents had 2 other children born in 2013 and 2014, and the mother was pregnant with their 4th child at or about the time of the commencement of the proceeding. In September 2015, the parents and the aunt had agreed that the subject child be placed with her for the ensuing school year, due to "financial and other difficulties caring for all of the children." The aunt filed a petition for custody 2 weeks after the child came to her home and received temporary custody. An FCA 1034 investigation ensued; physical abuse allegations were unfounded, but "allegations of inadequate food, clothing, shelter and guardianship were indicated against

respondents due to hygiene conditions so extremely poor that child protective authorities deemed the home to be uninhabitable by children." The mother and the two younger children temporarily relocated to the maternal grandparents' home while the house was cleaned; after an additional inspection, CPS allowed them to return 3 days later. The Third Department reversed, noting that while "lamentable conditions [were] found in the house at the time of the initial home visit by child protective workers, including garbage, feces and dirt on the floors, feces on the walls of the children's bedroom, and a flea infestation that had resulted in multiple bite marks on one of the younger children," and further opining that while "[j]oblessness and poverty undeniably lead to significant difficulties in maintaining adequate housing and hardships in raising children," those circumstances "are not any cause for subjecting children to feces-strewn homes; such conditions result solely from lack of care." The Appellate Division concluded that the aunt failed to satisfy her "heavy burden" to establish the existence of extraordinary circumstances, given the parents' remediation of the home, and their plan, as of the time of trial, to relocate with the children to another state to live with the paternal grandparents, who had a four-bedroom home and sufficient resources to enable the parents and their children to live with them.

Divorce - No-fault – DRL 230(4) Residency

In Ambrose v. Ambrose, 2017 Westlaw 2261042 (2d Dept. May 24, 2017), the wife appealed from a January 2016 Supreme Court order which denied her motion to dismiss the husband's no-fault divorce complaint for failure to state a cause of action. The Second Department affirmed, noting that although the parties were married in California, they resided together in NY at the time of the commencement of the action. The Appellate Division held, contrary to Stancil v. Stancil, 47 Misc3d 873 (Sup. Ct. N.Y. Co. 2015) that the allegations in the complaint are sufficient to satisfy the residency requirements of DRL 230(4) ["the cause occurred in the state and both parties are residents thereof at the time of the commencement of the action."]

Equitable Distribution – Property in Trust & Disclosure Thereof

In Trafelet v. Trafelet, 2017 Westlaw 1946162 (1st Dept. May 11, 2017), the husband appealed from a November 2016 Supreme Court order, which: denied his motion for partial summary judgment, seeking to dismiss the wife's claim for equitable distribution of certain irrevocable trusts; denied his request for a protective order with respect to the trusts; and granted the wife's cross motion to compel discovery. The First Department affirmed, finding that the trusts were initially funded by a transfer of 40% of the husband's marital business interests, and that there were issues of fact as to the

propriety of the initial transfer of marital property thereto. Further, the husband was allowed to substitute property for trust assets and was alleged to have regularly used the trusts' assets. The Appellate Division held that Supreme Court "did not improvidently exercise its discretion in declining to limit discovery at this point by issuing a protective order."

Family Offense - Assault 3d, Disorderly Conduct & Harassment 2d

In Matter of Jolanda K. v. Damian B., 2017 Westlaw 2173892 (1st Dept. May 18, 2017), respondent appealed from a November 2015 Family Court order, which, after a hearing, found that he committed disorderly conduct, harassment in the second degree and assault in the third degree. The First Department affirmed, finding that petitioner's testimony that while she was 9 months pregnant, respondent "grabbed her forcefully by the wrist, then grabbed her by the shoulders and shook her, causing her substantial pain, and refused to allow her to use the bathroom," to be sufficient to sustain harassment in the second degree and assault in the third degree. The Appellate Division noted that petitioner was "concerned for the safety of her unborn child, who was kicking in a way that petitioner had not previously experienced, and she was in so much pain that she went to the emergency room." The Court concluded that respondent's behavior "at the property manager's office as well as on the street outside the office" (both unspecified) constituted disorderly

conduct.

Paternity – Equitable Estoppel

In Matter of Darnel J.P. v. Lianna Y.D., 2017 Westlaw 1555492 (1st Dept. May 2, 2017), the putative father appealed from a May 2016 Family Court order, which, after a hearing, dismissed his paternity petition pertaining to a child born to a married woman, who was nearly 4 years old at the time of the filing, upon the ground of equitable estoppel. The First Department affirmed, noting that petitioner had seen the child "approximately four times before commencing the paternity proceeding, during which time he failed to communicate with the child or provide any financial support." The Appellate Division noted: "On one occasion, petitioner verbally and physically abused the child's mother in the child's presence, and the mother obtained an order of protection against him. Approximately two weeks later, curiously, petitioner filed the instant petition for paternity." The Court concluded: "The child was brought up believing that the mother's husband, whom she calls 'Daddy,' was her biological father, and identifies members of his extended family as members of her own family."

Procedure - Discontinuance and Retroactivity of Temporary Relief

In A.K. v. T.K., 2017 Westlaw 2260918 (2d Dept. May 24, 2017), the wife appealed from two May 2016 Supreme Court orders, which: (a) denied her motion to vacate the husband's notice of

discontinuance in a prior action, to compel him to accept untimely service of her summons in another prior action, and to award her temporary relief retroactive to May 8, 2015; and (b) awarded her certain temporary relief retroactive to November 16, 2015. The Second Department affirmed. The wife commenced the first action on April 10, 2015 but did not serve the husband until November 2015. The husband commenced the second action (being unaware of the first action given the lack of service) on April 13, 2015 and then discontinued the same. The husband then commenced a third action on May 4, 2015, in which the wife made a May 8, 2015 motion for temporary relief, but then discontinued the same pursuant to CPLR 3217(a) on November 2, 2015, before any relief was granted to the wife. The wife commenced a fourth action on November 5, 2015, and made the subject motion for temporary relief on November 16, 2015. The Appellate Division held that Supreme Court properly denied the wife's motion to vacate the husband's notice of discontinuance of the third action, which was his "absolute and unconditional right." The Second Department further determined that Supreme Court correctly declined to compel the husband to accept the wife's late service in the first action, given that the wife "made no effort at timely service." Finally, the Court held that the wife's May 8, 2015 motion for temporary relief in the third action was rendered a nullity when the husband discontinued the

same on November 2, 2015, thus leaving the wife’s November 16, 2015 motion as the only surviving application for temporary relief and the only date from which retroactivity of temporary awards may be measured.