NYSBA FAMILY LAW SECTION, Matrimonial Update, May 2017

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Agreements - Interpretation – Cohabitation and DRL 248

In Perez v. Perez-Brache, 148 AD3d 1647 (4th Dept. Mar. 24, 2017), the husband appealed from a January 2016 Supreme order which, following a hearing, denied his motion to terminate his maintenance obligation pursuant to the parties' incorporated agreement, upon the wife's "cohabitation with an unrelated adult male pursuant to New York State Domestic Relations Law [§]248." Supreme Court determined that the husband was required to prove that the wife was habitually living with an unrelated adult male *and* that she held herself out as his wife, and that he failed to do so. Supreme Court also concluded in the alternative that, even if the husband was not required to prove that the wife was holding herself out as the other man's wife, he nonetheless failed to establish that she was habitually living with another man. The Fourth Department affirmed, stating that it agreed that Supreme Court erred in determining that the husband was required to establish that the wife held herself out as another man's wife. The Appellate Division held that "the fact that the agreement refers only to the cohabitation prong of Domestic Relations Law §248 compels us to conclude that the parties did not intend to include the second prong of plaintiff holding

herself out as another man's wife," and concluded that the husband failed to establish by a preponderance of the evidence that the wife was habitually living with her fiancé, given the testimony that although he occasionally stayed overnight at her residence, he maintained his own separate residence in Canada, where he received his mail and kept his personal belongings. He did not own any real property with the wife and did not financially contribute to the payment of any of her expenses.

Agreements - Interpretation – Postnuptial – Overreaching; Temporary Relief

In Davis v. Davis, 2017 Westlaw 1322225 (1st Dept. Apr. 11, 2017), the husband appealed from an October 2015 Supreme Court order, which determined that the wife did not waive her right to pendente lite relief, and from an August 2016 order which granted her motion seeking financial discovery and a hearing to determine whether the parties' postnuptial agreements are valid and enforceable, and denied the husband's cross motion for summary judgment. On appeal, the First Department affirmed, noting that the wife's waiver does not clearly reflect the parties' intent that she waive any temporary relief. As to the wife's motion and the husband's cross motion, the Appellate Division found that the wife, "a person of limited education, did not have independent legal counsel for the 2001 agreement, which was drafted by the husband's real estate lawyer, whom the

parties jointly retained" and that she was "represented" in the 2005 agreement by the husband's friend and "drinking buddy," who had little to no matrimonial experience. The Court found that "the wife's counsel was in direct contact with the husband, a lawyer and successful businessman, and was influenced by the husband's impatience to move the 2005 agreement forward." The wife also alleged that she was the victim of emotional and physical abuse throughout the marriage, and developed an addiction to alcohol. The First Department concluded that "the wife's allegations raise an issue of fact as to whether the agreements were the product of the husband's overreaching," given that the wife, "who never worked during the parties' marriage and had a net worth of approximately $75,000 in 2005, waived substantial rights, including the right to maintenance and equitable distribution of approximately $24,000,000 in assets.

Agreement - Interpretation – Prenuptial – Title to Artwork

In Anonymous v. Anonymous, 2017 Westlaw 1234201 (1st Dept. Apr. 4, 2017), following a divorce granted in March 2014, the wife appealed from an October 2015 Supreme Court order, which interpreted the parties' prenuptial agreement by declaring that art purchased in either party's sole name was that party's separate property. The parties signed a prenuptial agreement on April 21, 1992 and were married on May 5, 1992. The husband

commenced the matrimonial action on May 6, 2014, claiming separate ownership of tens of millions of dollars' worth of art. The wife claimed the art was jointly owned. The Appellate Division found that the prenuptial agreement “does not specifically address how the parties should divide their art collection upon dissolution of the marriage” and “provides that any property owned on the date of execution of the prenuptial agreement, April 21, 1992, or ‘hereafter . . . acquired’ by one party remains that party's separate property.” The prenuptial agreement further provides that “any property acquired after the date of the marriage that is jointly held in the names of both parties shall *** be divided equally between the parties.” Another clause stated: "No property hereafter acquired by the parties or by either of them . . . shall constitute marital property . . . unless (a) pursuant to a subscribed and acknowledged written agreement, the parties expressly designate said property as marital property . . . or (b) title to said property is jointly held in the names of both parties." The First Department found that Supreme Court erred by relying upon invoices “as proof of whether the art was jointly or individually held” and determined that “invoices, standing alone, may not be regarded as evidence of title or ownership of the art.” The Appellate Division concluded that “title to personalty cannot be determined by relying solely upon an

invoice” and “all the facts and circumstances of the acquisition and indicia of ownership must also be considered.” The First Department reversed, on the law, and remanded for further proceedings, including discovery and an evidentiary hearing to determine the ownership of the disputed art.

Agreements - Interpretation – Room and Board Credit

In Keller-Goldman v. Goldman, 2017 Westlaw 1272107 (1st Dept. Apr. 6, 2017), the father appealed from an October 2015 Supreme Court judgment, which adhered to its interpretation in an August 2015 order that there was a cap on the "room and board" credit provision of the parties' agreement. The First Department affirmed (3-2). The parties had four unemancipated children, three of whom were in the mother’s custody and the remaining child was in the father’s custody, for whom he waived child support. Application of the CSSA would have provided $5,000 per month in child support to the mother, and the parties deviated downward to $2,500 per month. The agreement reduced child support to $2,150 per month upon the emancipation of the first child and to $1,462 per month upon the emancipation of the second child. The agreement further provided a credit to the father against child support for room and board he pays for any of the children’s higher education. After the agreement was executed and before the divorce, the father began taking such a credit of $1,200 per month against his $2,500 monthly child

support obligation, and the wife moved for an order "capping" the credit at the amount of the emancipation reduction. Supreme Court granted the motion, noting that the father's interpretation could conceivably wipe out child support for the remaining child or children, under circumstances where the parties had already agreed that the father's presumptive CSSA child support obligation was reduced by half. The Appellate Division concluded: "We recognize that Domestic Relations Law section 240(1-b)(h) permits parties to deviate by agreement from the basic child support obligation. However, that section also provides that the court shall retain discretion with respect to child support. That discretion unquestionably extends to invalidating those provisions in agreements that violate public policy, as the court did here."

Attorney & Client - Contingent Fee Prohibited

In Medina v. Kraslow, 2017 Westlaw 1394154 (2d Dept. Apr. 19, 2017), the client brought an action for unjust enrichment against her attorney, and appealed from a March 2016 Supreme Court order, which denied her motion for summary judgment on the issues of liability and damages and to dismiss the attorney's counterclaims. The Second Department modified, on the law, by granting the client summary judgment on the issue of liability and dismissing the attorney's counterclaims. The client retained the attorney for post-judgment enforcement of a money judgment

for equitable distribution, and agreed to a minimum fee of $10,000 and a 25% contingency fee for all amounts recovered. The attorney negotiated a recovery, and retained $163,750, which was 25% of all of the funds recovered excluding $25,000. The Appellate Division held that the contingency fee violated Rule 1.5(d)(5)(ii), and noted that the retainer agreement also failed to provide how the attorney would be compensated in the event of a discharge, and that the client did not receive bills every 60 days. The Court concluded that summary judgment was properly denied on the issue of damages because the attorney was entitled to recover fees under a quantum meruit theory.

Child Support – CSSA – Modification – 2010 Amendments (15%)

In *Matter of Harrison v. Harrison*, 148 AD3d 1630 (4th Dept. Mar. 24, 2017), the mother appealed from an August 2015 Family Court order, which denied her objection to a Support Magistrate order, dismissing her petition to modify the judgment which incorporated the parties' 2013 oral stipulation, upon a 15% change in the father's income. On appeal, the Fourth Department reversed, on the law, reinstated her petition and remitted to Family Court. The Support Magistrate dismissed the petition on the ground that the mother failed to establish a substantial change in circumstances. Family Court denied the mother's objection, stating that, although "a petition for modification of child support may be brought based on an increase in a

party's income of 15% or more, there [must be] a showing of a **substantial** change of circumstances in order to be successful." The Appellate Division noted that FCA 451 allows a court to modify an order of child support, without requiring a party to allege or demonstrate a substantial change in circumstances. The Fourth Department concluded that the Support Magistrate "failed to make several necessary findings of fact, including the amount of the father's income at the time of the stipulation in 2013, whether that income included monies the father earned from playing music, and whether the mother established that the father's income had increased by the requisite 15% at the time of the filing of the petition."

Child Support - CSSA – Over $143,000 – Special Needs

In Matter of Garduno v. Valdez, 2017 Westlaw 1378199 (1st Dept. Apr. 18, 2017), the mother appealed from an October 2016 Family Court order, which granted the father's objections to a modification of an earlier support order pertaining to the parties' child. On appeal, the First Department reversed, on the law and the facts, and reinstated the Support Magistrate order, which applied the CSSA to income in excess of the $143,000 cap, for reasons which included the child's special needs.

Child Support - Imputed Income; Maintenance - Durational

In Kumar v. Chander, 2017 Westlaw 1240080 (2d Dept. Apr. 4, 2017), the husband appealed from a March 2014 Supreme Court

judgment which, upon a September 2013 decision after trial, awarded the wife maintenance of $450 per week for five years and directed him to pay child support of $914 per month for one child. The Second Department modified, on the law, by deleting the child support provision and remitting for a recalculation, continuing the child support order in the interim. The parties were married in March 1999, have one child and the wife commenced the divorce action in 2007. The Appellate Division held that Supreme Court properly imputed income to the husband of $70,566 for the purpose of maintenance, "considered the relevant statutory factors, including the parties' predivorce standard of living, and providently exercised its discretion in awarding the defendant maintenance in the sum of $450 per week for a period of five years." The First Department found that Supreme Court erred by imputing, without explanation, $10,000 more in income to the husband than the income imputed to him for maintenance purposes, by failing to reduce the husband's income by maintenance before calculating his child support obligation, and by failing to provide a method to adjust child support payments when maintenance ended.

Child Support - Modification – CSSA Deviation Reversed

In Matter of Hall v. Pancho, 2017 Westlaw 1239900 (2d Dept. Apr. 5, 2017), the mother appealed from a July 2015 Family Court order, denying her objections to a June 2015 Support Magistrate

order made after a hearing, which increased the father's child support obligation from $260 biweekly to only $425 biweekly for the parties' 11 year old child. The Second Department modified, on the law and the facts, by granting the mother's objection to the extent of awarding child support in the sum of $839.76 biweekly. The father's CSSA income was $128,688.32 and the combined parental income was $175,937.99, which would have yielded a CSSA obligation of $839.76 bi-weekly, which the Support Magistrate adjusted downward to $425 biweekly. The Appellate Division noted that a court may consider "[t]he needs of the children of the non-custodial parent for whom the non-custodial parent is providing support who are not subject to the instant action (Family Ct Act §413[1][f][8]) in determining whether the basic child support obligation is unjust or inappropriate, but the statute mandates that this factor may only be considered where the resources available to support such children are less than the resources available to support the children who are subject to the instant action (Family Ct Act §413[1][f][8]). Furthermore, the court must also consider the financial resources of any person obligated to support such children (Family Ct Act §413[1][f][8])." The Second Department found that the Support Magistrate "failed to consider the financial resources of the father's wife in concluding that a deviation from the CSSA presumptive amount of child support was

warranted based on the needs of the father's other two children." The Appellate Division determined that the Support Magistrate "improperly credited the father's disingenuous account of his economic situation and expenses, as the father's evidence as to both his income and his expenses was inconsistent, contradictory, and not supported by the record."

Child Support - Modification – 2010 Amendments – 15% Decrease – Loss of Employment

In Matter of Conde v. Gouin, 2017 Westlaw 1335543 (2d Dept. Apr. 12, 2017), the father appealed from a June 2016 Family Court order, denying his objections to a March 2016 Support Magistrate order which, after a hearing, denied his petition for downward modification of child support, upon the ground that his income had declined by more than 15% since the last order. The Second Department affirmed, holding that "the record supports the Support Magistrate's determination that the father did not testify credibly regarding the reasons and circumstances surrounding his departure from his former employment" and he "failed to present sufficient evidence that he diligently sought re-employment commensurate with his earning capacity," as required by Family Ct Act §451[3][b][ii].

Counsel Fees – After Trial–Assets, Maintenance & Prior Payments

In Shine v. Shine, 148 AD3d 1665 (4th Dept. Mar. 24, 2017), both parties appealed from a December 2015 Supreme Court

judgment, which denied counsel and expert fees to the wife and awarded her maintenance. On appeal, the Fourth Department affirmed, holding that as to maintenance (amount and duration unspecified), Supreme Court “properly considered plaintiff's reasonable needs and predivorce standard of living in the context of the other enumerated statutory factors set forth in the statute.” The Appellate Division concluded that based upon the wife’s “substantial assets[,] the significant award of maintenance," and the significant amounts of money previously paid by the husband for the wife's attorneys and experts, Supreme Court “properly ordered plaintiff to pay her own costs and fees.”

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

In Marin v. Marin, 148 AD3d 1132 (2d Dept. Mar. 29, 2017), the wife appealed from a December 2013 Supreme Court judgment, which, upon a June 2013 decision after trial, directed the husband to pay the wife maintenance of $3,500 per month for 24 months following the sale of the marital residence, apportioned debt, and declined to award her counsel fees. The Second Department modified the judgment, on the facts and in the exercise of discretion, by increasing the maintenance award to $5,000 per month until the emancipation of the parties' second child, at which time the award shall be $7,000 per month, to

terminate 7 years following the closing on the marital residence, and by awarding the wife counsel fees of $118,000, and otherwise affirmed. The parties were married in July 1989, and have 2 children born in 1992 and 1996, for whom the wife has been the primary caregiver. The husband has his own medical practice and Supreme Court imputed income to him of $350,000. The Appellate Division held that “Supreme Court providently exercised its discretion in imputing income of only $350,000 to the defendant.” The husband’s adjusted gross income, as reported on his 2007-2011 tax returns, was $338,639, $266,594, $319,332, $243,560, and $123,074, respectively, and Supreme Court imputed income to him based upon “substantial amounts of cash generated by his medical practice over the years.” With regard to debt, the Second Department found that the loans at issue “were used to benefit the defendant's medical practice” and “it cannot be said that this debt was incurred for the defendant's sole benefit,” such that the equal apportionment thereof was “not an improvident exercise of discretion.” As to maintenance, the Appellate Division increased the award considering “the almost 20-year length of marriage, the parties' ages and lifestyle during the marriage, that the plaintiff was the primary homemaker and caregiver for the parties' children during their marriage, the plaintiff's limited employment history and level of education, and the parties' financial circumstances.” With

respect to counsel fees, based upon “the overall financial circumstances of the parties and the circumstances of the case as a whole,” the Second Department’s award of $118,000 was approximately half the balance of the wife’s outstanding counsel fees.

Custody - Evaluator Opinion; Primary Caretaker

In Matter of Gregory D. v. Athena Q., 2017 Westlaw 1378415 (1st Dept. Apr. 18, 2017), the mother appealed from a February 2016 Family Court order which, after a hearing, modified a prior order by awarding sole custody of the parties’ 3 children to him. The First Department reversed, on the law and the facts, and awarded sole custody to the mother, holding that Family Court’s decision “lacked a sound and substantial basis in the record (citation omitted) since the mother has been the children's primary caretaker and, sole source of financial support, for the majority of the children's lives,” and given that from 2011 to 2013, the father “scarcely visited or spoke with the children, while the mother had enrolled them in a charter school and extracurricular activities, including dance and karate, and the children were thriving in her care.” While the mother had in the past engaged in “poor judgment and misconduct which led to a neglect finding against her in 2013 after being the victim of domestic violence,” she “complied with all of the court's directives in an effort to regain custody of

the children" and "continues to take them to their medical appointments and pay for their dental and eye care." The Appellate Division noted "the children's clear preference to reside with the mother" and that Family Court "dismissed the observations and conclusions of the neutral, court-appointed evaluator, ***, but credited the testimony of the two experts who had never met the mother or evaluated her parenting ability."

Custody – Modification-School Change; In Camera

In Matter of Sloma v. Sloma, 148 AD3d 1679 (4th Dept. Mar. 24, 2017), the father appealed from a February 2014 Family Court order, which modified a prior order by granting the mother primary physical custody of their child. On appeal, the Fourth Department affirmed. The parties' incorporated agreement provided for joint custody with primary physical custody to the mother, and the parties would enroll the child "in the Whitesboro School District at Deerfield Elementary if possible." The mother relocated and moved the child into a school in a different school district a year later, and the father was granted primary physical custody after a trial based primarily on the change in the child's school. The father re-enrolled the child at Deerfield, but six months later, he enrolled the child in a different school in the same school district. The Appellate found that "the change in school, together with testimony from

the mother concerning the father's interference with her custodial rights, was sufficient to establish a change in circumstances." The Fourth Department held that the custody award to the mother was in the child's best interests, in that "the evidence established that the father failed to nurture or facilitate a relationship between the mother and the child" and "the father made decisions regarding the child that were beneficial to his new family, such as changing her school, pediatrician, and dentist, but the decisions were not always beneficial to the child." The Appellate Division concluded that Family Court "properly exercised its discretion in declining to conduct a *Lincoln* hearing," given that "the conduct of the father's wife prevented the scheduled *Lincoln* hearing from occurring" and "the testimony that [the child] was being coached on what to say to the court, an in camera hearing with the child would not be helpful in determining the child's preferences."

Custody – Third Party – Grandparent

In Matter of Margot M. v. Chante T., 148 AD3d 647 (1st Dept. Mar. 30, 2017), the grandmother appealed from a March 2016 Family Court order which, after a hearing, dismissed her petition for lack of standing. On appeal, the First Department affirmed, holding that Family Court properly found that "conditions did not exist to warrant an equitable intervention granting the grandmother standing to seek visitation (Domestic

Relations Law §72[1]).” The Appellate Division noted that “the grandmother made a false ACS report against respondent father in retaliation for his eviction of respondent mother and that the grandmother was aggressive and angry” and “admitted that she had not seen the child since March 2013, and that the child did not recognize her at that time.” The First Department concluded that “the parents had valid objections to the grandmother visiting the child.”

Custody - Third Party – Standing Denied

In K. v. C., 2017 Westlaw 1356080 (Sup. Ct. NY Co. Apr. 11, 2017, Nervo, J.), K and C entered into a cohabitation agreement in 2007 and signed a written separation agreement in May 2010. During their relationship, they planned to adopt and raise a child together. C learned in March 2011 that the child A was available for adoption in Ethiopa, and she completed the adoption on her own in August 2011. K contended that the joint plan to adopt continued unabated after the parties’ separation and that she developed and maintained a significant connection to A. C argued that K was no more than a godmother or dear friend and not a defacto parent. Supreme Court concluded, after a hearing held over 36 days, that K “has on numerous occasions stated that she did not want to be a parent and gave no indication to either respondent or third parties that she either wanted this role or acted as a parent. Therefore, she has failed

to establish by clear and convincing evidence that she has standing as a parent under Domestic Relations Law Section 70, as established *In the Matter of Brooke S.B. v Elizabeth A.C.C.”*

Custody - Third Party – Visitation – Child’s Wishes

In Matter of Rohr v. Young, 148 AD3d 1681 (4th Dept. Mar. 24, 2017), the grandmother appealed from a March 2016 Family Court order, which decreased her visitation with the two teenaged children from one hour biweekly supervised therapeutic visitation, to one supervised Saturday two hour visit per month in a public place. The Fourth Department affirmed, noting that “the 15-year-old child testified that she did not wish to visit with her grandmother,” and although “not dispositive, the express wishes of older and more mature children can support the finding of a change in circumstances.” The Appellate Division concluded that the “modified schedule has no meaningful adverse impact on the [grandmother's] interests.”

Disclosure – Preclusion Denied; Equitable Distribution – Separate Property Appreciation; Imputed Income

In Seale v. Seale, 2017 Westlaw 1261620 (3d Dept. Apr. 6, 2017), the parties married in April 2002, had 2 children born in 2003 and 2007, and separated in January 2010. The wife commenced the divorce action in May 2010, and the parties resolved custody by stipulation in November 2011. The matter proceeded to trial over 30 days, and Supreme Court entered an uncontested judgment

of divorce in favor of the wife pursuant to DRL 170(1), determined equitable distribution, child support and maintenance. The wife appealed, contending that Supreme Court erred by: denying her multiple motions for preclusion, made both pre-trial and during the trial; finding that certain assets were separate property with no appreciation to which she was entitled; imputing too much annual income to her ($50,000) and too little income ($173,000) to the husband. The Third Department affirmed the judgment in all respects, except for modifying on the law and the facts, by reversing the finding that two of the husband's life insurance policies worth $57,684 were his separate property, deeming them to be marital property and awarded the entirety thereof to the wife, resulting in an overall 55%/45% distribution in the husband's favor. With regard to the preclusion issues, the Appellate Division noted that the husband: "had provided more than 30,000 documents in response to the wife's demands for financial and business records and testified for more than 20 hours during depositions"; "met with the wife's real estate appraisers to allow them to view properties at issue and met with the wife's computer expert when he examined the husband's computers"; and "averred that he did not have the requested documents or that such documents never existed." The Third Department was "unable to conclude, upon this record, that Supreme Court abused its considerable

discretion in accepting the husband's representations and finding that he had meaningfully attempted to comply with the wife's discovery demands, and that, as a result, the wife's requested sanctions were unwarranted." As to the separate property issues, the Third Department held that Supreme Court properly found that the assets in question, consisting of 4 car washes, did not appreciate during the marriage, and, further, even assuming that Supreme Court erred in determining that a resort and a shopping plaza did not appreciate during the marriage, the wife did not sustain her burden of showing that the same appreciated due to active management, as opposed to market forces. The Appellate Division noted that the wife's expert "specifically acknowledged that the wife asked her to form an opinion regarding the degree to which any appreciation in the properties at issue was the result of active management as opposed to passive market forces" and "conceded that she was unable to form such an opinion, *** partially because the properties included both actively run businesses and real estate, she was unable to form an opinion regarding the degree to which any appreciation of said properties during the marriage was due to active management as opposed to market forces." Rejecting the wife's claims on the issues of imputed income, the Third Department noted that Supreme Court discredited the testimony of both parties' expert witnesses, and relying upon

2002 to 2011 tax returns, the parties' net worth statements and the husband's credit applications and testimony, properly imputed income of $173,000 per year to the husband. The Appellate Division found the wife had a Master's degree in reading and had taught at various times prior to and during the marriage and earned between $45,000 and $50,000 in year 2000. The wife was a substitute teacher at the time of trial. Supreme Court rejected the testimony that the wife "would be unable to become employed again as a teacher," and imputed $50,000 in annual income to her, which finding the Third Department upheld.

Equitable Distribution - Pension – Proportions (99%/1%)

In Campbell v. Campbell, 2017 Westlaw 1377813 (1st Dept. Apr. 18, 2017), the husband appealed from a November 2015 Supreme Court order which, among other things, awarded him 50% of the wife's pension only between the date of marriage in August 1973 and the parties' separation in January 1978. On appeal, the First Department modified, on the law and the facts, to award the husband 1% of the marital portion of the pension (date of marriage to the May 17, 2013 date of commencement of the action). The Appellate Division noted the wife's credible testimony that she and the parties' son received no economic or non-economic support from the husband, and found that the pension "was due almost entirely to [the wife's] efforts." The wife retired in 2011 with 38 years of service at a hospital, and

collected a monthly pension of $4,242 per month, plus Social Security, and had no other income.

Paternity - DNA Test – Equitable Estoppel

In Matter of Aranessa L. v. Isaac C., 148 AD3d 609 (1st Dept. Mar. 28, 2017), respondent appealed from a March 2016 Family Court order which, after a hearing, declared him to be the father of the subject child. The First Department affirmed, holding that Family Court properly determined that he was "equitably estopped from obtaining DNA testing and denying paternity," given that the record "established that he assumed the role of a parent, albeit in a somewhat limited way, and led the child to believe that he was her father for the next 15 years of her life."

Paternity - DNA Test – Putative Father Estopped

In Matter of Carlos O. v. Maria G., 2017 Westlaw 1394091 (2d Dept. Apr. 17, 2017), the putative father appealed from a March 2016 Family Court order which, after a hearing, denied his April 2015 petition seeking DNA testing, in order to declare him the father of the then 8 year old subject child. On appeal, the Second Department affirmed, noting that while the mother acknowledged that petitioner was the child's biological father, her husband's name was on the child's birth certificate, and her husband had raised the child as his son for the entirety of the child's life, along with the parties' other children. The

Appellate Division held that Family Court acted within the best interests of the child, given that petitioner “provided limited financial support for the child and had seen the child only approximately 20 times over the course of the child's life.”