NYSBA FAMILY LAW SECTION, Matrimonial Update, November 2017

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Adoption - Vacated – Non Biological Parental Standing Found

In Matter of Maria-Irene D. 153 AD3d 1203 (1st Dept. Sept. 28, 2017), the adoptive father appealed from a March 2017 Family Court order, which, upon granting reargument, adhered to its December 2016 order, which had granted the motion by the spouse of the genetic father to vacate his adoption of the subject child. On appeal, the First Department affirmed. Genetic father Marco D., and Ming, both British citizens, entered into a civil union in the United Kingdom (UK) in 2008, which they converted into a legal marriage in 2015, effective as of the date of their civil union. In 2013, they executed an egg donor and surrogacy agreement with the intention of becoming parents. The embryo fertilized by Marco was transferred to the surrogate and their daughter was born in September 2014. An October 2014 Missouri order awarded Marco, as the genetic father, "sole and exclusive custody" of the child. Marco, Ming, and the child returned to Florida, where they lived as a family until October 2015, when Ming returned to the UK to seek employment. Around 2013, Marco entered a relationship with adoptive father Carlos A., and they moved to New York with the child after Ming went to the UK. In

January 2016, Carlos commenced the subject adoption proceeding, alleging that Marco and Ming had not lived together continuously since 2012 and that Carlos and Marco had been caring for the child since her birth. Ming's role in the surrogacy process was not disclosed to Family Court, nor was any mention thereafter made of Ming's March 2016 Florida divorce action, in which he sought joint custody of the child. Family Court granted Carlos' adoption petition in May 2016. Ming moved to vacate the adoption, upon the ground that he was entitled to notice thereof and relevant facts had not been disclosed to Family Court. In affirming, the Appellate Division noted that the child was born "as the result of jointly executed surrogacy agreements, at a time when the couple was considered legally married, thus giving rise to the presumption that the child is the legitimate child of both Marco and Ming." The First Department found that "Marco, Ming and the child lived together as a family, and the couple took affirmative steps in the UK to establish Ming's parental rights in accordance with UK law." Given that the child "was born in wedlock, *** Ming was entitled to notice of the adoption proceeding" under DRL §111[1][b]. The Court concluded: "Under the Court of Appeals' most recent decision concerning parental standing (Matter of Brooke S.B. v Elizabeth A.C.C., 28 NY3d 1 [2016]), Ming's claim to have standing as a parent is even stronger."

Agreement - Enforcement – Enhanced Earnings

In Anderson v. Anderson, 153 AD3d 1627 (4th Dept. Sept. 29, 2017), the former husband appealed from a June 2016 Supreme Court order, which denied his motion, made 9 years following the divorce, for a share of the value of the former wife's degree earned during the marriage. The Fourth Department reversed on the law, and remitted to Supreme Court for a hearing to determine the value of the degree and the former husband's interest therein. The parties' incorporated stipulation entitled the former husband to an interest in the former wife's master's degree, but there was no valuation of the degree or percentage assigned to the former husband. The former husband's motion included a valuation of $223,116, while the wife's expert countered with a value of $18,529. Supreme Court denied the motion on the ground that there was "no enforceable stipulation" with respect to the degree. In reversing, the Appellate Division held that the former wife "effectively conceded that the stipulation was enforceable when she asserted that the only questions before the court were the valuation of her master's degree and the extent of plaintiff's marital interest therein. Thus, we conclude that the court erred in denying plaintiff's motion on the ground that the stipulation was unenforceable."

Child Support - CSSA – Imputed Income – Rental, Subchapter S, Unpaid Parent Loan

In Matter of Worfel v. Worfel, 2017 Westlaw 4679943 (3d Dept. Oct. 19, 2017), the father appealed from a February 2016 Family Court order, which upheld the Support Magistrate's determination to impute income to him from: his rental properties, his shares in a family Subchapter S corporation, and an unpaid debt owed to his parents. The Third Department affirmed, rejecting the father's argument "that fire damage to one of his rental properties resulted in the rentals operating at a loss in 2013," given that he admitted that he had "consistently earned some money," the fire damage had been repaired, and the father offered no evidence "indicating that the rental income subsequently remained adversely affected." The father was employed as the manager of a hardware store, as to which his parents are the majority shareholders of the related subchapter S corporation. The father reported passive earnings on his 2013 tax return arising from his Subchapter S shares, but argued that this income "was improperly imputed to him as he never actually received this money." The Appellate Division upheld the imputed income finding, noting that while the father paid roughly $3,000 in taxes on Subchapter S earnings, he claimed to have "no clue" as to where the money was. Further, the Third Department found: "[t]he father failed to disclose his shares in his initial April 2014 financial disclosure affidavit. On a second affidavit submitted 11 months

later, he disclosed that he had received 127 shares in 2013 and additional shares in 2014." With regard to the parental loan, there was a promissory note, but the father had not begun to repay the loan by its terms and also failed to list it on his financial disclosure affidavits. Family Court noted that "the parents had allegedly made a major loan while decreasing [the father's] pay, with knowledge of the ongoing contentious legal proceedings." The Appellate Division concluded: "Upon this record, we find no abuse of discretion in Family Court's determination to impute to the father the rental income reported in his 2012 tax return (citations omitted) *** and "no abuse of discretion in the determination to impute the income he received from his shares in the family company (citations omitted), or to impute an amount equal to the unpaid monthly payments on the promissory note."

Child Support - College and Health Insurance Contributions Denied; Equitable Distribution - Proportions – Business Debt (50%/50%); Separate Property Credit

In Wallace v. Wallace, 2017 Westlaw 4680170 (3d Dept. Oct. 19, 2017), both parties appealed from a February 2015 Supreme Court judgment, which, among other things, distributed marital property upon a decision of the Court. The parties were married in May 2000 and have a daughter born in 1995 and a son born in 2001. The wife commenced the divorce action in December 2011 and

the parties resolved the issues of custody and personal property. The Third Department upheld Supreme Court's failure to credit the wife for the daughter's college expenses, finding: "Although the court made no express finding on this request, *** the parties otherwise have limited financial resources. The husband is paying $683.75 in child support and a payment in the same amount for arrears, and the parties incurred heavy debt to pay for their business. The daughter, who is estranged from the husband and, unbeknownst to him, had enrolled in a state university (later transferring to a local community college), paid her expenses with various loans, grants and financial aid, and the wife did not qualify for parental loans. Under all of the circumstances, including the husband's limited ability to pay, we decline to credit the wife for the daughter's college expenses (citations omitted)." As to the issue of health insurance, the Appellate Division noted "the wife testified that the children are covered through the Child Health Plus program at a cost to her of $30 each per month, and she has insurance through her employer, while the husband is enrolled in Medicaid. Supreme Court properly ordered the husband to pay his pro rata share (42%) of the children's future unreimbursed health-related expenses and, when the children no longer qualify for this program, directed the wife to add them to her health insurance plan and the husband to pay the wife his 42% share of those

costs. Given the child support award, minimal insurance costs under the program and the parties' financial circumstances, we do not find, as the wife urges, that the court abused its discretion in declining to credit her retroactively for the husband's share of health care costs (citations omitted).” As to the husband’s cross appeal, the Appellate Division modified, on the law, and remitted to Supreme Court. The business was purchased with a bank loan (partially secured by a mortgage on the marital residence), marital funds and loans from the parties' parents and had been listed for sale. The Third Department found: “Despite the wife's limited direct involvement in the business, the court ordered that the net proceeds be equally divided upon its sale, with certain adjustments related to the bank loan, and the parties were each held responsible to repay their respective parents. The husband argues that, given the equal distribution of the business asset, the court should have equally apportioned the outstanding credit card debt and 401(k) loans — reportedly totaling approximately $125,000 — that he incurred to directly support the business prior to the commencement of this action. He also requested credit for any payments made after the action was commenced. We agree. *** Thus, Supreme Court could have credited the husband for one half of the total debt amount and for payments made toward these debts after the action was commenced. Alternately, the court

could have equally divided those debts and assigned them specifically to each party or ordered them to be paid out of the proceeds from the sale of the business. Supreme Court will need to address these matters upon remittal." The Appellate Division concluded: "We similarly find that the husband should have been credited for his premarital contributions toward the purchase of the marital home in 1999. *** The husband offered uncontradicted testimony that, prior to the marriage, he contributed $17,575 from his separate property toward the down payment and purchase of the parties' home, which was deeded to both parties, from funds that he obtained from his personal banking ($7,148) and 401(k) ($10,427) accounts. While he temporarily placed some of the withdrawn 401(k) funds in the parties' joint account, this was done for convenience and those funds were used at the closing on the marital residence the following week, and, under all of the circumstances, we find that they 'retained [their] character as separate property.' (Citations omitted)."

Child Support - Modification – Agreement Interpretation – Gross Income

In Toscano v. Toscano, 153 AD3d 1440 (2d Dept. Sept. 27, 2017), the mother appealed from a June 2015 Supreme Court order, which denied her January 2015 motion to modify the father's child support obligation. The Second Department reversed, on the

law, and remitted to Supreme Court. The parties' incorporated September 2011 agreement provided that the mother would pay the father $4,000 per month in spousal support for 36 months, $2,083.33 per month for 24 months, and then the obligation would cease. Given the father's lack of income in the year preceding separation, his child support obligation was set at $25 per month, subject to modification pursuant to the CSSA upon any of the DRL 236(B)(9)(b) grounds and the following enumerated events: (i) December 31st of any year in which the Father's earned income exceeds $25,000; (ii) December 31st of any year in which the Father's gross income from all sources exceeds $45,000; and (iii) the date on which each child becomes emancipated. The mother's motion alleged that during 2012 she paid $48,000 in spousal support to the father, and thus, for that year, the father's "gross income from all sources" exceeded $45,000, triggering a mandatory adjustment of the father's basic child support obligation. The father argued that there was no indication in the agreement that the spousal support paid to him was intended to be included in the calculation of his child support obligation and that it was "illogical that he would accept spousal support from the mother, only to immediately pay her back with her own money." Supreme Court concluded that the parties' agreement did not intend for child support to be paid back to the mother by the father from the spousal support she

paid to him. The Appellate Division held that "Supreme Court erred in concluding that the parties did not intend to include the spousal support paid by the mother to the father as part of the father's gross income from all sources used to determine whether his child support obligation should be modified. The use of the terms 'gross income from all sources,' each of which have a clear and plain meaning in and of themselves, coupled with the fact that the agreement distinguished between 'earned income' and 'gross income from all sources,' established that the parties contemplated a clear distinction between income the father earned and monies the father obtained from any sources, including spousal support, to support himself. *** Thus, the parties knew or should have known that the spousal support would be considered income to the father by any court called upon to modify his child support obligation."

Custody - Mental Health Issues

In Matter of Agu v. Williams, 2017 Westlaw 4532200 (2d Dept. Oct. 11, 2017), the mother appealed from a June 2016 Family Court order, which, after a hearing, granted custody to the father. The Second Department affirmed, stating: "Here, the evidence presented at the hearing established that the mother had been diagnosed by at least two mental health experts as suffering from 'Psychotic Disorder NOS' and/or 'Personality Disorder NOS with Paranoid and Schizotypal Features,' that the

mother refused to obtain appropriate treatment for her serious mental health problems, and that these problems impaired her ability to function appropriately as a custodial parent (citations omitted). Accordingly, the Family Court's determination to award custody to the father, which was consistent with the opinion of the court-appointed forensic expert and the position of the attorney for the child, has a sound and substantial basis in the record and will not be disturbed."

Custody - Prospective Decision Reversed

In Matter of Jonathan A. v. Tiffany V., 2017 Westlaw 4782048 (1st Dept. Oct. 24, 2017), the mother appealed from a September 2016 Family Court order, which directed that the child be enrolled in school in Bronx County and that, if the mother moves to Queens in the future, the father be awarded primary physical custody, with visitation to the mother on three weekends each month. The First Department reversed, on the law and the facts, and vacated those two provision of the order, stating: "Because the mother's petition did not seek permission to relocate with the child, the Family Court's order that custody be modified to set a particular parenting time schedule in the event that the mother moved in the future lacked a sound and substantial basis in the record." The Court concluded: "There was also no basis for the Family Court to direct that the

child be enrolled in school in Bronx County since the father was granted final decision-making authority on education issues."

Custody - Third Party – Grandparent – Standing Denial Reversed

In Matter of Monroe v. Monroe, 2017 Westlaw 4680065 (3d Dept. Oct. 19, 2017), the paternal grandparents appealed from a September 2015 Family Court order, which granted the mother's motion to dismiss their petition upon the ground of lack of standing. The two subject children were born in 2013 and 2015 and the parents were not married. In July 2015, the grandparents filed a petition seeking visitation. Supported by the attorney for the children, the mother moved to dismiss the grandparents' petition on the ground that they lacked standing to seek visitation. Family Court granted the mother's motion without a hearing and the Third Department reversed. The Appellate Division found: "Here, the grandparents acknowledge that they do not have a close relationship with either grandchild; however, they aver that the mother has willfully and deliberately denied them any access to the children — without any reasonable cause for doing so — since their respective births. *** [T]he grandparents submitted a notarized letter. With regard to the oldest child, the grandparents aver that they were able to hold the child at the hospital on the day she was born. They aver that, since such time, they have not been allowed to have contact with the child and acknowledge that they have only seen

the child four additional times — one of which was the result of them showing up unannounced to the parents' residence and, on another occasion, to the child's first birthday party. With regard to the youngest child, the grandparents aver that they went to the hospital on the day of the child's birth; however, after only briefly holding the child, the mother informed them that they were not welcome and security was called to escort them out of the hospital. They have not been able to see the child since. Two months later, the grandparents filed the instant petition seeking visitation." The Third Department found "the proof adduced in support of the grandparents' petition to be sufficient to confer standing to seek visitation with their grandchildren ***" given "that the mother has made deliberate and immediate efforts to preclude the grandparents from having and/or developing any significant relationship with the subject children — since the very day they were born — without any stated reasonable justification for doing so (citation omitted). Further, given the young ages of the children and the brief amount of time that has elapsed between their respective births and the disruption of the grandparents' visitation, equity dictates that we not allow the lack of an established relationship be used as a pretext to prevent the grandparents from otherwise exercising their right to seek visitation." The father did not oppose the relief sought by his parents on

appeal. The Appellate Division remitted to Family Court to conduct a hearing as to whether visitation by the grandparents is in the best interests of the children.

Enforcement - Income Execution – Modification of Percentage of Income

In Fishler v. Fishler, 2017 Westlaw 4799838 (2d Dept. Oct. 25, 2017), the father appealed from a July 2016 Supreme Court order, which denied his motion pursuant to CPLR 5240 to modify and limit a June 2013 order (which had directed a 65% income execution) to no more than 10% of his income. The Second Department reversed, on the law, and limited the aforesaid income execution to 40% of the father's disposable earnings, citing CPLR 5231(g) and 5241. Pursuant to a 1999 judgment of divorce and incorporated agreement, and subsequent litigation over the amount of arrears for combined spousal and child support, and in connection with the aforesaid June 2013 order, the parties had stipulated to judgments stating that the father owed support arrears of approximately $1.6 million. Supreme Court at that time directed that, until all the judgments were satisfied in full, the father's earnings, including bonuses and commissions, would be subject to a 65% income execution. The Appellate Division noted that CPLR 5240 provides that a court "may at any time, on its own initiative or the motion of any interested person, and upon such notice as it may require, make

an order denying, limiting, conditioning, regulating, extending or modifying the use of any enforcement procedure." The Second Department found that: the father demonstrated that a 65% income execution was unduly prejudicial; since June 2013, the mother had received at least $511,000 toward the arrears and both children have become adults and attended college; only one of the adult children lives with the mother; the father showed that the 65% income execution provided the mother with a monthly payment of approximately $7,500, and that he received only about $3,000 per month after garnishment and other deductions; and the father established that his monthly expenses were approximately $5,000, which included $575 per month for student loan payments on behalf of one of the parties' adult children. The Court concluded: “In light of his substantial arrears, we find that the plaintiff is not entitled to have the income execution limited to only 10% of his disposable earnings. However, on this record, the plaintiff demonstrated that limiting the income execution to 40% of his disposable earnings is warranted.”

Equitable Distribution - Judicial Estoppel – Tax Returns – Charitable Contributions

In Melvin v. Melvin, 2017 Westlaw 4781198 (1st Dept. Oct. 24, 2017), the wife appealed from a May 2017 Supreme Court order, which granted the husband’s motion to declare the wife judicially estopped from claiming that $1.5 million dollars in

charitable contributions reported on the parties' joint 2011 through 2015 tax returns, which she stated were made without her consent, and of which she was unaware, constituted marital waste. The First Department affirmed, noting that the wife "does not deny that she signed the tax returns under penalty of perjury, that the charity receiving the contributions was a bona fide nonprofit organization, and that the marital estate received a benefit from the contributions in the form of tax deductions." With regard to the wife's claim of unawareness, the Appellate Division found that while she alleged she received only the signature page, "she had unfettered access to the complete returns from the parties' accountant" and "by signing the tax returns, she is presumed to have read and understood their contents." The Court noted further that "the wife does not argue that the husband received a financial gain from the donations, only that they were inherently wasteful in their excess." The First Department concluded that Supreme Court properly applied this rule: "A party to litigation may not take a position contrary to a position taken in an income tax return," citing Mahoney-Buntzman v Buntzman, 12 NY3d 415, 422 (2009).

Family Offense - Aggravating Circumstances – Harassment 1st and 2d; Sexual Abuse 3d

In Matter of Monwara G. v. Abdul G., 153 AD3d 1174 (1st

Dept. Sept. 26, 2017), the husband appealed from an October 2016 Family Court order, which, upon a fact-finding determination that he committed a family offense, granted the wife a four-year order of protection. The First Department modified, on the law and the facts, to add to the order of protection a finding that "aggravated circumstances exist, including violent and harassing behavior by respondent toward petitioner, which constitute an immediate and ongoing danger to petitioner." The Appellate Division held that Family Court properly “credited the wife's testimony, which showed that the husband had engaged in a course of significant physical and sexual abuse over a 19-year period, which included hitting the wife, pulling her hair, and forcing her to engage in sex against her will, leaving her with bruises.” The foregoing “sufficiently supported the allegations in the petition that the husband had committed the family offenses of harassment in the first and second degree *** and sexual abuse in the third degree.” The Court concluded: “The Family Court provided for an extended period of protection beyond two years without setting forth any finding of aggravating circumstances, as required by Family Court Act §842. However, we find that the record amply supports a determination that aggravating circumstances, as defined in Family Court Act §827(a)(vii), exist, and therefore modify the order of protection to set forth this finding.”

Family Offense - Disorderly Conduct; Harassment 2d – Found

In Matter of Theresa N. v. Antoine A., 60 NYS3d 815 (1st Dept. Oct. 3, 2017), the father appealed from an April 2016 Family Court order, which found that he had violated an earlier order of protection by committing the family offenses of harassment in the second degree and disorderly conduct. The First Department affirmed, holding that the findings that "the father committed the family offenses of harassment in the second degree (Penal Law §240.26[1]) and disorderly conduct (Penal Law §240.20) were supported by a fair preponderance of the evidence, including the mother's testimony that, inter alia, the father grabbed the mother in the lobby of her apartment building and cursed at her with the intent to alarm her through physical contact, and that his conduct had alarmed and annoyed the public."

Pendente Lite - Exclusive Use and Occupancy

In L.M.L. v. H.T.N., 57 Misc3d 1207(A), 2017 Westlaw 4507541, NY Law Journ. Oct. 20, 2017 at 21, col. 5 (Sup. Ct. Monroe Co. Oct. 3, 2017, Dollinger, A.J.), the parties were married and have two sons, ages 12 and 9, and lived in the marital residence together. The wife moved for exclusive possession, alleging that the husband's temper and the parties' verbal disputes make it unsafe for them to remain together. The Court noted that the parties' affidavits presented diametrically

opposed versions of events. The attorney for the children supported the wife's motion, upon the children's statements that the environment was very stressful and unhealthy for them. Supreme Court granted the motion, subject to a hearing in 45 days, finding that a more enlightened view of "domestic strife" under DRL 234 mandates that the court consider constant verbal conflict between the parents in terms of its effect upon the children. The Court directed the husband to vacate in 15 days, and directed the wife, upon her prior consent, to make $10,000 available to the husband within 10 days so that he can relocate.

Pendente Lite - Temporary Maintenance Guidelines (Former); Carrying Charges; Upward Deviation

In Galvin v. Galvin, 2017 Westlaw 4679950 (3d Dept. Oct. 19, 2017), the wife appealed from a January 7, 2016 Supreme Court order, which directed the husband to pay $15,415 in monthly household expenses (for the marital residence and a Colorado condominium), plus $2,500 per month as temporary maintenance, where the husband's income exceeded the then $543,000 cap. The parties married in 1995 and have three children, one unemancipated. The husband commenced the divorce action in 2015 and both parties continued to reside in the marital residence. The wife claimed total monthly expenses in excess of $54,000 and had some income, the amount of which was unspecified. The presumptive amount of temporary maintenance

payable to the wife was $160,331 per year, or $13,361 per month. On appeal, the wife contended “that Supreme Court erred by completely offsetting the presumptive award by the husband's payment of the household expenses” and that “he should be permitted to offset no more than 50% of the household expenses [$15,415 per month/2 = $7,707.50] against the presumptive amount of temporary maintenance.” The wife argued that in effect, the husband is paying her share of the household expenses ($7,705.50 per month), plus $2,500 = $10,207.50 per month, which is less than the presumptive guidelines amount ($13,361 per month). The Third Department agreed and modified, on the law, “to allow the wife to receive the properly calculated presumptive share of maintenance.” The Appellate Division noted: “It is apparent that Supreme Court believed it was appropriate to award temporary maintenance in excess of the statutory cap, and the submissions provide ample support for this conclusion. Where, as here, the parties continue to reside together in the marital residence during the pendency of a divorce, we find that it is appropriate to credit the payor spouse with one half of the court-ordered carrying charges (citations omitted).” The Court concluded that “the wife is entitled to the presumptive award of $13,361 each month, plus $2,500 for the amount of the husband's income above the statutory cap, offset by one half of the household expenses, or a credit in the amount of $7,707.50 each month” and that “in

addition to the defined household expenses, the monthly amount payable by the husband to the wife as temporary maintenance should be increased by $5,654, for a total of $8,154."