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Agreements - Interpretation – Pension

In Santiago v. Santiago, 2017 Westlaw 3496094 (2d Dept. Aug. 16, 2017), the wife appealed from a November 2015 Supreme Court order which, among other things, denied her motion to direct payment of a portion of the husband's 401(k) pension plan to her, with interest, and which awarded her only a 50% share of the husband's general pension. On appeal, the Second Department modified, on the law, by granting the motion as to the 401(k) plan, modifying the pension award to conform to the formula in the parties' agreement, and remitted to Supreme Court. The parties' July 1999 agreement was incorporated into a September 2000 judgment and provided the wife with "a share of all payments" received by him under "the pension plan" pursuant to a specific formula. The Appellate Division held that the term requiring the husband to pay the wife "a share of all payments" received by him, was unambiguous, and entitled the wife to share in a portion of the 401(k) pension distributions, without regard to when the contributions thereto were earned or acquired. The Second Department determined that Supreme Court erred in awarding the wife a 50% of the general pension, instead of applying the agreement's formula.

Agreements - Interpretation – Postnuptial – Upheld

In Ruggiero v. DePalo, 2017 Westlaw 3611683 (2d Dept. Aug. 23, 2017), in a January 2014 action to rescind a February 2008 postnuptial agreement, incorporated into the parties' January 2009 judgment of divorce, the wife appealed from a September 2015 Supreme Court order, which granted the husband's cross motion to dismiss so much of the wife's cause of action as alleged fraud, and for summary judgment dismissing the remainder of the cause of action. The Second Department affirmed, holding that "the Supreme Court properly granted dismissal of so much of the first cause of action as alleged fraud," because the wife's "conclusory allegations *** were insufficient *** in accordance with the applicable pleading requirements." With regard to the grant of summary judgment, the Appellate Division found that the wife "failed to raise a triable issue of fact as to whether the postnuptial agreement was procured through duress, coercion, or overreaching, or that it was unconscionable."

Custody - Expert Witness – Cross Examination Permitted

In E.V. v. R.V., 2017 Westlaw 3272238 (2d Dept. Aug. 2, 2017), the mother appealed from a February 26, 2016 Supreme Court order, which denied her motion to strike an updated forensic mental health report, or, in the alternative, for leave to cross-examine the court-appointed forensic expert on the updated report. The mother and the child appealed from an

February 29, 2016 order of the same court, which modified prior orders incorporated into the parties' judgment of divorce, so as to award the father sole legal and physical custody of the parties' child. The Second Department modified the February 26, 2016 order, on the law, by granting the mother leave to cross-examine the court-appointed forensic expert on the updated report, and remitted for the sole purpose of allowing such cross-examination and thereafter for a report setting forth the Supreme Court's findings. The Appellate Division held the appeals from the February 29, 2016 order in abeyance, pending receipt of Supreme Court's report, which it directed be filed not later than 45 days from the date of its order. Supreme Court's July 2014 order had granted sole legal and physical custody to the father. The Second Department reversed, holding that Supreme Court had failed to conduct an *in camera* examination of the child and had relied upon a forensic report that, by the date the court issued its determination, was more than 2½ years old. E.V. v R.V., 130 AD3d 920 (2d Dept. 2015). The Appellate Division remitted for "a re-opened expedited hearing solely to receive an updated forensic mental health evaluation," for an in camera examination of the child, and for a new determination thereafter. On the present appeal, the Second Department held that Supreme Court properly denied the mother's motion to strike the updated report, given that she

"failed to identify any deficiency in the updated forensic mental health evaluation conducted by the forensic evaluator that would warrant such relief." The Appellate Division further determined that Supreme Court "properly declined to re-open the custody hearing for the purpose of receiving further evidence, as a 44-day hearing was already held on the issue of change of custody," but "should have permitted the plaintiff to cross-examine the forensic evaluator with respect to the updated report," citing 22 NYCRR 202.16[g][2] and Ekstra v Ekstra, 49 AD3d 594, 595 (2d Dept. 2008).

Custody - Modification – Religious Differences and Sexual Orientation

In Weisberger v. Weisberger, 2017 Westlaw 3496090 (2d Dept. Aug. 16, 2017), the mother appealed from a May 2015 Supreme Court order, which, after a hearing: (1) granted so much of the father's motion to modify a stipulation of settlement so as to award him sole legal and residential custody of the subject children, as well as final decision-making authority over medical and dental issues, and issues of mental health, with supervised therapeutic visitation to the mother, (2) conditioned a stay of enforcement of the provision of the order limiting the mother's visitation to supervised therapeutic visits upon her compliance with a religious upbringing clause contained in the stipulation of settlement, (3) granted so much of the father's

motion which was to enforce the religious upbringing clause contained in the stipulation of settlement so as to require the mother to direct the children to practice full religious observance in accordance with the Jewish Hasidic practices of ultra Orthodoxy at all times and require her to practice full religious observance in accordance with the Hasidic practices of ultra Orthodoxy during any period in which she has physical custody of the children and at any appearance at the children's schools, (4) denied so much of the mother's motion which was to modify the religious upbringing clause contained in the stipulation, and (5) denied so much of the mother's motion which was to modify the vacation and holiday schedule contained in the stipulation, so as to award the father visitation during all Jewish holidays and for two weeks during summer vacation, and to award her visitation during all non-religious school vacations, with the exception of the two weeks each summer to be spent with the father. The parties were married in March, 2002. In 2005, the mother told the father that she “was sexually attracted to women” and the parties were divorced in March 2009. The children were 5, 3 and 2 years old at the time of divorce. The parties’ incorporated November 2008 stipulation provided for joint legal custody of the children with the mother having primary residential custody. The father's visitation included a two-hour period once per week after school (to be increased to twice per

week with respect to their son when he turned eight years old, for the purpose of religious study); overnight visitation every other Friday after school until Saturday evening for the observance of Shabbos (the Sabbath); for two consecutive weeks every summer; and an alternating schedule for holidays. The stipulation included a religious upbringing clause: "Parties agree to give the children a Hasidic upbringing in all details, in home or outside of home, compatible with that of their families'. Father shall decide which school the children attend. Mother to insure that the children arrive in school in a timely manner and have all their needs provided." The Appellate Division engaged in an extended discussion of the issues, noting: “Additionally, to the extent the mother's sexual orientation was raised at the hearing, we note that courts must remain neutral toward such matters, such that the focus remains on the continued best interests and welfare of the children.” The Second Department held that “Supreme Court's determination to modify the stipulation of settlement so as to award the father sole legal and residential custody of the children, as well as final decision-making authority over medical and dental issues, and issues of mental health, with supervised therapeutic visitation to the mother, lacked a sound and substantial basis in the record” and that “the court gave undue weight to the parties' religious upbringing clause, finding it to be a

‘paramount factor’ in its custody determination.” The Appellate Division held that “clauses in custody agreements that provide for a specific religious upbringing for the children will only be enforced so long as the agreement is in the best interests of the children.” With regard to Supreme Court’s custody award to the father, the Second Department determined: “Considering all of the facts and circumstances of this case, the father failed to demonstrate that it is in the children's best interests to award him sole legal and residential custody of the children, as well as final decision-making authority over medical and dental issues, and issues of mental health. The mother has been the children's primary caretaker since birth, and their emotional and intellectual development is closely tied to their relationship with her.” The Court concluded that “there was no showing that unsupervised visitation was detrimental to the children and *** it was wholly inappropriate to use supervised visitation as a tool to compel the mother to comport herself in a particular religious manner.”

Custody - Temporary – Educational Decision-Making

In A.K. v. E.K., NY Law Journ. Aug. 21, 2017 (Sup. Ct. Nassau Co., Goodstein, J.), the parties disputed whether their 5 year old daughter would be enrolled in a private Yeshiva or a public school. Supreme Court, noting that its decision may change after trial, after determining that the child would fall

behind her classmates with regard to religious studies if she attended a public school, awarded the father temporary educational decision-making authority.

Custody - Visitation – Modification - Suspension Reversed

In Matter of Nixon v. Ferrone, 2017 Westlaw 3401059 (2d Dept. Aug. 9, 2017), the mother appealed from a December 2016 Family Court order which, after a hearing, granted the father's May 2015 petition for modification of a 2010 incorporated stipulation, so as to award him sole custody of the parties' child born in 2004, and suspended her visitation for 3 months, to be followed by supervised visitation with a therapist selected by the father. The Second Department modified, on the law and the facts, by deleting the visitation suspension and directed that Family Court, upon consultation with the attorney for the child and the parties, designate a therapist to conduct supervised therapeutic visitation to commence immediately, and remitted to Family Court. The 2010 stipulation provided for joint legal custody with the mother having physical custody and the father having weekly parenting time. The Appellate Division held that "the father established a change in circumstances such that modification of the existing custody arrangement between the parties was necessary to protect the best interests of the child" and that "Family Court's determination to award sole physical custody of the child to the father was supported by a

sound and substantial basis in the record." The Court concluded that while "Family Court appropriately determined that supervised therapeutic visitation was necessary, the court should have directed that it would designate the therapist upon consultation with the attorney for the child and the parties, and that the mother's supervised therapeutic visitation would commence immediately."

Enforcement - Automatic Orders - Life Insurance – Contempt

In Savel v. Savel, 2017 Westlaw 3411679 (2d Dept. Aug 23, 2017), the husband appealed from an April 2015 Supreme Court order, which denied his motion to hold the wife in contempt and to direct her to maintain a whole life insurance policy during the pendency of the action. The Second Department affirmed. The husband sought to hold the wife in civil and criminal contempt, alleging that she violated the automatic orders of DRL 236(B)(2)(b), by ceasing to pay the premiums for his whole life insurance policy, and requested an order directing her to maintain the subject policy during the pendency of the action. The wife conceded that she ceased paying the premiums, but contended that she did not violate the automatic orders and even if she did, the husband was not prejudiced. The Appellate Division noted that the parties "had $12 million in term life insurance benefitting their children, in addition to each of their whole life insurance policies." The wife argued that the

whole life insurance policies were “intended as savings vehicles that should not be subject to the automatic orders, and she should not have to contribute her post-commencement earnings to a savings vehicle for the plaintiff.” The Second Department found: “Under the particular circumstances of this case, including the $12 million in term life insurance on the parties, an additional $7.6 million in whole life insurance on the defendant, and the plaintiff's admitted use of his whole life insurance policy as a ‘savings plan,’ the Supreme Court providently exercised its discretion in declining to hold the defendant in contempt.”

Equitable Distribution - Debt (50%/50%); Mortgage Principal Reduction Credit

In Morales v. Carvajal, 2017 Westlaw 3273299 (2d Dept. Aug. 2, 2017), the wife appealed from a December 2014 Supreme Court judgment, which, upon an October 2014 decision, determined equitable distribution in the wife’s May 2009 action, wherein they stipulated to custody, maintenance and child support. The parties were married on July 17, 1994 and had 2 children. Supreme Court determined that: each party would receive 50% of the net proceeds of the sale of the marital residence, but the husband was entitled to a $14,805 credit for payments that he made during the action which reduced the mortgage principal; and the wife was responsible for 50% of the total amount of marital

debt, payable to the husband out of her share of the net proceeds of the sale of the marital residence. The Second Department affirmed, holding that the husband was "entitled to receive a credit against the proceeds of the sale of the marital residence for the money that he paid to reduce the balance of the mortgage during the pendency of the action" which he made "without any contribution from the [wife]." As to the other debt, the Appellate Division held: "Credit card debt incurred prior to the commencement of a matrimonial action constitutes marital debt and should be equally shared by the parties" and that "Supreme Court providently exercised its discretion in finding the defendant responsible for 50% of the marital debt."

Family Offense - Extension of Order of Protection

In Matter of Emiliano E. v. Viviana V., NY Law Journ. Aug. 15, 2017 (Fam. Ct. Rockland Co., Richardson-Mendelson, R., July 14, 2017), the attorney for the children sought an extension of an order of protection against the father, initially issued in January 2013, and then extended at the same attorney's January 2014 request in July 2014, to expire in July 2016. The order of protection directed the father to stay away from the mother and children, except as provided by a custody or visitation order of a court of competent jurisdiction. The father resides in Italy and the mother and children reside in NY. The father filed a Hague Convention petition, seeking to have the children returned

to Italy, which was denied by the US District Court under the "grave risk of harm" exception, and affirmed by the Second Circuit, which found that the father had engaged in "a sustained pattern of physical abuse directed at Viviana and the children." Family Court extended the order of protection for another 2 years, rejecting the father's argument that the law required a showing that he violated the order, as a condition precedent to such an extension, and finding that FCA 842 allows the Court to extend an order of protection upon a showing of "good cause."

Maintenance – Durational

In Volkerick v. Volkerick, 2017 Westlaw 3611650 (2d Dept. Aug. 23, 2017), the husband appealed from a November 2015 Supreme Court judgment, which, among other things, awarded the wife maintenance of $1,500 per month for 4 years. The Second Department affirmed. The parties were married in 1991 and have 2 children. The wife commenced the action in July 2009 and the issues of custody, visitation and equitable distribution were settled by written stipulations in May 2011. The parties agreed that Supreme Court would decide child support and maintenance upon written submissions. The Appellate Division held that Supreme Court properly imputed income to the husband of $130,000 per year, given that he was a college graduate and had a recent earnings history as an estimator for various construction companies; $130,000 was his salary for the period 2005-2009, and

although he had periods of unemployment in 2010 and 2011, his 2011 income from earnings and unemployment compensation was $130,000. The wife was a high school graduate and had worked part-time as a cashier since 1998, earning between $10,000 and $15,000 per year. The Second Department upheld the maintenance award as appropriate and found that the 4 year duration was “a reasonable time to allow the plaintiff to obtain any necessary training to enable her to be self-supporting and regain self-sufficiency.”