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Automatic Orders – Case of First Impression

In Spencer v. Spencer, 2018 Westlaw 1075362 (2d Dept. Feb. 28, 2018), an action in which the parties were divorced by a judgment entered November 30, 2015, the husband appealed from a November 2016 Supreme Court order which, after a hearing, granted the wife's motion to hold him in civil contempt for violation of the automatic orders, and directed his incarceration, unless he paid a purge amount of $150,000 by December 16, 2016. The Second Department stayed enforcement of the order, pending hearing and determination of the appeal. Following entry of judgment, the wife learned that during the pendency of the action, the husband had sold a warehouse which constituted marital property, without her consent or court permission. The Appellate Division reversed, on the law, and denied the wife's motion for civil contempt. The Court found that while the automatic orders constitute "unequivocal mandates of the court" for contempt purposes, contempt is not an available remedy for violation thereof when contempt is sought after entry of a judgment of divorce.

Child Support – Cap at $650,000; Nanny Denied; Private School Pro Rata; Counsel Fees – After Trial; Equitable Distribution –

Proportions (60/40); Separate Property Credit; Maintenance - Durational – Until Receipt of Distributive Award

In M.M. v. D.M., 2018 Westlaw 1414195 (1st Dept. Mar. 22, 2018), both parties appealed from an August 2017 Supreme Court Judgment, awarding plaintiff wife child support and maintenance, awarding defendant husband a credit of $1 million for his separate property interest in the marital residence, distributing the parties' non-business marital assets 60% to plaintiff and 40% to defendant, awarding plaintiff a share of defendant's business interests valued as of January 2015, awarding credits for various post-commencement expenses, and allocating 65% of plaintiff's counsel fees to defendant. The First Department modified, on the law and the facts, to award defendant a credit of $71,000 for his Lehman Brothers retirement account, to delete the directive that defendant be solely responsible for the children's private school tuition and to direct instead that the parties share the children's private school tuition pro rata, to delete the directive that defendant contribute to the cost of a full-time nanny, and to remand for a determination of the credit owed defendant for documented moving expenses, documented post-commencement contributions to his 401(k) account and for a recalculation of defendant's child support obligation, and his child support arrears, treating plaintiff's durational maintenance as income. The Appellate

Division noted that the wife conceded that the husband's Lehman Brothers retirement account, valued at $71,000, is separate property and was erroneously distributed as a marital asset and that he is entitled to a credit in that amount. The First Department held that Supreme Court providently exercised its discretion in distributing the parties' non-business marital assets 60% to the wife and 40% to the husband, based upon the wife's contributions to the husband's career, at the expense of her own career, and the parties' probable future financial circumstances, in particular, defendant's far greater earning potential and family wealth. The Appellate Division agreed with the husband that the $1 million he received from his father toward the down payment on the marital residence was a gift structured as a "loan" to defendant alone, and was therefore defendant's separate property and that there "was no repayment using marital funds; indeed, there was no expectation of repayment." As to the husband's business interests, the First Department properly chose January 2015 as the valuation date, on the ground that he was forcibly hospitalized around that time and diagnosed with temporal lobe epilepsy, and subsequently had very little involvement in his family's business. The Court noted that while Supreme Court found that the husband's post-commencement contributions to his 401(k) were separate property, it was "not clear whether he was credited for his documented

post-commencement contributions to that account," and remanded for a determination of the credit owed to him for those contributions. As to child support, the Appellate Division found that Supreme Court properly imputed income of $1.5 million to the husband and applied a CSSA income cap of $650,000, based upon "the lifestyle enjoyed by the children during the marriage, which included country club membership, theater and other entertainment, and luxury vacations." The First Department further stated: "We also agree with defendant that the Referee erred in ordering him to contribute to the cost of a nanny, since plaintiff does not work, and the youngest child was 12 years old at the time of trial (*see* DRL §240[1-b][c][4])" and that Supreme Court failed to credit defendant for his documented moving expenses. With regard to maintenance, the Appellate Division held that Supreme Court properly awarded the wife maintenance "for six months or until she received her distributive share of the marital assets, on the ground that the cash flow from those assets would be sufficient to support her lifestyle without the need for additional maintenance from defendant. After a 15-year marriage in which she was primarily a homemaker, plaintiff surely would have been entitled to maintenance of a longer duration – if not for the equitable distribution to her of 60% of the non-business marital assets, which provided her with the means to be self-supporting." As to

counsel fees, the First Department upheld the allocation of 65% of the wife's counsel fees to the husband, noting: "The parties' accrued counsel fees exceeded $7,000,000, and were paid mostly out of their liquid marital assets, although defendant was earning a substantial salary until 2015. *** Further, the Referee properly took into account that, although both parties engaged in needless litigation, plaintiff's trial positions were on the whole more successful (citation omitted). We note that even after the award plaintiff remained responsible for more than $1 million in legal fees." [**Editor note**: There are other points of law in this case, so a complete read is a must.]

Child Support – CSSA Income Cap

The CSSA income cap is raised to $148,000, effective March 1, 2018.

Custody - Modification – Sole to Father - Mother Grand Larceny; Joint Counseling Denied

In Hogan v. Hogan, 2018 Westlaw 1178385 (2d Dept. Mar. 7, 2018), the mother appealed from a February 2017 Supreme Court judgment, which awarded the father sole legal and physical custody of the parties' 14 year old child and declined to direct joint counseling sessions between the parties and the child. The Second Department affirmed. The father received temporary custody after the mother was incarcerated for failure to make restitution payments, required as part of a sentence upon her

guilty plea to grand larceny, arising from her theft of funds from the PTA at the child's school. The Appellate Division held: “the mother's theft of the PTA funds, her poor decision-making about her failing business, certain postings on her blog and Flickr account, and unstable housing circumstances demonstrated poor caretaking ability and parental judgment. Additionally, the relationship between the mother and the then 14-year-old child had drastically deteriorated after the mother's arrest and later incarceration. The mother's unwise decision to seek election to the position of second vice president of the PTA at the child's new school, and her subsequent election to that position, rekindled the negative publicity about her earlier theft of funds from the PTA at the child's former school. The unfavorable news articles prompted the mother to resign her position and further cemented the rift between the child and the mother. Additionally, the court-appointed forensic psychologist recommended that the father have sole legal and physical custody of the child. The attorney for the child supported that position (citation omitted) and informed the court that the child wished to reside with the father.” With regard to counselling, the Second Department concluded that Supreme Court properly determined that “the parties' inability to communicate and cooperate on matters concerning the child, together with the child's strong position about the mother, rendered joint

counseling sessions at that time unworkable and inappropriate under those circumstances."

Custody - Modification – Sole to Father - Mother's Unsubstantiated Abuse Allegations

In McGinnis v. McGinnis, 2018 Westlaw 1188971 (1st Dept. Mar. 8, 2018), the mother appealed from a March 2016 Supreme Court judgment which: transferred sole custody of the child to the father; granted the mother 12 hours per week of supervised visits; and awarded counsel fees of $132,031 to the father. The First Department affirmed, holding: "The mother's lack of insight, poor judgment, efforts to minimize the father's relationship with the child and multiple, unsubstantiated claims of abuse — as well as her refusal to return to New York in violation of the parties' settlement agreement until compelled to do so by the court — all support the IAS court's findings." The Appellate Division reiterated the principle that "[a] parent's repeated allegations of abuse are acts of interference with the parental relationship 'so inconsistent with the best interests of the child[]' that it raises a strong probability of unfitness" and found that "the mother is unwilling to ensure meaningful contact between the child and her father." As to the issue of counsel fees, the First Department concluded that the award was within Supreme Court's discretion and was "supported by the plain terms of the parties' settlement agreement."

Custody - Third Party – Grandparent – Granted

In Matter of Mastronardi v. Milano-Granito, 2018 Westlaw 1404081 (2d Dept. Mar. 21, 2018), the mother and children appealed from a January 2016 Family Court order which, after a hearing, granted the visitation petition of the paternal grandparents, following the death of the father. The Second Department affirmed, holding that "Family Court properly determined that visitation between the paternal grandparents and the children was in the children's best interests" and that "the estrangement between the paternal grandparents and the children resulted from the animosity between the mother and the paternal grandparents, and the record supported the forensic evaluator's determination that the paternal grandparents' conduct was not the cause of the animosity."

Custody - Visitation – As Agreed – Modification Dismissal Reversed

In Matter of Kelley v. Fifield, 2018 Westlaw 1441971 (4th Dept. Mar. 23, 2018), the father appealed from a September 2016 Family Court order which, *sua sponte* and without a hearing, dismissed the father's petition for modification of a prior order, which had granted him supervised visitation "as the parties can mutually agree. "The father alleged changed circumstances, including that: the mother had not allowed him any contact in 3 years; the mother had alienated the child from

him; and he had been incarcerated and was seeking correspondence and supervised visitation to reconnect with the child. The Fourth Department reversed, on the law, reinstated the petition and remitted for further proceedings. The Appellate Division held: "Where, as here, a prior order provides for visitation as the parties may mutually agree, a party who is unable to obtain visitation pursuant to that order 'may file a petition seeking to enforce or modify the order' (citations omitted). We agree with the father that the court erred in dismissing the modification petition without a hearing inasmuch as the father made 'a sufficient evidentiary showing of a change in circumstances to require a hearing' (citation omitted). *** [W]e conclude that the father adequately alleged a change of circumstances insofar as the visitation arrangement based upon mutual agreement was no longer tenable given that the mother purportedly denied the father any contact with the child (citation omitted). In addition, we note that, although the father is now incarcerated, there is a rebuttable presumption that visitation is in the child's best interests."

Custody - Visitation – In NY Only; No Unaccompanied Minor Travel

In Matter of Annalyn DCC v. Timothy R., 2018 Westlaw 1414202 (1st Dept. Mar. 22, 2018), the father appealed from a July 2017 Family Court order, which denied his request for modification of a prior order, granted the mother's request for

modification and directed that the father's visitation be in New York State. The First Department affirmed, holding that Family Court "properly found that the father failed to demonstrate a change in circumstances to warrant, among other things, allowing the parties' six-year-old child to travel as an unaccompanied minor to the United Kingdom for parental access time" and that "the court properly ordered that the father's visitation with the child take place within the state of New York as in the child's best interest."

Equitable Distribution – License – Student Loan Debt; Life Insurance – Trustee Designation

In Stubbs v. Facey, 2018 Westlaw 1309769 (2d Dept. Mar. 14, 2018), the wife appealed from a May 2015 Supreme Court judgment which directed her to maintain a life insurance policy for the benefit of the parties' child with the husband as trustee, and awarded her only $294,000 (percentage unspecified) as her share of the husband's enhanced earning capacity (value unspecified) from his medical license. The Second Department affirmed, upholding the life insurance directive and the husband's trustee status. As to the distributive award, the Appellate Division held that "Supreme Court properly took into consideration the marital portion of the defendant's student loan debt in determining his enhanced earning capacity."

Equitable Distribution - Separate Property – Appreciation;

Credit Granted; Maintenance Denied

In Spencer-Forrest v. Forrest, 2018 Westlaw 1179339 (2d Dept. Mar. 7, 2018), both parties appealed from a November 2016 Supreme Court judgment which, among other things: awarded the wife $30,000 (20%) of the appreciation in the marital residence; provided the husband with a separate property credit of $105,000; and denied the wife's request for maintenance. The Second Department modified, on the law and in the exercise of discretion, by increasing the wife's share of the marital residence to $122,500 (50%), and otherwise affirmed. The parties were married in March 1984 and had no children together, but children from each of the parties' prior marriages resided with the parties. Both parties were employed for the majority of the marriage, and the wife provided care for the husband's children, who were younger and resided in the marital residence longer than her children. The husband purchased the marital residence prior to the marriage, and transferred the property into joint names in 1989. Both parties contributed to the household expenses, the husband more so than the wife, who retired in about 2007, 5 years before she commenced the divorce action in August 2012. The wife was 68 years old and the husband was 67 years old at the time of trial. The Appellate Division held that Supreme Court erred in awarding the wife 20% of the increase in value of the residence between 1989, when title was transferred

to the parties jointly, and the commencement of the action, stating: “By placing the marital residence in both names, the defendant changed the character of the property to marital property (citations omitted). The court providently exercised its discretion in awarding the defendant a credit for his contribution of separate property toward the creation of the marital asset (citation omitted). However, given the plaintiff's contributions to the marital residence, financial and otherwise, during the period between the parties' marriage in 1984 and 1989, when title was transferred to both parties, the appreciation of the value of the marital residence during that period constituted marital property (citation omitted). Accordingly, the court should have utilized the valuation of the marital residence at the time of the marriage, or $105,000, as the sum of the defendant's separate property contribution. Moreover, although the defendant thereafter contributed a larger share of funds towards the maintenance of the residence, in light of the plaintiff's contributions to the residence, financial and otherwise, an award to her of 50% of the marital portion of the residence was warranted.” With respect to maintenance, the Second Department concluded: “In light of the age of the parties and the plaintiff's distributive award, the Supreme Court providently exercised its discretion in denying the plaintiff an award of maintenance.”

Family Offense - Harassment 2d; Child Removed from Order of Protection

In Matter of Alquidamia E.R. v. Luis A., 2018 Westlaw 1190650 (1st Dept. Mar. 8, 2018), the husband appealed from an October 2015 Family Court order, which found that he committed harassment in the second degree, and granted a two-year order of protection in favor of the wife and her minor son. The First Department modified, on the law and the facts, to remove reference to the wife's son from the order of protection. The Appellate Division held that the wife "established by a preponderance of the evidence that respondent, her husband, committed the act of harassment in the second degree by physically shoving her and making threats of physical violence toward her while having the requisite intent to harass, annoy or alarm her." The Court concluded that "there is no evidence in the record to support extending the order to petitioner's son."

Family Offense – Harassment 2d–Statements Outside Petition Disallowed

In Matter of Almaguer v Almaguer, 2018 Westlaw 1404102 (2d Dept. Mar. 21, 2018), the husband appealed from a May 2017 Family Court order of protection, made following a hearing upon a finding that he committed harassment in the second degree, and which directed him to stay away from the marital residence for 2 years. The Second Department reversed, on the law, remitted to

Family Court for a new hearing and determination, and reinstated the temporary order of protection. The wife alleged that the husband threatened to kill her if she filed for divorce. The Appellate Division held: “Family Court erred in considering and relying upon statements made by the husband during a preliminary conference and in proceedings prior to the hearing. Statements made during a preliminary conference are not admissible at a fact-finding hearing (*see* Family Ct Act §824). Moreover, the court may not rely upon evidence of an incident not charged in the petition in sustaining a charge of harassment.”