NYSBA FAMILY LAW SECTION, Matrimonial Update, April 2019

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Agreements - Set Aside – Duress and Unconscionability – Summary Judgment Denied; Disclosure – Nonparty – Reasons Needed

In Gandham v. Gandham, 2019 Westlaw 1272551 (2d Dept. Mar. 20, 2019), the wife appealed from February 2017 and March 2017 Supreme Court orders which, respectively, granted a nonparty's motion to quash certain subpoenas she issued, and granted the husband's motion for summary judgment dismissing her counterclaim to enforce a June 2016 stipulation of settlement. The Second Department affirmed the order granting the nonparty's motion to quash and reversed, on the facts, the order granting the husband's motion for summary judgment. The parties' June 2016 stipulation settled the husband's 2014 action for divorce and provided that said action would be discontinued. The husband commenced a second action later in June 2016 and the wife counterclaimed for enforcement of the June 2016 stipulation, against which counterclaim the husband moved for summary judgment, alleging that the stipulation, was "the product of duress and was unconscionable." The husband claimed that the stipulation "transferred virtually all of the marital assets to the defendant and all of the marital debts to the plaintiff," but also "recited that the transfers were 'to compensate the

[defendant] for all the marital assets wasted by the [plaintiff],' including payments to women with whom the [plaintiff] allegedly had adulterous relationships and whom he held out publicly as his wives." In December 2016, the wife served subpoenas duces tecum and a subpoena seeking testimony on a nonparty -- one of the women with whom the wife alleged the husband had an adulterous relationship. Supreme Court's February 2017 order granted the motion to quash because: (1) the subpoenas did not comply with CPLR 3101(a)(4) [failure to state the circumstances or reasons the evidence was needed]; and (2) the nonparty demonstrated that the evidence sought was "utterly irrelevant" to the action. The Appellate Division, in affirming the February 2017 order, disagreed "that the testimony sought from the nonparty was utterly irrelevant," but agreed with Supreme Court "that the subpoenas were defective since, among other things, the defendant failed to provide the nonparty with the required explanation of the circumstances or reasons requiring disclosure either on the face of the subpoenas or in any accompanying material," citing CPLR 3101[a][4]. The Court concluded that "Supreme Court should not have granted the plaintiff's motion *** for summary judgment dismissing the defendant's counterclaim." The Second Department held: "Assuming the facts alleged in the stipulation regarding the plaintiff's wasteful conduct are proven, the stipulation is not

unconscionable on its face, and the plaintiff failed to establish, prima facie, his entitlement to judgment as a matter of law dismissing the counterclaim on the basis that the stipulation is unconscionable (citations omitted).” As to duress, in denying summary judgment to the husband, the Appellate Division found that he “met his prima facie burden for judgment as a matter of law dismissing the defendant's counterclaim based upon the defense of duress, by proffering evidence demonstrating that the defendant coerced him to sign the stipulation by making credible threats that she would commit suicide if he refused to sign the stipulation. However, in opposition, the defendant raised a triable issue of fact as to whether the plaintiff executed the stipulation under duress.”

Child Support – CSSA Cap $300,000, Imputed Income; Counsel Fees – After Trial; Equitable Distribution – Stock Options (50%); Maintenance – Denied, Duration of Temporary Award as Factor

In Feng v. Jansche, 2019 Westlaw 1028961 (1st Dept. Mar. 5, 2019), both parties appealed from an October 2017 Supreme Court judgment which, upon a July 2017 decision after trial of the wife’s 2013 divorce action: (1) distributed 40% of the stipulated valued of the husband’s stock options and restricted stock units to the wife; (2) terminated the temporary maintenance award as of July 31, 2017 and declined to award the wife post-divorce maintenance; (3) imputed income of $831,710 to

the husband, imposed a CSSA income cap of $400,000 and made the child support award prospective; and (4) awarded the wife $25,000 in counsel fees. The First Department modified, on the law and the facts, to: (1) award the wife 50% of the value of the marital portion of defendant's stock options and restricted stock units; (2) impose a CSSA income cap of $300,000 and award child support retroactive to October 1, 2014; and (3) remand for further proceedings. The Appellate Division held that "[t]o the extent the marital portion of defendant's stock options and GSUs represents compensation, plaintiff's award should be increased from 40% to 50% of the value, or $126,487." With respect to maintenance, the First Department determined that Supreme Court "properly declined to award plaintiff post-divorce maintenance on the grounds that she holds a doctorate in computer science and is working full-time as a data scientist" and correctly terminated the temporary order as of July 2017 when its decision after trial was issued. The Court noted that the duration of temporary maintenance "was one of the factors [Supreme] court considered in determining that further maintenance was not warranted." On the issue of imputed income, the Appellate Division held that Supreme Court "properly imputed income to defendant based on the average of his total income for the years 2012 through 2014." As to child support, the First Department found that Supreme Court "correctly considered the standard of

living the child would have enjoyed had the marriage remained intact in deviating from the statutory cap," but given the fact that the husband was ordered to pay 88% of extracurricular activities, summer camp, and private school, the Court reduced the CSSA income cap to $300,000. With respect to the issue of retroactivity, the Appellate Division agreed with the wife that Supreme Court "erred in making the child support award prospective only (citation omitted). It should be retroactive to October 1, 2014, the date on which plaintiff started receiving court-ordered pendente lite child support." The action was remanded for a determination of retroactive child support owed, including add-on expenses, and whether the husband should pay arrears "in one sum or periodic sums." The First Department upheld the $25,000 counsel fee award, determining that Supreme Court properly considered "the financial circumstances of both parties together with all the other circumstances of the case, which may include the relative merit of the parties' positions," and given that the husband had already paid $120,000 of the wife's counsel fees, the total of $145,000 was more than half of her fees at the time of trial.

Child Support – CSSA Cap $300,000, Imputed Income; Equitable Distribution – Debt and Property 50%; Maintenance – Durational

In Flom v. Flom, 2019 Westlaw 1064152 (1st Dept. Mar. 7, 2019), the wife appealed from a March 2017 Supreme Court

judgment which, among other things: (1) distributed 40% of certain marital assets to the wife and 60% to the husband, including an in-kind distribution of an LLC; (2) apportioned 40% of the assets and liabilities related to certain investments to the wife and 60% to the husband; (3) awarded the wife $26,000 per month in taxable maintenance for 6 years; and (4) imputed annual income to the wife of $50,000 for CSSA purposes and applied the then-statutory cap of $141,000. The First Department modified, on the law and the facts, by: (1) increasing the wife's distribution of assets to 50%; (2) increasing her distribution of and responsibility for, the assets and liabilities of the investments to 50%; and (3) imposing a CSSA cap of $300,000, without imputing any income to the wife, and increasing child support for the parties' unemancipated child from $1,238 per month to $4,250 per month, retroactive to the entry of judgment. The Appellate Division held that Supreme Court "improvidently exercised its discretion in distributing the marital assets 60% to plaintiff and 40% to defendant," citing the principle that "where both spouses equally contribute to the marriage which is of long duration, a division should be made which is as equal as possible." The parties were married for 18 years and had 2 children. The Court found that "the referee divided the marital property unequally solely because defendant was not employed outside the home and the parties

hired domestic help, and thus, in the referee's view, she did not contribute equally to the marriage." The First Department cited the trial testimony, which established that the mother "was actively involved with the children, coaching their athletic teams, attending parent-teacher conferences, and, as plaintiff testified, being 'their mom.'" Increasing the marital property distribution to the wife to 50%, the Appellate Division stated: "It is undisputed that the parties enjoyed a lavish lifestyle, and the evidence indicated that defendant played a major role in managing the home, including entertaining clients and paying household expenses from the parties' joint account. The referee's finding that there was no evidence that defendant 'ever cooked a meal, dusted a table or mopped a floor' did not support the court's determination that she was therefore entitled to only 40% of the parties' marital assets." On the issue of marital debt, the First Department determined that Supreme Court "providently exercised its discretion in apportioning liability to defendant for failed investments *** that plaintiff personally guaranteed with a collateral account," finding that "[the husband's] conduct in guaranteeing the loans did not absolve defendant of joint liability." The Court concluded on this issue: "Since the investments were made during the marriage for the benefit of the parties, the parties should share [equally] in the losses." With regard to the in-kind

distribution of the husband's interest in an LLC, which the Court increased to 50%, the Appellate Division rejected the husband's argument that the same "could not be distributed because defendant failed to value the asset" given that he proposed "prior to trial to distribute [the LLC interest] in lieu of maintenance." The Appellate Division upheld the maintenance award "based on the lavish lifestyle of the parties during the marriage, and the fact that [the wife] had not worked outside the home in over 20 years." Given the wife's now increased equitable distribution award, and Supreme Court's direction that the husband provide her with health insurance until she qualifies for Medicare, the Court rejected the wife's argument for "at least 12 years, if not lifetime, maintenance." With regard to child support, the First Department held that there was "no basis" for the imputation of $50,000 in annual income to the wife and noted the referee's findings that: the husband "had significantly greater financial resources and a gross income that greatly exceeded defendant's"; the child enjoyed a "luxurious standard of living" during the marriage; and "no deviation from the then-income cap of $141,000 was warranted because plaintiff had voluntarily agreed to pay the child's educational expenses, coaching, tutoring and summer camp." The Court concluded that "given the factors considered, but subsequently disregarded, by the referee *** we find that a

$300,000 income cap, which would result in a monthly basic child support award of $4,250, retroactive to entry of the judgment of divorce, would satisfy the child's ‘actual needs’ and afford him an ‘appropriate lifestyle.’”

Child Support - CSSA – Imputed Income – Fiancé Support

In Matter of Picone v. Golio, 93 NYS3d 879 (2d Dept. Mar. 13, 2019), Golio, the non-custodial parent, appealed from a June 2018 order denying his objections to a December 2017 Support Magistrate order, which, after a hearing, upon imputing an additional $47,600 to his earned income, directed him to pay child support of $1,460 per month for 2 children. The Second Department affirmed, noting that the Support Magistrate determined that Golio's annual income was $94,532, including imputed income of $47,600 “based upon his testimony regarding his access to and receipt of financial support from his fiancé,” which constitutes "money, goods, or services provided by relatives and friends," as defined by FCA §413[1][b][5][iv].

Child Support – Modification – 2010 Amendments

In Bishop v. Bishop, 2019 Westlaw 1051899 (2d Dept. Mar. 6, 2019), the mother appealed from an October 2016 Supreme Court order which, without a hearing, granted the father’s motion pursuant to CPLR 3211(a)(7) to dismiss her April 2016 petition for an upward modification of the child support provisions of an April 2013 stipulation incorporated into an October 2013

judgment, and denied her cross motion pursuant to Domestic Relations Law §238 and 22 NYCRR 130-1.1 for counsel fees. The Second Department modified, on the law, by: (1) denying the father's motion to dismiss; and (2) by reversing so much of the order appealed from as denied the mother's cross motion pursuant to Domestic Relations Law §238 for counsel fees, and remitted for a hearing on the mother's petition for an upward modification of child support for the 2 subject children and her cross motion for counsel fees. The April 2013 stipulation provided that the father would pay the mother $3,000 per month in child support. In May 2016, following the mother's April 2016 Family Court modification petition, the father moved in Supreme Court to: appoint a forensic psychiatrist to determine whether a modification of custody was in the children's best interests; transfer the Family Court petition to Supreme Court; and, as above stated, dismiss the modification petition. On consent, Supreme Court converted the modification petition into a post-judgment motion, and the father's motion to appoint a forensic psychiatrist was withdrawn. The parties' April 2013 stipulation specifically opted out of the 3-year and 15% modification grounds, meaning that the wife had the burden of establishing "a substantial change in circumstances," as defined by DRL §236[B][9][b][2][i]. The Appellate Division noted that when evaluating a claim of "substantial change in circumstances," a

court must consider “the increased needs of the children, the increased cost of living insofar as it results in greater expenses for the children, a loss of income or assets by a parent or a substantial improvement in the financial condition of a parent, and the current and prior lifestyles of the children,” and must hold a hearing “where the parties’ evidentiary submissions disclose the existence of genuine issues of fact.” The Second Department found that “the parties' evidentiary submissions raised genuine issues of fact with regard to whether an increased cost of living and expenses related to the children and an increase in the plaintiff's income warranted upward modification” and Supreme Court should have denied the father’s motion to dismiss and should have held a hearing. As to counsel fees, the Court held: “***given the presumption that counsel fees should be awarded to the less monied spouse (*see* Domestic Relations Law §238), the Supreme Court also should have held a hearing on *** defendant's cross motion *** pursuant to Domestic Relations Law §238 ***.” The Appellate Division concluded that “Supreme Court providently exercised its discretion in denying that branch of [the mother’s] cross motion *** pursuant to 22 NYCRR 130-1.1 for an award of counsel fees based on her contention that *** plaintiff's motion ** to appoint a forensic psychiatrist was frivolous.”

Custody – to Father – Interference – Absconding with Child

In Matter of Jarvis v. Lashley, 169 AD3d 1043 (2d Dept. Feb. 27, 2019), the mother appealed from a February 2017 Family Court order, which granted sole custody of a child born in 2011 to the father. The Second Department affirmed, noting that the parents lived together until the child was 4 years old, when in October 2015, the mother took the child to Georgia without telling the father. The Appellate Division found that the mother: "willfully interfered with the relationship between the father and the child by absconding with the child for three months and not facilitating contact between the father and the child during that time; *** [and] failed to foster a positive relationship between the child and the father after returning to New York."

Custody - Modification – Summary Judgment – Mental Health, Neglect

In Matter of Elisa N. v. Yoav I., 2019 Westlaw 1178745 (1st Dept. Mar. 14, 2019), the father appealed from a January 2016 Family Court order, which granted the mother's summary judgment motion upon her petition to modify an October 2014 custody order, and awarded her sole custody of the subject children. The October 2014 order was rendered following a hearing, and granted supervised visitation to the father "without end unless the father could demonstrate that he was receiving treatment for his

mental illness within the next six months." The First Department affirmed, holding that "a full plenary hearing was not required because [Family Court] possessed ample information to render an informed decision on the children's best interests and because the father offered no proof that he was in compliance with his treatment of his mental health issue." The Appellate Division determined that the "neglect finding against [the father] constituted a change in circumstances warranting a modification of the prior custody arrangement" and it was clear that the father "did not get such treatment and that the safety risk to the children has not been mitigated" since the prior order.

Custody - Refusal to Allow GAL to Meet Father's Girlfriend; Zones of Decision Making Rejected

In Amley v. Amley, 169 AD3d 605 (1st Dept. Feb. 26, 2019), the father appealed from an October 2016 Supreme Court order after trial, which awarded the mother sole custody of the parties' daughter. The First Department affirmed, noting that the father had not seen the child since March 2016 "due to his refusal to satisfy the court's precondition that he allow [the child's guardian ad litem] to meet his girlfriend, an indication that he apparently cares more about his own needs than those of his child." The Appellate Division held that Supreme Court "correctly set aside the parties' stipulations, which appear to have allocated arenas of decision-making to each parent, because

the stipulations required cooperation and coordination between the parents, which the court correctly found impeded by intense animosity at this juncture."

Family Offense - Criminal Mischief 4th – Not Found

In Matter of Ghassem T. v. Kevin T., 93 NYS3d 835 (1st Dept. Mar. 7, 2019), respondent (petitioner's son) appealed from an April 2017 Family Court order, which, after a hearing, found that he committed harassment in the second degree and criminal mischief in the fourth degree, and granted a one year order of protection in favor of his father. The First Department modified, on the law, to vacate the finding that the son committed criminal mischief in the fourth degree [PL 145.00(1)], upon the ground that the property he allegedly damaged "had been gifted to him by petitioner."

Family Offense – Harassment 2d Found

In Matter of Wilson v. Wilson, 169 AD3d 1279 (3d Dept. Feb. 28, 2019), the husband appealed from a November 2017 Family Court order which, following a hearing, found that he committed family offenses and granted the wife a 2-year order of protection. The Third Department affirmed. The parties resided together until February 2017, when the wife told the husband to leave the marital residence due to his drug use. The Appellate Division found that beginning in the fall of 2016, during disputes which the wife testified were caused by the husband's

crystal methamphetamine addiction, the husband "referred to petitioner in vulgar terms *** and *** grabbed her and pinned her in place while demanding that she listen to him." The wife further testified that on Christmas Eve 2016, the husband "pushed her onto a bed, clambered on top of her and punched a hole in the wall after she kicked him away." The husband conceded that in February 2017, he had "physically restrained [the wife] and punched a wall." The Third Department concluded that the testimony established that the husband "harbored an intent to annoy, harass or alarm" the wife and that he "committed, at the very least, the family offense of harassment in the second degree."

Family Offense – Intimate Relationship

In Matter of Rizzo v. Pravato, 2019 Westlaw 1141778 (2d Dept. Mar. 13, 2019), petitioner appealed from a March 2018 Family Court order which, without a hearing, dismissed her March 2017 family offense petition against her step-aunt for lack of subject matter jurisdiction. The Second Department reversed, on the law, reinstated the petition, and remitted to Family Court for a hearing to determine subject matter jurisdiction pursuant to Family Court Act §812(1)(e). Petitioner's mother was married to respondent's brother; respondent was the sister of petitioner's stepfather. Here, the issue is whether the parties are "members of the same family or household," FCA §812(1),

defined as here relevant as “persons who are not related by consanguinity or affinity and who are or have been in an intimate relationship regardless of whether such persons have lived together at any time.” FCA §812[1][a], [e]. The Appellate Division held that “Family Court should not have determined, without a hearing, that the parties were not and had never been in an intimate relationship,” given that “the legislature left it to the courts to determine on a case-by-case basis what qualifies as an intimate relationship within the meaning of Family Court Act §812(1)(e) based upon consideration of factors such as the nature or type of relationship, regardless of whether the relationship is sexual in nature; the frequency of interaction between the persons; and the duration of the relationship.” The Court concluded that “in light of the parties’ conflicting allegations as to whether they had an ‘intimate relationship’ within the meaning of Family Court Act §812(1)(e), the Family Court *** should have conducted a hearing on that issue.”

Maintenance - Durational - Increased to Age 62; Health Insurance; Life Insurance; Retroactivity

In DiLascio v. DiLascio, 2019 Westlaw 1141928 (2d Dept. Mar. 13, 2019), the wife appealed from a June 2016 Supreme Court judgment, upon October and December 2015 decisions after trial, which, among other things: (1) awarded her maintenance of only

$140,000 per year until the earliest of May 1, 2022, the death of either party, or her remarriage; (2) directed that maintenance and child support would begin on the first day of the first month following entry of judgment and declined to make said awards retroactive to the September 2012 commencement of the action; and (3) directed the husband to maintain life insurance of only $500,000. The Second Department modified, on the law, on the facts, and in the exercise of discretion, by: (1) increasing the duration of maintenance so as to terminate at the earliest of the wife’s age 62, the death of either party, or her remarriage; (2) directing that maintenance and child support shall be retroactive to September 19, 2012; (3) directing the husband to pay for the wife's health insurance for the same duration as his maintenance obligation; and (4) directing the husband to maintain a declining term policy of life insurance for the wife’s benefit, until payment of child support, maintenance, and health insurance is completed, in an amount sufficient to secure those obligations. The Appellate Division remitted to Supreme Court for a calculation of the amount of retroactive maintenance and child support arrears from September 19, 2012, giving the husband appropriate credit for the actual amount of the carrying charges on the marital home and expenses he paid pursuant to the pendente lite order, and taking into account his payments of pendente lite maintenance and child

support, and to determine an appropriate amount of life insurance to secure the payment of the maintenance, child support, and health insurance. The parties were married in 1997 and have two children, a son, who resides with the wife, and a daughter, who resides with the husband. The son became severely disabled at the age 5, has required 24-hour care and attends school with a private duty nurse, with nursing care paid for by Medicare and supplemented by both parents for any gaps in coverage. The parties had a prenuptial agreement in which they were governed as to property by a “title scheme.” The husband “had a highly lucrative career in the financial industry, and the [wife] last worked as an ultrasound technician before the marriage.” As to maintenance, the Appellate Division agreed “with the Supreme Court's determination, upon its consideration of all of the factors set forth in Domestic Relations Law former §236(B)(6)(a), that, notwithstanding the plaintiff's care of their disabled son, an award of lifetime maintenance was not appropriate,” but increased the award of durational maintenance until the wife’s age 62, subject to the above termination events, as such an extension “would more realistically provide the plaintiff a sufficient opportunity to become self-supporting.” With regard to retroactivity, the Court cited the statutory rule that the awards “are retroactive to, the date the applications for maintenance and child support were first made,

which, in this case, was September 19, 2012," citing Domestic Relations Law §236[B][6][a] and [7][a]. On the health insurance issue, the Second Department held that "in light of all of the circumstances of this case, the defendant should be directed to pay the plaintiff's health insurance costs during the period the defendant is obligated to pay maintenance."

Maintenance - Termination – Cohabitation

In Kelly v. Leaird Kelly, 2019 Westlaw 1218215 (4th Dept. Mar. 15, 2019), the former husband (husband) appealed from an August 2017 Supreme Court order which, after a hearing, denied his motion to terminate maintenance to the former wife (wife) upon the ground of cohabitation. The Fourth Department reversed, on the law, and granted the husband's motion. The parties' incorporated agreement provided that maintenance ends if the wife remarries or if there is "a judicial finding of cohabitation pursuant to Domestic Relations Law §248." The Appellate Division reasoned: "Pursuant to Domestic Relations Law §248, cohabitation means 'habitually living with another person' (citations omitted)" and noted that the Court of Appeals "found that a common element 'in the various dictionary definitions [of cohabitation] is that they refer to people living together in a relationship or manner resembling or suggestive of marriage,'" citing Graev v Graev, 11 NY3d 262, 272 (2008). The Fourth Department noted, among other hearing testimony, that "it is

undisputed that defendant reconnected with the man on a dating website and moved directly into his home from her marital residence, after which they commenced a sexual relationship. They have taken multiple vacations together, including for his family reunion, and they sometimes shared a room while on those vacations. Defendant wears a diamond ring on her left hand that the man purchased. They also testified regarding their complicated financial interdependence." The Court concluded that "the record does not show that the sexual relationship between defendant and the man had ended" and found that the husband "established by a preponderance of the evidence that defendant was engaged in a relationship or living with the man in a manner resembling or suggestive of marriage."