NYSBA FAMILY LAW SECTION, Matrimonial Update, August 2019

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COURT OF APPEALS NOTE

In Pangea Capital Mgt., LLC v. Lakian, 2019 Westlaw 2583109 (June 25, 2019), the Court of Appeals, in response to a certified question from the Second Circuit, held that where an entered divorce judgment grants a spouse an interest in real property pursuant to DRL 236 and the spouse does not docket the divorce judgment in the county where the property is located, that spouse's interest is not subject to attachment by a subsequent judgment creditor who has so docketed its judgment (CPLR 5203) and seeks to execute against the property. The parties were married in 1977 and in 2002 purchased a home in Suffolk County for $4.5 million, with title in the husband's name having been immediately transferred to a trust for which the husband was sole trustee, with the sole power to revoke and terminate the trust, and of which the parties were each 50% beneficiaries as tenants in common. The parties settled the wife's 2013 New York County divorce action by written agreement in 2015, which provided that the wife would receive 62.5% of the sale proceeds of the Suffolk County property plus $75,000 and the husband would receive the remainder. A June 2015 divorce judgment incorporated the agreement. In 2012, Pangea, the

husband's former employer, brought an action against the husband and a co-worker (with whom he was romantically involved) alleging that they had defrauded Pangea by diverting millions of dollars to themselves. The action was discontinued in favor of arbitration, which awarded $14 million to Pangea in January 2016. Pangea brought an action in US District Court to enforce the award against the husband and obtained an order of attachment against the property. The husband sought modification of the attachment order to permit the sale of the property and the federal court allowed the wife to intervene. The parties agreed to the sale and that the over $5 million in proceeds would be deposited in court, pending the outcome of Pangea's claim. The federal court confirmed the award against the husband and entered a judgment in Pangea's favor in November 2016, which Pangea promptly docketed in Suffolk County. The Court of Appeals concluded that the wife did not become the husband's judgment creditor, and thus, this was not a case of competing judgment creditors under CPLR 5203 with priority according to first in time docketing. Rather, the Court of Appeals held that the judgment of divorce was "a final settling of accounts" between spouses with an equitable interest in all marital property, such that legal rights to specific marital property vest upon the judgment of divorce, creating actual independent ownership interests upon divorce.

Child Support – Approximately Even Custodial Time; Recoupment Allowed

In Matter of Rapp v. Horbett, 2019 Westlaw 2896748 (4th Dept. July 5, 2019), the mother appealed from a June 2017 Family Court order, which denied her objections to a Support Magistrate order awarding the father $125 per week in child support for the period April 2, 2015 to January 1, 2016, during which period the parties "shared near equal access time with the child and the father had the higher income." The Fourth Department modified on the law, vacated the foregoing order and remitted for further proceedings, to establish a credit to the mother against any arrears accruing after January 1, 2016, when the mother "did not diligently exercise her access time and the father spent far more time with the child." The Appellate Division allowed recoupment to "relieve the mother of an erroneously-imposed financial obligation" and in consideration of her "significantly less income and *** [receipt of] certain public benefits, while the father received substantial disability and pension benefits and had significant assets."

Child Support - Modification – Agreement Condition Precedent Not Met

In Matter of Yerdon v. Yerdon, 2019 Westlaw 3226535 (3d Dept. July 18, 2019), the mother appealed from a July 2018 Supreme Court order dismissing her August 2017 Family Court

child support modification petition, which had been consolidated with the father's Supreme Court enforcement proceeding. The parties were married in 2000 and had one child born in 2002. Their March 2016 agreement was incorporated into an April 2016 divorce judgment and provided that the mother would waive CSSA child support in return for the father's interest in the marital residence. The agreement further stated that if either party sought to modify the agreement, he or she was first required to return anything received under the agreement. The father's Supreme Court enforcement proceeding sought return of the money and interest in the marital home received by the mother under the agreement. Supreme Court found that the mother failed to meet the condition precedent and that the father was entitled to enforcement of the agreement. The Third Department affirmed, holding that the condition precedent was unambiguous and also rejecting the mother's argument that the condition precedent cannot be enforced because the parties did not opt out of their modification rights pursuant to DRL 236(B)(9)(b)(2)(ii), finding that child support modification was not precluded if the condition precedent was satisfied.

Child Support - Modification – Emancipation – Written Agreement

In Matter of Brandon v. Lopez, 2019 Westlaw 3210531 (2d Dept. July 17, 2019), the mother appealed from a December 2018 Family Court order denying the mother's objections to an October

2018 Support Magistrate order, which, after a hearing, dismissed her child support modification petition. The parties were divorced in May 1998 and a subsequent child support order was made in November 2013 (terms unspecified). The judgment of divorce provided for termination of child support upon emancipation, defined as, among other things, the child's age 21. Just prior to the child's 21st birthday, the mother filed a petition seeking to extend child support beyond her 21st birthday, based upon a notarized document which the father admitted he had signed. The parties did not provide the judgment of divorce or incorporated stipulation to the Support Magistrate; the mother attached the said documents to her objections. The Second Department affirmed, holding that Family Court "could not enforce the notarized agreement to which the parties referred as it was not incorporated into the judgment of divorce" and that the judgment and stipulation could not be considered because they "were not offered at the hearing."

Counsel Fees – After Trial - Granted

In Lugo v. Torres, 2019 Westlaw 3046157 (2d Dept. July 10, 2019), the husband appealed from an April 2018 Supreme Court order which, following a 23-day trial (see 2019 Westlaw 3046162), awarded the wife $193,549 in counsel fees. The Second Department affirmed, noting that the husband's "dilatory conduct resulted in unnecessarily protracting this otherwise

straightforward matrimonial action" and that his "litigiousness was fueled by seemingly unlimited family resources, which allowed him to spend well over $800,000 in litigating this case."

Counsel Fees - After Trial; Maintenance – Duration Increased

In Beyel v. Beyel, 173 AD3d 1129 (2d Dept. June 26, 2019), the wife appealed from a September 2016 Supreme Court judgment, rendered upon a December 2015 decision after trial of the wife's 2013 divorce action, which awarded her maintenance of only $3,000 per month for 7 years and counsel fees of only $10,000. The Second Department modified, on the facts and in the exercise of discretion, by increasing the duration of maintenance to 10½ years and upheld the counsel fee award. The Appellate Division noted: the parties were married 27 years; the wife's age at the time of trial (unspecified) and her limited full-time work experience; and the disparity in the parties' incomes and education levels. With respect to counsel fees, the Second Department held that the same was proper, given "the amount of the distributive award [unspecified] and the maintenance award."

Counsel Fees - Attorney for Child – Non-compliance with Part Rules

In Basile v. Wiggs, 173 AD3d 1127 (2d Dept. June 26, 2019), the father appealed from a June 2017 Supreme Court money judgment in favor of the AFC for $8,876. The Second Department

reversed, on the law, and remitted to Supreme Court. Supreme Court's October 2014 order directed the father to pay all of the AFC's fees, including an initial $3,000 deposit and provided that the AFC could not demand payments except as authorized by the order, with further fees to be sought by application on notice to the parties, in accordance with the applicable Matrimonial Part Operational Rules. The AFC sent periodic demands for payment to the father's attorney without court approval and then sought the subject money judgment, which the father opposed, citing the October 2014 order and the Part Rules. The Second Department deemed the motion for a money judgment to be a motion for further fees and instructed Supreme Court to allow the father an opportunity to respond.

Custody - Domestic Violence; Sexual Abuse; Video Games - Remitted to Different Judge

In Matter of Nicole TT. v. David UU., 2019 Westlaw 3226724 (3d Dept. July 18, 2019), the mother appealed from a March 2018 Family Court order which, after a 13-day hearing held between October 2016 and February 2017, dismissed her January 2016 petition seeking custody of the parties' child born in 2010 and granted the father's cross petition, awarding him sole legal and physical custody with 2 hours of supervised visitation per week to the mother. The Third Department reversed, on the law, and remitted for further proceedings before a different judge. The

mother's January 2016 petition was based upon the child's report to her (when she returned home at 8 p.m. to find the father playing a video game and the child awake and alone in her room), that the father had touched her in a sexual manner. The mother had the child examined and then interviewed by CPS. Family Court initially issued an order of protection, prohibiting any contact with the father and ordered a forensic evaluation in April 2016. The mother filed a family offense petition in September 2016, based upon an additional allegation of sexual abuse during the father's supervised visit 3 days earlier, but when it was revealed that the father wore a body camera during the visit, which did not show anything inappropriate, Family Court issued a temporary order, removing the child from the mother's custody and placing her in the custody of the paternal grandmother with supervised visitation. The Appellate Division found that the mother, even after she initially returned to work, remained the child's primary caretaker, while the father, during his nonworking hours, played "an interactive video game while wearing a headset, leaving the mother to attend to the child." At the time of the hearing, the father worked full time and had the support of his parents, while the mother was unemployed and relied upon her aging great-grandmother for help. Both parents had used drugs and alcohol in the past and were seeking help at the time of the hearing, but the mother had tested positive for

opiates, leading Family Court to find that she was "in need of significant professional help." An October 2015 CPS report against the father was indicated and validated the mother's claim that the father had punched her in the face in the child's presence; the CPS caseworker observed the mother's black eye during an interview. The maternal great-grandmother and another witness testified that they "regularly heard the parties fighting and observed bruises on the mother." The Third Department held that Family Court's decision "misstates and mischaracterizes the record evidence" and "lacks a sound and substantial basis in the record." The Appellate Division noted that Family Court's decision characterized the testimony of the mother's psychologist, who opined that the mother was mentally fit, as a "brief interlude of comic relief" and "lauded the father's willingness to undergo penile plethysmograph testing – characterized as a 'colonoscopy of the soul' – as 'speak[ing] volumes to his actual innocence.'" The Third Department found that Family Court "went so far as to criticize the forensic expert's testimony concerning the September 2016 visitation as an example of blending incidents by commenting, 'The only blending here … is that of pseudoscience with the world's oldest profession.'" The Appellate Division concluded: "The record does not support any of this unfortunate and bizarre commentary" and determined that Family Court "diminished the evidence of

domestic violence perpetrated by the father against the mother in the child's presence."

Custody – Forensic Report - Copy to Pro Se; Evidence – Forensic Custody Report Received

In Matter of Raymond v. Raymond, 2019 Westlaw 3045177 (2d Dept. July 10, 2019), the father appealed from a February 2018 Family Court order which, among other things, granted the mother sole custody of the parties' child. The Second Department affirmed, holding that "Family Court did not improvidently exercise its discretion in denying the request of the father, who proceeded pro se, for a copy of the forensic report prepared by the court-appointed forensic evaluator. The court provided the father with liberal access to the report over an extended period of time during which he could review the report upon request and take notes with regard to its contents (citations omitted). The father has failed to show that his ability to prepare for the hearing was prejudiced by his not having his own physical copy of the report." The Appellate Division agreed that Family Court properly admitted the forensic report into evidence, finding: "The parties received access to the report well in advance of the scheduled hearing, the forensic evaluator testified and was cross-examined by the parties at the hearing, the parties had the opportunity to rebut the forensic evaluator's findings, and the conclusions in the report were

based primarily on the forensic evaluator's firsthand interviews rather than on hearsay statements made by nontestifying declarants."

Custody - Visitation – Modification – Child's Wishes (9 y/o); Missed Activities; False Sex Abuse Allegations

In Matter of Princetta S.S. v. Felix Z. J., 173 AD3d 637 (1st Dept. June 27, 2019), the mother appealed from an October 2015 Supreme Court order which dismissed her petition for modification of visitation. The First Department reversed, on the law, and remanded to Family Court for a hearing. The Appellate Division held that the mother's allegations that: the father had been making baseless sex abuse allegations against her; the now almost 9-year-old child wanted to spend one weekend per month with the mother; and that the father was not taking the child to her extracurricular activities as required, could all constitute changes in circumstances.

Custody - Temporary – No Hearing – Reversed

In Matter of Sandra Y. v. Jahi J.Y., 101 NYS3d 603 (1st Dept. July 2, 2019), the attorney for the child (AFC) appealed from a November 2018 Family Court order which granted temporary custody. The First Department reversed, on the law, and remanded for a hearing. The Appellate Division found that Family Court's temporary order was: "based exclusively on school records and allegations of educational neglect, which the parties were not given an opportunity to challenge

by way of a hearing"; "over the objection of the [AFC] *** based on statements and observations in a court-ordered investigation (COI) report regarding the father's violent nature and possible drug abuse"; and devoid of any articulation of "an emergency situation that warranted the imposition of a new custody order without a hearing."

Custody - Visitation – Activity Precedence Reversed; Increased – Substance Abuse Unsubstantiated; Police Exchange Reversed

In Matter of Cuccia-Terranova v. Terranova, 2019 Westlaw 2843762 (2d Dept. July 3, 2019), the father appealed from a May 2018 Family Court order, which: limited his weekend visitation to the 3rd weekend from noon Saturday to noon Sunday; did not provide weekday visitation; awarded even year Christmas Day visits from noon to 9 p.m. and no odd year access; directed retrieval and drop off at the local police station; directed that his visits could not adversely affect the children's school, religious or extracurricular activities; and directed that if he cancelled visits, he got no makeup time unless the mother agreed. The Second Department modified, on the facts and in the exercise of discretion, by: granting him visits on Thursdays from after school until 5:30 p.m. or if no school, from noon, and increasing the 3rd weekend access to Saturdays at 10 a.m. to Sundays at 6 p.m.; granting him Christmas Eve access in odd years from the earlier or noon or release from school to 9 p.m.; deleting the police station provision and substituting

curbside at mother's residence or another agreed location; and deleting the activity conditions and the no makeup provision. The Appellate Division noted no prior issues with the father's previous exercise of weeknight and alternate weekend overnight visitation, that the mother's allegations of drug and alcohol abuse were insufficient to curtail visitation and rejected her contention that the children "were very busy with activities" which made a fixed schedule "difficult." The police station provision was unsupported by any prior issues or problems. The Second Department found Family Court's failure to provide odd year Christmas access deprived the children of contact and that Family Court "improvidently exercised its discretion to direct that the *** activities of the children are always to take precedence," since the mother is permitted to unilaterally determine such activities. The Appellate Division also found that the preclusion of makeup time was also improvident.

Custody - Visitation – Supervised – Special Needs Child

In Matter of Michael J.M. v. Antoinette T., 173 AD3d 598 (1st Dept. June 25, 2019), the father appealed from a January 2018 Family Court order which, after a hearing, denied his motion for unsupervised visitation, which was presently supervised by his aunt, a nurse, at her home. The First Department affirmed, finding that despite "having multiple opportunities over a year-long period, petitioner failed to

educate himself about how to address the child's special needs, and how to provide proper care for her when she is with him." The child's special needs included cerebral palsy, autism, asthma, sleep apnea and speech defects.

Enforcement – Contempt – Counsel Fee Order

In Lugo v. Torres, 101 NYS3d 891 (2d Dept. July 10, 2019), the husband appealed from a November 2018 Supreme Court order which, after a hearing, granted the wife's motion to hold him in civil contempt for failure to comply the Court's April 2018 order directing him to pay counsel fees of over $193,000 and directed him to be imprisoned for 30 days, "as may be extended, or until he had paid the arrears owed" to the wife for counsel fees. The Second Department affirmed, holding that there was "an unequivocal order" requiring the husband to pay the wife's counsel fees within 30 days of the date of the order and that it was "undisputed" that the husband was aware of this order. The Appellate Division found that the wife "was clearly prejudiced" by the husband's violation, "as she is more than $100,000 in debt and facing continuing, expensive, and unrelenting litigation from the [husband]." The Court noted that the husband "enjoys seemingly unlimited financial resources from a family member, who thus far has paid in excess of $1 million to cover the plaintiff's own legal fees in this action."

Evidence - Custody – Preclusion of Respondent's Testimony

Reversed

In Matter of Liska J. v. Benjamin K., 2019 Westlaw 2835000 (3d Dept. July 3, 2019), the father appealed from a May 2017 Family Court order, which, following a 3 day trial in March 2017 of the mother's August 2016 petitions, granted the parties joint legal custody of a child born in 2011, primary physical custody to the mother and granted the father visitation on alternate weekends with an overnight every Wednesday. The father argued that Family Court deprived him of procedural due process when Family Court excluded testimony as to his fitness as a parent. Family Court's decision stated that because the father did not also file a custody petition it could "only take into consideration the testimony brought by the mother." While the father raised no objections at trial to Family Court's evidentiary limitations, the Third Department reversed, on the facts, and remitted to Family Court, holding that "the court's failure to allow the father a full and fair opportunity to present evidence, coupled with the court's own limitations on its decision, constitutes a fundamental due process error ***."

Evidence - Leading Questions – Adverse Party

In Matter of Argila v. Edelman, 2019 Westlaw 2843931 (2d Dept. July 3, 2019), the mother appealed from a June 2018 Family Court order, which denied her March 2017 petition to modify an April 2016 order, so as to allow her relocate to Florida with

the parties' child born in 2015, and granted the father's modification petition so as to award joint legal custody. The Second Department affirmed. The Appellate Division rejected the mother's contention that Family Court improperly restricted her examination of the father as part of her direct case by refusing to permit her to use leading questions. Noting that this is a discretionary determination when an adverse party who is called as a witness may be viewed as hostile, thus permitting leading questions, here, the Second Department held that: "the mother already had the opportunity to cross-examine the father using leading questions when he testified as part of his own direct case"; the father "was not reluctant or evasive in answering questions"; and "the mother, on appeal, identifies no instance in which she was unable to elicit the necessary information without the use of leading questions."

Pendente Lite - Maintenance Guidelines – Deviation – Same Household, Sharing of Expenses

In Warshaw v. Warshaw, 173 AD3d 582 (1st Dept. June 25, 2019), the husband appealed from an August 2018 Supreme Court order, which awarded the wife $11,668 per month in temporary maintenance, while requiring her to pay from that sum 50% of the parties' rent (the parties were living together), utilities and household help, plus 100% of her own personal expenses, resulting in a net award to her of $4,307 per month. The First

Department affirmed, noting that the presumptive amount on the first $184,000 of the husband's income was $4,600 per month, given that the wife had no income and was not receiving child support, and that the wife had requested $4,375 per month. The Appellate Division noted that while Supreme Court should not have relied upon an income averaging, it appropriately looked beyond the husband's most recent income tax return, including the husband's 70% ownership of a business with his two brothers, and "reasonably considered the possibility that defendant, whose income declined precipitously after plaintiff commenced this action, might wield some control over the timing and amount of his compensation." The Court also rejected the husband's argument that income should be imputed to the wife based upon a master's degree she earned in 2008, finding that she had been out of the workforce for years, and that the employment and salary statistics he cited for new master's graduates "offer little insight into what a 43-year-old parent reentering the work force after or while raising three young children might be expected to earn." The First Department also considered that the youngest child was 2 years old and the parties' nanny worked twice per week.

Legislative Update - Revenge Porn – New Crime and Private Right of Action

Penal Law §245.15 is added, CPL §530.11 and FCA §812 are

amended, and Civil Rights Law §52-b is added, **all effective September 21, 2019**. A.5981/S.1719C, Laws of 2019, Chapter 109, signed July 23, 2019. For details, see NYSBA Family Law Section, Matrimonial Update, June 2019.