NYSBA FAMILY LAW SECTION, Matrimonial Update, December 2018

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Agreements – Enforcement – Statute of Limitations

In Svatovic v. Svatovic, 2018 Westlaw 6052110 (1st Dept. Nov. 20, 2018), both parties appealed from, among other things, a March 2017 Supreme Court judgment which, after a hearing in the wife's 2014 divorce action, determined that the husband was entitled to $250,000 from the wife as his share of the former marital residence, pursuant to the terms of a September 1995 agreement. The parties were married in 1974 and have 2 children. The agreement provided that the residence would be sold "as quickly as possible" when the children attained age 22, which occurred in May 2003. The First Department modified, on the law, "to declare that enforcement of the parties' separation agreement is barred by the applicable statute of limitations and that all claims regarding the sale of the former marital residence and payment of equitable distribution therefrom are dismissed as time barred," based upon the 6 year statute of limitations set forth in CPLR 213(2).

Agreements – Interpretation – Emancipation

In Goldstein v. Goldstein, 2018 Westlaw 5931506 (2d Dept. Nov. 14, 2018), both parties appealed from, among other things, an October 2016 Supreme Court order, which granted the father's

October 2014 motion to terminate child support based upon an emancipation clause in the parties' 1999 stipulation, incorporated into their 2000 judgment of divorce, and which denied his motion for recoupment of $7,846 in child support paid to the mother while the motion was pending. The child permanently relocated to the father's residence on June 30, 2014, which constituted an emancipation event under the stipulation. The child submitted an affidavit stating that she "made the decision to permanently reside" with the father as of June 30, 2014, has not spent overnights at the mother's house since that date, and that, although she began college in late August 2014, she considers the father's house her home "and intend[s] to return there during school breaks and holidays." The Second Department affirmed, holding that the father established an emancipation event, but was not entitled to recoupment based upon the "strong public policy in this State, which the Child Support Standards Act did not alter, against restitution or recoupment of the overpayment of child support."

Attorney & Client – Disqualification – Contact with Children

In Anonymous 2017-1 v. Anonymous 2017-2, 2018 Westlaw 5316851, NY Law Journ. Nov. 9, 2018 at 21, col. 5 (Sup. Ct. Nassau Co., Lorintz, J., Oct. 23, 2018), the mother received a speeding ticket in November 2017, and hired an attorney to handle the same. The mother thereafter became concerned that the

ticket had not been resolved and that her license may have been suspended. The mother “feared that this could be used to justify her arrest, which she believed was being engineered by the [father], his counsel and [a] private investigator”; she observed the investigator parked near her home upon her return thereto on April 2, 2018, at which time he was photographing her, the children (ages 8 and 10) and their nanny. At or about the same time, the mother also observed a marked police car parked near her home. The mother then called her attorney regarding her fears of being arrested for driving with a suspended license, and the attorney then drove to the mother’s home and transported her, the children and another adult to the home of a friend of the mother. The father moved to disqualify the mother’s attorney “based upon his alleged unauthorized contact with the children” in violation of Rules of Professional Conduct 4.2. Supreme Court “found it both relevant and helpful to conduct an *in camera* interview of both children” and held two individual *in camera* interviews of the children, each in the presence of the AFC. Supreme Court noted that “[b]oth children stated that they did not know their father's lawyer but verified that they knew their mother's lawyer, ***." Supreme Court concluded: “From the interview, it was clear that there were conversations between [the mother’s attorney] and the children during the car ride” which “included discussions about what was

happening with the private investigator. Additionally, the children were aware that the private investigator was hired by the [father]. This information was provided to them by the [mother].” Supreme Court granted the motion to disqualify the mother’s attorney, holding: “By purporting to rescue their mother, in their presence and without their counsel, from an unlawful arrest engineered by their father, [the mother’s attorney] risked influencing the children to think favorably of him and the [mother] and unfavorably of the [father]. In doing so, he acted against the best interests of the children. (citation omitted). Since [the mother’s attorney] failed to notify the Attorney for the Child [AFC], *** who was appointed to protect the children's interests, [the AFC] was unable to act. *** [The mother’s attorney’s] failure to notify [the AFC], before or after the events of April 2, 2018, ***, evidence his indifference to the attorney-client relationship existing between the children and their counsel. His disqualification is therefore necessary to protect the rights of the children.”

Child Support - Enforcement - Medical Evidence in Defense Inadequate; Modification – Denied – SSD Not Determinative

In Matter of Linda D. v. Theo C., 2018 Westlaw 5985456 (1st Dept. Nov. 15, 2018), the father appealed from a September 2017 Family Court order, which granted the mother’s objections by modifying a March 2017 Support Magistrate order, which, after a

hearing, determined the father was not in willful violation of a child support order and granted his petition for a downward modification, to the extent of vacating the modified order of support, dismissing the father's downward modification petition, and reinstating the prior order for $1,200 in monthly child support. The First Department affirmed, finding that “the father failed to rebut the prima facie evidence of his willful violation of the order of support” and holding that “the Support Magistrate mistakenly relied on letters from the father's health care providers that had not been properly admitted into evidence.” The Appellate Division further determined that Family Court properly dismissed the father's downward modification, noting that the father’s “receipt of Social Security disability benefits did not preclude a finding that he was capable of work.”

Child Support - Modification – Income Decrease Caused by Relocation Nearer to Child

In Matter of Parmenter v. Nash, 2018 Westlaw 5875499 (4th Dept. Nov. 9, 2018), the father appealed from a June 2017 Family Court order, which denied his objection to a Support Magistrate order dismissing his petition for downward modification, based upon a decrease in his income due to his relocation. The Fourth Department reversed, on the law, granted the father’s objection, reinstated his petition, and remitted to Family Court. From 2013

to 2015, the parties resided together with their son in northern Virginia. In 2015, the mother relocated with the child to Onondaga County. Six months later, the father quit his job in Virginia and moved to New York in order to be closer to the child. The Appellate Division held that the general rule, holding a non-custodial parent responsible for a voluntarily cessation of higher paying employment, "should not be inflexibly applied where a parent quits a job for a sufficiently compelling reason, such as the need to live closer to a child (citations omitted)." The Court concluded that "[t]he equities weigh heavily in favor of the father here given that it was the mother who moved the child hundreds of miles away from the father and thereby created the difficulties inherent in long-distance parenting."

Child Support - Modification – Medical Evidence Inadequate; Public Assistance Arrears Cap Denied

In Matter of Mandile v. Deshotel, 2018 Westlaw 5875868 (4th Dept. Nov. 9, 2018), the mother appealed from a November 2016 Family Court order, which confirmed a Support Magistrate order that she willfully violated a prior child support order and awarded the father a money judgment. The Fourth Department affirmed, finding that the mother failed to pay the amounts directed by the support order, and the burden thus shifted to her to submit "some competent, credible evidence of [her]

inability to make the required payments" (citations omitted). The Appellate Division held that the mother failed to meet her burden, and while she "presented some evidence of medical conditions that allegedly disabled her from work, her medical records indicate that the diagnoses related to those conditions were 'based solely on [the mother's] subjective complaints, rather than any objective testing.'" (Citations omitted). The Support Magistrate found that "the mother did not seek treatment for her alleged conditions until shortly after the father filed his first violation petition and that she had testified several years earlier that she did not intend to work because she could be fully supported by her paramour." The Fourth Department rejected the mother's arrears cap argument, noting that if "the sole source of a noncustodial parent's income is public assistance, unpaid child support arrears in excess of five hundred dollars shall not accrue," citing FCA 413(1)(g), and finding that here, although "the mother received public assistance and did not maintain employment, circumstantial evidence suggested that she 'ha[d] access to, and receive[d], financial support from [her live-in paramour].'" (Citations omitted).

Custody - Domestic Violence; Interference with Parental Relationship

In Matter of Wojciulewicz v. McCauley, 2018 Westlaw

5875655 (4th Dept. Nov. 9, 2018), the father appealed from a February 2017 Family Court order which awarded primary legal and physical custody of the children to the mother. The Fourth Department affirmed, finding a sound and substantial basis in the record, noting that the mother "has been a victim of domestic violence, first with the father when they resided together, and then with an abusive live-in boyfriend with whom she had other children." The Appellate Division found: "There are two critical factors that weigh in favor of the mother: the father's use of excessive punishment, including excessive corporal punishment, and his failure to foster the children's relationship with the mother. The record reflects multiple instances of excessive punishment from the father, the most serious of which involved striking one of the children multiple times with a belt. *** Additionally, the father made a concerted effort to interfere with contact between the children and the mother when the children were in his custody, as well as to interfere with contact between the children in his custody and their siblings. The record establishes that, for a period of six months, the mother was only able to see two of the children if she went to their school and saw them during lunch and the father prevented phone contact between the mother and the children."

Enforcement - Incarceration Upheld

In Matter of Garrett v. Jones, 2018 Westlaw 5659897 (3d Dept. Nov. 1, 2018), the father appealed from an April 2017 Family Court order, which revoked the suspension of his sentence of 30 days' incarceration, which suspension had been conditioned upon his making regular child support payments, for his child born in 2005, for 26 weeks following a November 2016 Court appearance. In February 2017, the matter was restored to the calendar upon the mother's allegation that the father was $350 in arrears since November 2016, and he made no further payments before the April 2017 hearing, at which time he stated that his "anticipated new employment had been delayed but that he expected to begin work soon." The Third Department affirmed, finding that "the father paid only $250 toward the total of approximately $950 in child support payments that became due between the entry of the order suspending his sentence of incarceration and the revocation of the suspension," and, further, that the father "failed to support his assertions that new employment was imminent with any evidence other than his own self-serving testimony." The Appellate Division held that "the father's consistent failure to take advantage of the opportunities offered to him by Family Court to comply with his child support obligations," constituted "good cause for the revocation of the suspension of his sentence."

Enforcement - Receiver Appointed

In Caponera v. Caponera, 2018 Westlaw 5624041 (2d Dept. Oct. 31, 2018), the husband appealed from a September 2015 Supreme Court order, which granted the wife's motion to appoint her as receiver of the marital residence. The Second Department affirmed. The parties' April 2010 stipulation, which was incorporated into a September 2010 judgment, provided that the wife would have exclusive occupancy of the marital residence until November 1, 2013, unless she remarried or cohabited with an unrelated adult, in which case the marital residence would be placed on the market for sale. A July 2014 so-ordered stipulation provided that the marital residence would be transferred to the wife, who married shortly thereafter. The husband then refused to effectuate the transfer of ownership and the wife moved to be appointed as receiver of the marital residence. The Appellate Division held that given "the acrimonious relationship between the parties and the defendant's willful failure to cooperate in effectuating the transfer of ownership of the marital residence to the plaintiff, as required by the parties' July 2014 so-ordered stipulation, the Supreme Court providently exercised its discretion in appointing the plaintiff to be the receiver of the marital residence."

Family Offense - Assault 2d, Attempted Assault 3d, Menacing 2d

In Matter of Amanda R. v. Daniel A.R., 2018 Westlaw 5985432 (1st Dept. Nov. 15, 2018), the father appealed from a September

2017 Family Court order which, after a hearing, found that he committed menacing in the second degree, assault in the second degree, and attempted assault in the third degree, and granted the mother a two year order of protection. The First Department affirmed, holding that the mother established, by a fair preponderance of the evidence, that the father committed menacing in the second degree (Penal Law §120.14), assault in the second degree (Penal Law §120.05[1]), and attempted assault in the third degree (Penal Law §120.00[1]). The mother testified that: in December 2010, while she was 8½ months pregnant, the father shoved her down onto a bed during an argument; in May 2012, during an argument, the father got on top of her and choked her causing her to lose consciousness, and causing her neck to swell and have red marks on it for numerous days; and in early September 2014, the father punched her very hard in the face causing her to fall and knock over a closet.

Family Offense – Sufficiency

In People v. Creecy, NY Law Journ. Nov. 5, 2018 at 17, col. 3 (Town Ct. Mamaroneck, Meister, J., Oct. 29, 2018), defendant moved to dismiss the information filed against him, alleging harassment in the 2d degree, PL 240.26(1), upon the ground of facial insufficiency. The information alleged that defendant, with intent to harass, annoy or alarm his wife, and threatening to subject her to physical contact, stated to her: “Brick by

brick, dollar by dollar, body by body, I'm going to start with you, and I'm going to run through every person who has ever helped you." Defendant conceded he made the statement to his wife in their home, while discussing their legal separation terms and being angered over her use of marital funds. The parties did not dispute that the above quote was a line from a Denzel Washington movie entitled "The Equalizer," which they had recently seen together. The Court denied the motion, rejecting Defendant's contention that because his statement was from a movie, it was somehow less threatening. The Court took judicial notice of the film's description as a "vigilante action thriller," its poster bearing an image of the star thereof carrying an automatic weapon and its "R" rating for "strong bloody violence and language throughout." The Court concluded: "Invoking language from a violent film that the parties had recently viewed together, and that evidently so strongly impressed the Defendant that he remembered the line verbatim, adds a chilling tone to it from which a threat of intended and imminent violence can easily be inferred."

Family Offense – Venue

In Matter of Natalie A. v. Chadwick P., 2018 Westlaw 6174920 (1st Dept. Nov. 27, 2018), the mother appealed from a December 2017 Family Court order which granted the father's motion to change venue and transferred the mother's family

offense and custody petitions to Clinton County. The First Department reversed, on the law, and denied the father's motion. The Appellate Division noted that the parties lived in Clinton County from 2011 to until September 23, 2017, "when the mother fled to escape a physical altercation in the home." The First Department held that "Family Court failed to consider the allegations of domestic violence against [the mother] by the father in Clinton County, which precipitated her abrupt move to safety in New York County, where her parents live, and the indicia of her residence in New York City" which included "a sworn affidavit that she had already secured a full-time job, health insurance, and a pediatrician for the child." The Court concluded: "The allegations of domestic violence and the safety of the mother support keeping New York County as the venue for these proceedings."

Paternity - Equitable Estoppel

In Matter of Ramos v. Broderek, 2018 Westlaw 5931352 (2d Dept. Nov. 14, 2018), Broderek appealed from a September 2017 Family Court order, which declined to apply equitable estoppel and adjudicated him to be the father of a child born in March 2011. The Second Department affirmed. The mother and Broderek had an intimate relationship beginning in June or July 2010, and the mother testified that for approximately one month, after he became aware that she was pregnant, Broderek acted as though he

was the father of the unborn child. However, near the time of conception, the mother also had intimate relations with her ex-husband, who was excluded by an August 2011 DNA test. The ex-husband and the child never had a relationship. When the child was approximately four years old, the mother married another man, with whom the child does not have a close relationship. A December 2016 DNA test indicated a 99.99% probability that Broderek was the father. In January 2017, the mother filed a paternity petition against Broderek. The Appellate Division agreed that equitable estoppel did not apply and noted that the principle "does not involve the equities between [or among] the . . . adults" and "[t]he paramount concern in applying equitable estoppel in paternity cases is the best interests of the subject child" (citations omitted). The Court concluded that "the evidence did not demonstrate a close relationship between the child and either the mother's former or current husband such that the application of equitable estoppel would be in the child's best interests."

Procedure - Service – Failure to Notify SCU of Address Change

In Matter of L. v. A., NY Law Journ. Nov. 5, 2018 at 17, col. 5 (Fam. Ct. Bronx Co., Bahr, S.M., Oct. 16, 2018), Family Court rejected respondent's contention, in the context of his motion to vacate a default order finding him in willful violation, that substituted service was invalid to his last

known address, given that respondent had failed to advise SCU of his change of address, as required by FCA 443. The facts and history are set forth in the court's over 5-page, single-spaced decision, but of note is that the process server's affidavit of due diligence, submitted in support of the mother's application for substituted service, stated that the server had spoken with respondent's ex-wife, who advised that the father no longer lived at the last address on file with SCU, and that "he is avoiding service as there are multiple orders out against him."

Court Rule Item

Judgments of Divorce – Incorporation, Retain Jurisdiction and Future Applications Paragraphs, Part Deux

Administrative Order AO/269/18, dated September 20, 2018, amends 22 NYCRR 202.50(b)(3), **effective for all divorce submissions made after September 30, 2018, but not enforced until October 30, 2018**, regarding two matters pertaining to judgments: (1) Last year, a new prescribed decretal paragraph was added pertaining to incorporation of an agreement into a judgment, which is now labeled as box A and there is no change to that language. There is a new box B, which would cover, for example, a pure default in an uncontested divorce, where the court is deciding the ancillary issues, and now gives the check box option: "there is no settlement agreement." (2) Last year's amendments, which require the "retain jurisdiction" paragraph

and the "any applications brought in Supreme Court" paragraph, have now been modified to require, in 3 places, the insertion of the words "if any." The amendment is set forth in its entirety below (additions are underlined and deletions are bracketed [ ]) and may also be found at the Divorce Resources web page of the OCA Matrimonial Practice Advisory and Rules Committee http://ww2.nycourts.gov/divorce/legislationandcourtrules.shtml and is incorporated into the very latest version of form UD-11, the judgment of divorce, which is part of the uncontested divorce packet http://ww2.nycourts.gov/divorce/divorce_withchildrenunder21.shtml

Fill in Box A or Box B whichever applies:

A. ☐ ORDERED AND ADJUDGED that the Settlement Agreement entered into between the parties on the day of , ☐ an original OR ☐ a transcript of which is on file with this Court and incorporated herein by reference, shall survive and shall not be merged into this judgment, and the parties are hereby directed to comply with all legally enforceable terms and conditions of said agreement as if such terms and conditions were set forth in their entirety herein; [and]

OR

B. ☐There is no Settlement Agreement entered between the parties; and it is further

ORDERED AND ADJUDGED, that the Supreme Court shall retain jurisdiction to hear any applications to enforce the provisions of said Settlement Agreement, if any, or to enforce or modify the provisions of this judgment, provided the court retains jurisdiction of the matter concurrently with the Family Court for the purpose of specifically enforcing, such of the provisions of that (separation agreement)(stipulation agreement,

if any), as are capable of specific enforcement, to the extent permitted by law, and of modifying such judgment with respect to maintenance, support, custody or visitation to the extent permitted by law, or both; and it is further

ORDERED AND ADJUDGED, that any applications brought in Supreme Court to enforce the provisions of said Settlement Agreement, if any, or to enforce or modify the provisions of this Judgment shall be brought in a County wherein one of the parties reside; provided that if there are minor children of the marriage, such applications shall be brought in a County wherein one of the parties or the child or children reside, except, in the discretion of the judge, for good cause. Good cause applications shall be made by motion or order to show cause. Where the address of either party and any child or children is unknown and not a matter of public record, or is subject to an existing confidentiality order pursuant to DRL §254 or FCA §154-b, such applications may be brought in the County where the Judgment was entered; and it is further