NYSBA FAMILY LAW SECTION, Matrimonial Update, December 2019

By Bruce J. Wagner
McNamee Lochner P.C., Albany

Agreements – Interpretation – CSSA Income

In Matter of Abramson v. Hasson, 2019 Westlaw 6139433 (2d Dept. Nov. 20, 2019), the mother appealed from a January 2019 Family Court order denying her objections to an October 2018 Support Magistrate order, which denied her motion seeking summary judgment as to the meaning of the term "gross earned income" contained in the parties' October 2013 stipulation incorporated into a December 2013 judgment of divorce, and granted the father's motion on the same issue. The Second Department reversed, on the law, and remitted for a hearing. The stipulation called for an annual recalculation of the father's child support obligation for the 2 children according to "gross earned income" attributable to each party and certain income caps. The mother had a salary of nearly $87,000, but also had nearly $40,000 in dividends and over $245,000 in Schedule E income due to ownership in an LLC in which she was apparently not employed. The father contended that all the aforesaid income should be considered in the calculations. The Support Magistrate determined that if the parties had intended to include only employment-type earnings and exclude all passive income, they should have so stated, and therefore applied the CSSA definition

of income. The Appellate Division held that the term "gross earned income" was ambiguous and that the Support Magistrate erred by not holding a hearing to determine the parties' intent in including the word "earned."

Agreements - Prenuptial – Upheld

In DiPietro v. Vatsky, 2019 Westlaw 5791626 (1st Dept. Nov. 7, 2019), the husband appealed from a December 2018 Supreme Court order, which granted the wife's motion for summary judgment dismissing his affirmative defenses and counterclaims and for a declaration that parties' prenuptial agreement and its amendments are valid and enforceable. The First Department affirmed, holding that the husband failed to meet his "very high burden" for challenging the prenuptial agreement and stating: "The parties, both educated and savvy professionals with significant assets of their own, were each represented by independent counsel, and entered into the prenuptial agreement after a period of negotiations several months before the marriage." The Appellate Division rejected the husband's contention that the wife failed to adequately disclose her finances, noting that "prior to executing the prenuptial agreement, the parties met with the [husband's] financial advisor to discuss their financial future together." The Court concluded that Supreme Court correctly found that the agreement and its amendments were not the product of overreaching and that

its mutual waivers of maintenance, equitable distribution and the right of election were not so "manifestly unfair" as to warrant equity's intervention. Observing that the husband's agreement to transfer his house to the wife "may not have been in his best financial interest," he nevertheless signed the prenuptial agreement over his attorney's objection and failed to establish that he did so under duress.

Child Support - Modification – 2010 Amendments; Opt-Out Defects

In Matter of Vetrano v. Vetrano, 2019 Westlaw 6139365 (2d Dept. Nov. 20, 2019), the father appealed from a December 2018 Family Court order denying his objections to an October 2018 Support Magistrate order which, after a hearing, dismissed his June 2018 petition seeking downward modification of his child support obligation for the parties' child, as set forth in an October 2014 judgment and May 2014 incorporated stipulation. The father alleged: a job loss due to a wrongful termination and that he had made diligent efforts to seek employment; 3 years had passed; his income had decreased by more than 15% and the mother's income had increased by more than 15%. The father also apparently proved a loss of assets at the hearing and contended that the stipulation did not comply with the CSSA. The Magistrate found that the father failed to demonstrate that he lost his employment through no fault of his own. The Second Department reversed, on the law, reinstated the father's

petition and remitted to Family Court for a new hearing. The Appellate Division agreed with the Support Magistrate that the father failed to show that the reduction in his income was involuntary and that he had made diligent attempts to secure employment, but held that the Magistrate erred by: failing to take into account the father's loss of assets; failing to acknowledge evidence of the significant increase in the mother's income; and failing to address the father's contention that the stipulation failed to comply with the CSSA's requirements that the presumptively correct child support obligation and reasons for deviation therefrom be stated.

Child Support - Retroactivity–To Date of Custody Order; Equitable Distribution – Debt-Student Loans; Separate Property Credit Granted; Maintenance – Durational-Denial Reversed

In Santamaria v. Santamaria, 2019 Westlaw 5945643 (2d Dept. Nov. 13, 2019), the wife appealed from an April 2016 judgment of divorce, rendered in her action commenced August 2, 2013 upon a December 2015 decision after trial and a November 18, 2015 residential custody order in favor of the husband, which, among other things: (1) awarded the husband a $322,000 separate property credit for the marital residence; (2) failed to award her maintenance; (3) awarded child support to the husband retroactive to the date of the commencement of the action; and (4) directed the husband to pay only $20,000 of the wife's

student loan debt. The husband cross appealed from so much of the judgment as: (1) failed to award him sole title to the marital residence; (2) awarded the wife 50% of any equity in the residence which accrued between 2002 and the date of sale; (3) directed the wife to pay retroactive child support at the rate of only $150 per month; (4) failed to award him interest on the retroactive child support; and (5) directed him to pay $20,000 of the wife's student loan debt. The Second Department modified, on the law, the facts and in the exercise of discretion, by: (1) awarding the wife maintenance of $750 per month for 4 years or until her remarriage commencing December 15, 2015 (date of decision) and directing the husband to pay retroactive arrears at the rate of $500 per month; and (2) making child support retroactive only to November 18, 2015, the date a custody order was made in the husband's favor, as opposed to the August 2, 2013 date of commencement of the action, and otherwise affirmed the judgment. The parties were married in December 2000 and have 2 children. As to the residence, the Appellate Division found that the same was transferred to the husband by his mother in 2002 and she retained a life estate, at which time the property was valued at $322,000. When the mother died in 2010, the husband transferred the property to himself and the wife jointly, renovations ensued, and the parties and children moved thereto in 2011. The Second Department held that the 2010

conveyance to the parties transformed the residence into marital property, but that the $322,000 credit to the husband was proper, that being the value of the residence at the time of the gift thereof to him in 2002. Given that significant marital funds were used to preserve the property, Supreme Court's decision to award the wife 50% of the post-2002 equity was proper. Regarding maintenance, given the statutory factors (the wife was earning $50,000 plus commissions; the husband's income was not specified), the Appellate Division held that its modification to provide the above-referenced durational maintenance award was warranted. As to retroactivity of child support, the Second Department noted that the parties resided together in the marital residence pendente lite and that the husband was awarded custody in a November 18, 2015 order, which, under the facts of this case, made an award of child support retroactive to the date of commencement of the action inappropriate. The Court otherwise upheld the child support repayment rate of $150 per month and denial of interest to the husband on retroactive child support arrears. As to the student loan debt, the wife claimed that Supreme Court's imposition of a $20,000 responsibility upon the husband was not enough, while he contends that he should not have had to pay any of the same, because he waived any interest in the value of the wife's bachelor's degree and she failed to establish what portions of

the loans ($52,000 at the time of trial) were accrued during the marriage. The Appellate Division upheld Supreme Court's assessment of $20,000 to the husband for the wife's student loans, finding that the loans were incurred during the marriage and had been owed since 2005, and, further, that "there was evidence that the defendant's attainment of her Bachelor's degree in business administration did benefit the marriage by enhancing her earnings capacity and bringing more income into the marriage," noting that prior to earning the degree, the wife worked as a waitress. At the time of trial, the wife was employed as a headhunter, earning $50,000 per year plus commissions, as above stated.

Counsel Fees - Custody

In Matter of Bartholomew v. Marano, 2019 Westlaw 6139430 (2d Dept. Nov. 20, 2019), the father appealed from a December 2018 Family Court order which, after a hearing upon both parties' petitions seeking modification of a prior custody order pertaining to the parties' child born in 2006, granted the mother's motion for counsel fees and awarded her $36,735. The Second Department affirmed, holding that the counsel fee award was a provident exercise of discretion, given the parties' respective financial circumstances and the relative merits of the parties' positions, where the mother was granted sole legal and residential custody and the father's petition was dismissed

[affirmed 174 AD3d 893 (Jul. 31, 2019)].

Custody - Decision-Making – Mental Health (NCP); Records Access; Religious Practices Directives

In Cohen v. Cohen, 2019 Westlaw 6139488 (2d Dept. Nov. 20, 2019), the father appealed from a July 2018 Supreme Court judgment, which after trial of the mother's January 2017 action for divorce, among other things: awarded the mother sole legal custody of the parties' two children born in 2011 and 2013, with parental access to him; directed the father to provide the children with exclusively kosher food and to make all reasonable efforts to ensure that the children's appearance and conduct comply with the Hasidic religious requirements of the mother and the children's schools while they are in his custody; and failed to direct that he have access to the children's medical, educational and extracurricular records. The Second Department modified, on the law and in the exercise of discretion, by adding as an exception to the mother's sole legal custody a directive that the father shall have decision-making authority with respect to the children's mental health treatment and by adding a provision that the father have access to the aforesaid records. The parties were married in November 2009 and separated in December 2016. In the early years of the marriage, they practiced Satmar Hasidic Judaism and the father thereafter "became non-religious." The Appellate Division affirmed the

custody award as being in the children's best interests, given that it was "undisputed that the mother was the primary caregiver for the children throughout their lives." Noting that the father was scheduled to join the children for a therapy session to discuss parental access issues when the mother fired the children's therapist and then retained a new therapist without the father's knowledge, the Second Department concluded that "the mother's actions regarding the children's therapy had the effect of interfering with the father's role" and warrant its award of decision-making authority to the father regarding the children's mental health treatment. The Court held that because the children "have developed actual ties to" Hasidic Judaism, Supreme Court's kosher food and conduct directives, which required the father's reasonable efforts and did not compel him to engage in any particular religious practices, were proper and not unconstitutional.

Custody - Relocation–Restriction Vacated; Travel (Non-Hague) Unrestricted

In Matter of Ece D. v. Sreeram M., 2019 Westlaw 5876001 (1st Dept. Nov. 12, 2019), the mother appealed from an April 2019 Family Court order, which granted joint legal custody of the children, residential custody to the mother and liberal visitation to the father, prohibited the mother from relocating from her current residence without the father's written consent

or court permission, and permitted either party to travel with the children internationally with no restrictions. The First Department modified, on the law and the facts, to require that the father's consent or court permission must be obtained if the mother seeks to relocate more than 10 miles from her current residence (an apartment), finding that "there is no basis for ordering petitioner to stay at her present address." The Appellate Division rejected the mother's argument, that the father should not be allowed to travel to India because that country is not a signatory to the Hague Convention on Child Abduction. The First Department concluded that Family Court's "implicit finding that [the father] is likely not an abduction threat has a sound and substantial basis in the record," noting the father's NY area real estate holdings, TLC license, his family in NY and his testimony that he wants the children (US citizens) to remain in the US.

Custody – Violation – Counseling

In Matter of Keith II v. Laurie II, 2019 Westlaw 6190179 (3d Dept. Nov. 21, 2019), the mother appealed from an April 2018 Family Court order which, after a hearing upon the father's petition, held her in willful violation of a prior order but imposed no sanction. The parties are the parents of 4 children (born in 2006, 2008 and 2010). A September 2017 consent order required the father to have therapeutic counseling with the

children to rehabilitate their relationship and, if the children's current counselor was not willing or able to conduct this counseling, the father and the mother were to use their best efforts to locate a new qualified counselor who was. The Third Department affirmed, holding that "the record provides clear and convincing proof necessary to support the finding of a willful violation." The Appellate Division noted that the father's uncontroverted testimony established that: he met with the children's counselor alone in August 2017, and again with both the counselor and the children approximately 30 days later; the counselor informed the father that she would not provide further counseling because, according to the mother, the children did not want to continue with counseling; and the mother informed him that she was opposed to a new counselor. The Court concluded: "By expressing her unwillingness for the children to engage with a new counselor, the mother 'defeated, impaired, impeded or prejudiced' the father's right to engage in rehabilitative therapy with his children (citations omitted)" and "we discern no error in Family Court finding that that the mother willfully violated the September 2017 order."

Divorce and Dissolution - Void Marriage – Equitable Distribution and Maintenance

In Valente v. Carol, 2019 Westlaw 5945346 (2d Dept. Nov. 13, 2019), the husband appealed from a November 2016 Supreme

Court order, which, in the wife's June 2016 action pursuant to DRL 140(a) seeking a judgment declaring the nullity of a void marriage, granted her summary judgment and denied so much of his motion as sought equitable distribution and maintenance. The parties were married in April 2000, but the husband was not yet divorced. The Second Department reversed, on the law, and remitted for further proceedings, holding that Supreme Court erred by denying the husband's request for equitable distribution and maintenance, citing, among other authorities, DRL 236(B)(5)(a) [equitable distribution available where the nullity of a marriage is declared] and DRL 236(A)(1) [maintenance where the nullity of a marriage is declared].

Family Offense –Aggravated Harassment 2d – PL 240.30(1)(a) Not Found; (2) Found

In Matter of Brant v. Widger, 2019 Westlaw 6042537 (4th Dept. Nov. 15, 2019), respondent appealed from an April 2018 Family Court order which found, after a hearing, that she had committed harassment in the second degree as defined by both PL 240.30(1)(a) and (2) against petitioner. The Fourth Department affirmed the order of protection, but vacated so much of the underlying oral decision as found that respondent had committed the offense as defined by PL 240.30(1)(a), holding that petitioner's testimony, that he received an anonymous telephone call from an individual whose voice he recognized as petitioner,

wherein the caller called him "a pathetic piece of shit" and told him that he deserved to die and "sit in jail forever," followed by 5-10 anonymous hang-up calls for the next 3 days, did not sustain his burden to prove that "a threat to cause physical harm to, or unlawful harm to [his] property, or a member of [his] family or household" was communicated during the initial call. The Appellate Division held that petitioner established respondent's identity as the anonymous caller and sustained his burden of proving aggravated harassment 2d as defined by PL 240.30(2) ["With intent to harass or threaten another person, he or she makes a telephone call, whether or not a conversation ensues, with no purpose of legitimate communication"].

Family Offense - Aggravating Circumstances; Disorderly Conduct and Harassment 2d – Found; Grand Larceny 4th and Identity Theft – Not Found

In Matter of Keith M. v. Tiffany SS., 2019 Westlaw 6119975 (1st Dept. Nov. 19, 2019), the mother appealed from a January 2018 Family Court order which, after a hearing, found that she had committed disorderly conduct, harassment 2d, grand larceny 4th and identity theft, found aggravating circumstances and granted the father a 5-year order of protection to stay away from him and the child, except for supervised visitation. The First Department modified, on the law, to vacate the findings of

grand larceny 4th and identity theft, and otherwise affirmed. The Appellate Division held that the father established disorderly conduct and harassment 2d through his testimony about an incident where the mother choked him and cut his nose with a bottle, and evidence that the mother "repeatedly made false accusations against petitioner with respect to his treatment of their child." The Court concluded that the proof failed to establish identity theft and grand larceny 4th, noting as to the latter that the amount of money taken from the father's account did not exceed $1,000. The First Department affirmed the finding of aggravating circumstances based upon, among other things, the mother's violation of prior court orders.

Family Offense Disorderly Conduct, Harassment 2d, Menacing 3d – Found

In Matter of Calin-Horvath v. Horvath, 2019 Westlaw 6139410 (2d Dept. Nov. 20, 2019), respondent (petitioner's stepson) appealed from an August 2018 Family Court order of protection which, upon a finding after a hearing on petitioner's March 2018 petition that he committed disorderly conduct, harassment 2d and menacing 3d, directed him to stay away from petitioner for 2 years. The Second Department affirmed, noting the 72-year-old petitioner testified that her husband, respondent's father, died on February 14, 2018 and that she was disabled and lived alone. She further testified that on December 24, 2017, the stepson

called her to tell her to pack her bags and return to Romania, and that he threatened to break her hands and legs if she did not. Petitioner also testified that on March 8, 2018, the stepson came to her apartment, pounded on her door, yelled for about a half an hour, again threatened to break her hands and legs and to "put" her in jail. The Appellate Division held that the December 2017 incident constituted disorderly conduct and harassment 2d and that the March 2018 incident supported a finding of menacing 3d.

Family Offense - Extension of Order of Protection

In Matter of Stacey T. v. Felix M., 2019 Westlaw 5791556 (1st Dept. Nov. 7, 2019), petitioner appealed from a September 2018 Family Court order, which determined that she had shown good cause for a 5-year extension of an October 1, 2014 order of protection which expired on September 30, 2016, but granted the 5-year extension from September 30, 2016. The First Department reversed, on the law, and extended the order for 5 years from September 28, 2018, based upon the "undisputed and serious facts of the case," citing FCA 842.

Family Offense - Stay Away Order Not Warranted

In Matter of Millie P. v. Arthur P., 2019 Westlaw 5791601 (1st Dept. Nov. 7, 2019), petitioner daughter appealed from a January 2019 Family Court order which, after a hearing, granted her an order of protection, but did not exclude respondent, her

father, from their shared home of 37 years. The First Department affirmed, holding that "Family Court providently exercised its discretion in determining that the incident at issue was isolated and that the threat the father made, while upsetting to the daughter, did not lead to the conclusion that an exclusionary stay-away order of protection, *** was reasonably necessary to protect the daughter."

Legislation and Court Rules

Maintenance Cap – Adjustment Date

DRL §§236(B)(5-a)(b)(5) and (6)(b)(4) and FCA §412(2)(d) are amended, to change the biennial adjustment date for the maintenance cap (presently $184,000) to March 1 (to coincide with the CSSA biennial adjustment date), **effective immediately and beginning March 1, 2020**. A.07518/S.05515, Laws of 2019, Chapter 523, signed November 20, 2019.

Parent Education

The Chief Administrative Judge has certified an online provider to offer parent education pursuant to 22 NYCRR Part 144. http://ww2.nycourts.gov/ip/parent-ed/pdf/PublicCertifiedPEP01.pdf