NYSBA FAMILY LAW SECTION, Matrimonial Update, February 2020

Matrimonial Update

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Child Support - CSSA – Income – Deduction of Union Dues

In Matter of Julien v. Ware, 2020 Westlaw 356132 (2d Dept. Jan. 22, 2020), the father appealed from an August 2018 Family Court order denying his objections to a May 2018 Support Magistrate order which, after a hearing, directed him to pay child support, retroactive child support and a pro rata share of uninsured health care expenses for the parties' child. The Second Department modified, on the law, by granting the father's objection to so much of the order as failed to deduct the father's nonvoluntary union dues from his CSSA income. The Appellate Division held that while the CSSA provides for no specific mandate that union dues be deducted, FCA 413(1)(b)(5)(vii)(A) allows a deduction from income for "unreimbursed employee business expenses except to the extent that said expenses reduce personal expenditures" and that nonvoluntary union dues may be deducted under this category.

Counsel Fees – After Trial - Denied

In Rock v. Rock, 2020 Westlaw 20384 (3d Dept. Jan. 2, 2020), the wife appealed from a June 2018 Supreme Court judgment which denied her request for counsel fees. The parties were

married for 8 years at the time of the commencement of the divorce action and the husband proceeded pro se. The primary issues at trial were distribution of the marital residence and counsel fees. The Third Department affirmed, finding, among other things, that the wife did not prove she was the less monied spouse, given her salary of $48,000 and the husband's income of $44,000, or that the parties' respective financial circumstances warranted an award of counsel fees.

Counsel Fees – After Trial-Granted; Equitable Distribution – Separate Property -Life Insurance Credit Not Proved; Real Property Appreciation Denied

In Gordon v. Anderson, 2020 Westlaw 20397 (1st Dept. Jan. 2, 2020), the wife appealed from a January 2018 Supreme Court judgment which awarded the husband 50% of the appreciation of her separate real property and 50% of the cash surrender value of her premarital life insurance policies and directed her to pay the husband's outstanding counsel fees of $41,355 (about 60% of his total fees). The First Department modified, on the law and the facts, by vacating so much of the judgment as awarded the husband any share of the appreciation of the wife's separate real property, rejecting his argument that he actively contributed toward the renovations thereof and finding that he failed "to provide any nexus between his alleged contributions and the property's appreciation in value." Although the wife's

life insurance policies were obtained prior to the marriage, she was precluded from offering evidence that might have established the separate property component thereof, due to her refusal to comply with the husband's discovery demands, which led the Appellate Division to affirm on this issue. The First Department upheld the counsel fee award, based upon: the parties' financial circumstances; the relative merit of their positions; the wife's obstructionist tactics; and her disruption of the courtroom during the trial.

Counsel Fees – After Trial – Granted; Equitable Distribution – Separate Property Appreciation Granted; Maintenance – Durational

In Allen v. Allen, 2020 Westlaw 239080 (3d Dept. Jan. 16. 2020), the husband appealed from an October 2015 judgment which, following a June 2015 trial of the wife's January 2013 divorce action, ordered that the wife receive a 40% share of the appreciation of his separate property residence and maintenance for a duration of 6 years, 8 months (until the youngest child's age 18) and from a January 2016 order which granted counsel fees to the wife. The parties were married in 1999 and have 4 children born between 1998 and 2001. The husband purchased the marital residence 3 months before the marriage and the parties agreed that the same had appreciated by $63,000 during the marriage. The husband did not rebut the wife's testimony that the parties nearly doubled the size of the home and that she

worked on improvements including painting, landscaping, hardwood floors, roof and siding. The Third Department upheld the award to the wife of 40% of the appreciation of the residence, or $25,200. The Appellate Division found that Supreme Court properly considered all the relevant factors, including the predivorce standard of living, and found no abuse of discretion in the maintenance award. The Third Department concluded that "[g]iven the widely disparate incomes between the parties, the court did not abuse its discretion in its award of counsel fees to the wife."

Custody - Modification – Closer Relocation by NCP; Corporal Punishment

In Matter of Campbell v. Blair, 2020 Westlaw 216934 (2d Dept. Jan. 15, 2020), the mother appealed from an August 2018 Family Court order which, after a hearing, dismissed her November 2017 petition seeking to modify an October 2017 custody order pertaining to the parties' child born in 2006. The October 2017 order granted the father sole legal and physical custody at a time when the mother was living in the country of Jamaica. The mother's modification petition alleged that the father's then-girlfriend, whom he later married, was using corporal punishment and the child had become suicidal. The petition was initially dismissed with leave to re-file if the mother returned to the US. The mother returned to the US and was living in Richmond

County with her family, and her petition was restored to the calendar for a hearing. The Second Department reversed, on the law, and remitted for a hearing, holding that Family Court erred in dismissing the mother's petition, given that she presented sufficient prima facie evidence of a change of circumstances which might warrant custody modification, including her relocation back to the US and the stepmother's use of corporal punishment.

Custody - Modification – Joint to Sole–Home Environment Harmful; School Commute Upheld; Wishes of Child

In Matter of Deanna V v. Michael C, 2020 Westlaw 61544 (1st Dept. Jan. 7, 2020), the father appealed from an April 2019 Family Court order, which granted the mother's modification petition and awarded her sole legal and physical custody of the parties' child and ordered that the child commute from the Bronx to Long Beach for high school. A 2012 stipulated joint custody order provided that the child would live with the father and paternal grandmother in the latter's home in Long Beach and would visit the mother every weekend. By 2016, the father was spending 2 of 5 weeknights at his girlfriend's home in Brooklyn, while the grandmother supervised the child and took him to all medical, dental and therapy appointments. The First Department observed that "[t]he record showed that the child complained to the mother that his grandmother was abusing him, took away his

things, and prevented him from contacting her" and through his AFC, the child "expressed his desire to not live with the grandmother, and to either live with the father outside of the grandmother's home or with his mother." The Appellate Division affirmed, finding that it "is clear from the child's actions that the father's current home, which he shares with the paternal grandmother, is harming the child's emotional and mental health" and that the father "has delegated decision-making authority to the grandmother, rather than sharing it with the mother." The First Department: found the custody modification to be in the child's best interests; upheld Family Court's order that the child attend Long Beach High School "so that he may remain with his friends and continue his extracurricular activities"; and determined, based upon the "parties' acrimonious relationship" and inability "to reach a consensus or communicate on issues relating to the child" that "joint legal custody is inappropriate."

Custody - Modification – Joint to Sole – Medical Treatment Delay

In Matter of Sabrina B v. Jeffrey B., 2020 Westlaw 239044 (3d Dept. Jan. 16, 2020), the father appealed from an April 2018 Family Court order which, after a hearing upon the mother's November 2017 petition and his February 2018 petition, modified a January 2016 divorce judgment (joint legal and shared physical custody) by granting the mother sole legal and physical custody

of the parties' child born in 2013. The Third Department affirmed, holding that given the parties' numerous disagreements and inability to communicate regarding the child's medical and education needs, joint legal custody was no longer appropriate. The Appellate Division found that the father "minimized and/or failed to recognize the severity of the child's ongoing symptoms and recurring ear infections" and that his demand that the child have a sleep test contributed to an approximate 5 month delay between the ENT specialist's September 2017 recommendation of surgery and the performance thereof in February 2018. The Third Department concluded that Family Court's award of sole custody to the mother, "balanced *** by specifically mandating that the mother solicit and consider the father's input on all medical, educational and religious decisions" was supported by a sound and substantial basis in the record.

Custody - Third Party – Aunt v. Neighbor

In Matter of Dakota G. v. Chanda H., 2020 Westlaw 20417 (3d Dept. Jan. 2, 2020), the neighbor appealed from a March 2018 Family Court order, which granted the paternal aunt custody of a child born in 2016. Several weeks after the child's birth, the mother and child moved in with the neighbor; the mother was frequently absent from the neighbor's home for lengthy periods. The father failed to appear several times on his own paternity and custody petitions and in response to the neighbor's March

2016 custody petition, and his petitions were dismissed. The mother's location was unknown and she also failed to appear in court, despite numerous efforts to serve her. In June 2016, paternity not having been established and the mother's whereabouts then being unknown, Family Court issued a custody order upon default to the neighbor, with supervised visitation to the mother. In November 2016, the mother filed a visitation petition and about 2 months later, the father's paternity now having been established, the paternal aunt filed a custody petition. After a hearing, Family Court found extraordinary circumstances existed to overcome the custody rights of both parents and that the child's best interests warranted an award of custody in favor of the aunt and directed that any contact between the child and the neighbor be as the parties may agree. The Third Department affirmed, rejecting the neighbor's argument that Family Court erred by not requiring the aunt to prove changed circumstances, given that the June 2016 order was entered upon default with no fact-finding hearing having been held. The Appellate Division held that Family Court properly determined that it was without authority to direct visitation in the neighbor's favor inasmuch as she lacks standing.

Custody - UCCJEA – Significant Connection; Substantial Evidence

In Matter of Defrank v. Wolf, 2020 Westlaw 88917 (2d Dept. Jan. 8, 2020), the mother appealed from a March 2019 Family

Court order which dismissed, for lack of subject matter jurisdiction, her June 27, 2018 petition seeking custody of the parties' child born in 2015 in Pennsylvania, where he lived with both parents until November 2017, when he began residing with his maternal great grandmother in New York. The mother came to New York to live with the child and great grandmother in January 2018. The father filed a petition in Pennsylvania after the mother filed her June 2018 petition. The Second Department reversed, on the law, reinstated the mother's petition, and remitted to Family Court, holding that: although the child had lived in NY for 6 months as of June 27, 2018, he was not with a parent for 6 or more months, nor was the great grandmother "acting as a parent," because she had not been awarded custody and did not claim a right of custody, citing DRL 75-a(7) and (13); but nevertheless, the child and one parent have a "significant connection" to NY and "substantial evidence" is available in NY, since the child attends school and is seen by a pediatrician in NY, conferring jurisdiction under DRL 76(1)(b).

Custody - UCCJEA – Temporary Emergency Jurisdiction

In Matter of Baptiste v. Baptiste, 113 NYS3d 604 (2d Dept. Jan. 8, 2020), the father appealed from a February 2019 Family Court order which dismissed, for lack of temporary emergency jurisdiction and after communicating with a Georgia court, his petition seeking modification of that court's custody order. The

Second Department affirmed, holding that Family Court could not invoke temporary emergency jurisdiction under DRL 76-c(1) in the absence of a real and immediate emergency.

Enforcement - Incarceration or Probation

In Matter of Lopez v. Wessin, 113 NYS2d 580 (2d Dept. Jan. 8, 2020), the father appealed from a February 2019 Family Court order which sentenced him to 5 years' probation upon a willful violation of a child support order, where a separate order issued on the same date sentenced him to 90 days' incarceration with a purge amount, which sentence the father served. The Second Department reversed, on the law, and vacated the sentence of probation, holding that FCA 454(3) provides, among other things, that Family Court, upon a finding of willful violation, may impose either probation or incarceration, but not both.

Equitable Distribution - Proportions (50/50)–Long Marriage; Separate Property Credit Granted; Maintenance Denied–Distributive Award Substantial, Parties' Ages

In Achuthan v. Achuthan, 2020 Westlaw 216985 (2d Dept., Jan. 15, 2020), the husband appealed from: (1) an October 2016 Supreme Court judgment which, after trial of his May 2014 divorce action, directed him to pay the wife maintenance of $2,000 per month for 10 years, maintain security therefor, and distributed marital property 51%/49% in the wife's favor and (2) a March 2018 order, which denied his motion to vacate the

maintenance award and its related security and to redistribute the marital assets 60%/40% in his favor. The parties were married in India in May 1981 and have 1 daughter born in October 1982. At the time of trial, the husband was 80 years old, earning $122,530 as a college professor and $29,014 in annual social security benefits, and the wife was 71 years old and had income of $55,000 per year, which included, among other things, $7,500 from a pension and $14,400 from Social Security. The parties lived apart for much of their marriage, beginning in December 1985, when the wife returned to India with the parties' daughter, where she remained until 1999, when she retired from her employment in India. The husband accumulated marital property of over $2.5 million and the wife accumulated marital property of over $1.4 million, including real property in India valued at over $1.2 million after a separate property credit of $63,715. The Second Department modified the judgment, on the law and in the exercise of discretion, to implement a 50/50 distribution of marital property, rejecting the husband's argument that he should receive a greater share of the same based upon the parties' long separation. The Appellate Division upheld the separate property credit to the wife of $63,715, even though her separate funds were commingled with marital property (in an account her name, alone), given that the same remained in the marital account for only one day as a matter of convenience

and Supreme Court found her testimony to be credible. The Second Department modified the order, on the law and in the exercise of discretion, by granting so much of the husband's motion as sought to vacate those portions of the judgment which directed him to pay maintenance and provide security therefor, given the wife's distributive award of nearly $2 million, the parties' ages and incomes, leading to its conclusion that "there is no basis to award [the wife] maintenance."

Maintenance - Termination – Oral Agreement

In Matter of Makris v. Makris, 2020 Westlaw 88888 (2d Dept. Jan. 8, 2020), the former husband (husband) appealed from a January 2019 Family Court order denying his objections to a May 2018 Support Magistrate order which, after a hearing, granted the former wife's (wife) August 2017 petition to enforce the maintenance provisions of a September 1998 judgment of divorce and set arrears at $53,312, and granted his October 2017 petition to terminate maintenance, based upon a June 2001 oral agreement, retroactive only to October 2017. The Second Department reversed, on the facts and in the exercise of discretion, by granting the husband's objections, vacating the enforcement order and denying the wife's enforcement petition in its entirety. The Appellate Division noted that DRL 236(B)(9)(b) allows modification of maintenance after the accrual of arrears where "the defaulting party shows good cause for failure to make

an application for relief from the judgment *** prior to the accrual of such arrears." The Second Department held that the husband made an adequate showing of good cause for failing to move for relief until after the wife's August 2017 enforcement proceeding, given his cessation of maintenance payments in reliance upon the June 2001 oral agreement and the wife's failure to make any written demands or otherwise move to enforce maintenance for over 16 years, which "evinced an intent by her to abandon her right to maintenance payments" and supported the husband's claim that she had orally agreed to terminate maintenance.

Paternity - Equitable Estoppel – Denied

In Matter of Denise R-D v. Julio RP, 113 NYS3d 566 (2d Dept, Jan. 8, 2020), the mother appealed from an October 2018 Family Court order, which denied her motion for a genetic marker test and granted the putative father's motion to dismiss her 2017 petition seeking to adjudicate him as the father of the subject child born in November 2000, upon the ground that the mother and child were estopped from asserting the putative father's paternity, given his lack of relationship with the then 17-year-old child and a long parent-child relationship with the mother's husband. The putative father was present at the hospital shortly after the child's birth, attended the child's baptism and had no further contact with the child after he was 9

months old. The mother married another man in July 2004 after being in a relationship with him since the child was 2 years old. The Second Department reversed, on the law, reinstated the mother's petition, vacated the order denying the genetic marker test and remitted to Family Court. The Appellate Division found that the mother and her husband told the child at an early age that the putative father was his biological father and held that he therefore failed to establish that "the child would suffer irreparable loss of status, destruction of his family image, or other harm to his physical or emotional well-being if a genetic marker test was ordered."

Paternity - Equitable Estoppel – Presumption of Legitimacy

In Matter of Walter G. v. Isabel LA, 2020 Westlaw 88912 (2d Dept. Jan. 8, 2020), the petitioner putative father appealed from an April 2019 Family Court order which, after a hearing, granted the child's motion to dismiss his July 2018 petition, seeking to establish his paternity of a child born in December 2016 during the mother's marriage to her husband, upon the ground that the presumption of legitimacy had not been overcome and that it was in the child's best interests to equitably estop petitioner from asserting paternity. The Second Department affirmed, noting that the husband's name was listed as the father on the child's birth certificate and there was conflicting testimony as to whether the mother and husband had

intimate relations at or about the time of conception. The Appellate Division found that there was no dispute that the husband: was present at the hospital when the child was born; lived with the child since her birth; was actively involved in her development; and established a loving father-daughter relationship with her. The Court concluded that there was no evidence that petitioner established a parent-child bond with the child.

Legislative Update

Child Support – Imputed Income and Modification–Incarceration Not Voluntary Unemployment

DRL 240(1-b)(b)(5)(v) and FCA 413(1)(b)(5)(v) are **amended, effective September 13, 2019** and applicable to pending actions and proceedings, regarding imputed income, to provide that "incarceration shall not be considered voluntary unemployment, unless such incarceration is the result of non-payment of a child support order, or an offense against the custodial parent or child who is the subject of the order or judgment." DRL 236(B)(9)(b)(2)(i) and FCA 451(3)(a) are also **amended, effective September 13, 2019** and applicable to pending actions and proceedings as follows (addition underlined): "***Incarceration **shall not be considered voluntary unemployment and** shall not be a bar to finding a substantial change in circumstances provided such incarceration is not the result of non-payment of a child

support order, or an offense against the custodial parent or child who is the subject of the order or judgment." A.0834/S.06560, L. 2019, Ch. 313, signed 9/13/2019.

Custody - Felony Sex Offender Precluded–Rebuttable Presumption

DRL 240(1-c)(b) is **amended, effective September 21, 2019,** to add a new paragraph, creating an additional rebuttable presumption that it is not in the best interests of a child to "be placed in the custody of or have unsupervised visits with a person who has been convicted of a felony sex offense, as defined in section 70.80 of the penal law, or convicted of an offense in another jurisdiction which, if committed in this state, would constitute such a felony sex offense, where the victim of such offense was the child who is the subject of the proceeding." FCA 651(a) is **amended, also effective September 21, 2019**, to specify that Family Court's jurisdiction to determine custody and related issues is as set forth in DRL 240 subdivisions (1) and (1-c), a clarification that probably should have been made when subdivision (1-c) was first enacted. A.04784-C/S.02836-C, L. 2019, Ch. 182, signed 8/22/2019.

Temporary Spousal Support – With Orders of Protection

FCA 828 has a new subdivision (5) and FCA 842 has an identical new paragraph, **effective October 3, 2019,** stating:

> Notwithstanding the provisions of section eight hundred seventeen of this article, where a temporary order of spousal support has not already been issued, the court

may, in addition to the issuance of an order of protection pursuant to this section, issue an order directing the parties to appear within seven business days of the issuance of the order in the family court, in the same action, for consideration of an order for temporary spousal support in accordance with article four of this act. If the court directs the parties to so appear, the court shall direct the parties to appear with information with respect to income and assets, but a temporary order for spousal support may be issued pursuant to article four of this act on the return date notwithstanding the respondent's default upon notice and notwithstanding that information with respect to income and assets of the petitioner or respondent may be unavailable.

A.07529-A/S.06423, L. 2019, Ch. 335, signed 10/03/2019.