NYSBA FAMILY LAW SECTION, Matrimonial Update, January 2019

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Agreements - Set Aside Denied

In Bradley v. Bradley, 2018 Westlaw 6537058 (1st Dept. Dec. 13, 2018), both parties appealed from an August 2017 Supreme Court order, which, without a hearing, denied the wife's motion to vacate the divorce judgment and incorporated stipulation and the husband's cross motion for counsel fees and sanctions. The First Department affirmed, finding an "absence of fraud, overreaching, mistake or duress" and noting that: the wife "was represented by able and experienced counsel, had been involved in negotiations for a period of time, came close to an agreement two weeks prior to reaching settlement, and spent the entire day negotiating the final terms of the settlement"; "the court conducted a proper allocution of the wife who represented that she understood the terms of the stipulation"; and the wife's "submission of two unsworn letters from physicians was insufficient to establish that she was so incapacitated as to warrant setting aside the stipulation." The Appellate Division held that "the wife has since ratified the stipulation of settlement by seeking disbursements in accordance with its terms." With regard to the husband's cross appeal seeking sanctions and fees, the First Department concluded that the

husband “failed to show that the challenged conduct, while without legal merit, was ‘so egregious as to constitute frivolous conduct within the meaning of 22 NYCRR 130-1.1.’”

Custody – Modification Without Hearing, Reversed

In Matter of Michael G. v. Katherine C., 2018 Westlaw 6537034 (1st Dept. Dec. 13, 2018), the mother appealed from a December 2017 Family Court order, which granted the father's modification petition and awarded him sole legal and physical custody of the child, suspended the mother's access for a year, and prohibited the mother from filing any modification petitions for a year. The First Department modified, on the law, by reversing so much of the order which suspended the mother’s access to the child, and remanded for further proceedings. The Appellate Division noted that there were sufficient alleged changed circumstances, including: the father’s claim that the mother had unilaterally prevented him from exercising his visitation under the prior order; the statement by ACS counsel that a report that the father had abused the child was unfounded; and the concerns of the father and the AFC that the mother had coached the then three-year-old child to make false allegations. The Appellate Division held that Family Court “erred when, without holding an evidentiary hearing, it made a final order transferring physical and legal custody to the father and suspending all contact between the mother and the

child for a year," where the mother had been the child's primary caretaker. The Court concluded that Family Court's prohibition on future petitions, given "no evidence that the mother had a history of relitigating the same claim or otherwise engaging in frivolous litigation against the father," was not appropriate.

In Matter of Williams v. Jenkins, 2018 Westlaw 6519193 (2d Dept. Dec. 12, 2018), the father appealed from a March 2016 Supreme Court order which, without a hearing, granted the mother's June 2015 petition for sole legal and physical custody of the subject child and for permission to relocate with the child to Illinois, and suspended the father's parental access with the child. The Second Department reversed, on the law, and remitted for a hearing on the mother's petition before a different Justice and a new determination, pending which hearing, Supreme Court was directed to "expeditiously establish a new parental access schedule for the father, and the provisions of the order entered March 3, 2016, pertaining to the child's relocation shall otherwise remain in effect." The parties are unmarried and have one child together. A May 2014 Supreme Court order provided for joint legal custody with physical custody to the mother, and directed that neither parent could relocate with the child outside New York City or the State of New Jersey, without the written consent of the other parent and the establishment of a mutually agreeable post-relocation

parental access schedule, or court approval for relocation. The father claimed that the mother did relocate without court approval. The Appellate Division found that prior to a March 2016 court appearance “the father purportedly appeared at the courthouse and, inter alia, screamed and used inappropriate language at courthouse staff. Without conducting a hearing, the Supreme Court immediately entered an order awarding the mother sole legal and physical custody of the child, and permission to relocate with the child to Illinois.” The March 2016 order further provided: "due to the father's disruptive and obstreperous behavior in the court room, having cursed at court personnel . . . all [of the father's parental access is] suspended," and that the father could petition for parental access upon completion of a drug treatment program. The Second Department concluded that the order "serve[d] more as a punishment to the [father] for h[is] misconduct than as an appropriate custody award in the child[ ]'s best interests." (Citation omitted).

Custody - Sole – Domestic Violence; Relocation (CA) Permitted

In Levitin v. Levitin, 2018 Westlaw 6332529 (2d Dept. Dec. 5, 2018), the father appealed from a September 2017 Supreme Court judgment of divorce, which, upon a November 2016 decision after trial, among other things, awarded the mother sole custody of the parties’ 3 children and permission to relocate to

California. The Second Department modified the judgment, on the facts and in the exercise of discretion, only by: (1) adding thereto a provision stating that with respect to the Jewish holidays of Rosh Hashanah, Succoth, Hanukkah, and Purim, commencing upon the close of the school day for all three children on the day prior to the holiday and ending on the day prior to the children's return to school, the defendant shall have the children on all even numbered years and the plaintiff shall have the children on all odd numbered years, and (2) adding thereto a provision directing that the defendant's telephone contact with the children on Friday evenings and the beginning of Jewish holidays shall be one hour prior to sunset in New York City. The Appellate Division noted that "[t]he plaintiff [mother] alleged that she was the victim of domestic violence, including rape by the defendant" and Supreme Court "credited the plaintiff's allegations of domestic violence and rape." The Second Department held that "contrary to the defendant's contention, the Supreme Court properly considered the allegations of domestic violence, along with all the other relevant factors, in awarding sole custody of the parties' children to the plaintiff" and that "plaintiff's proposed relocation to California with the parties' children is in the best interests of the children." The Appellate Division concluded that the mother demonstrated that the father

“ostracized and alienated her from their Orthodox Jewish community in New York, that she could not meet the family's living expenses in New York, and if she were permitted to relocate, she would receive, from her parents, financial assistance and assistance with child care, as well as the opportunity for her and the children to live with her parents rent-free.”

Custody - UCCJEA – Home State Jurisdiction

In Matter of Montanez v. Tompkinson, 2018 Westlaw 6332479 (2d Dept. Dec. 5, 2018), the father appealed from a February 2018 Family Court order, which declined jurisdiction on the ground that New York is an inconvenient forum and stayed the proceeding pending the reopening of the mother's custody proceeding in Hawaii. The Second Department reversed, on the facts and in the exercise of discretion, and remitted to Family Court. The child was born in New York in May 2016 and in early February 2017, the mother moved to Hawaii with the child, after the father allegedly perpetrated acts of domestic violence against her in the child's presence. On February 7, 2017, ACS commenced a neglect proceeding against the father in Family Court. The mother sought a temporary order of protection in Hawaii Court several weeks later. In May 2017, the father filed for custody in Family Court but was unable to serve the mother until December 2017. In August 2017, the mother filed for

custody in Hawaii. The Hawaii Court, apparently unaware of either the neglect petition or the father's custody petition in New York, and upon the father's default, awarded the mother, among other things, sole legal and physical custody. The neglect petition was settled in January 2018, at which time Family Court learned of the Hawaii proceeding. Family Court conferred with the Hawaii Court, and learned that the father was personally served with the mother's petitions. Family Court then declined to exercise jurisdiction, on the ground that New York is an inconvenient forum and that Hawaii is a more appropriate forum, pursuant to Domestic Relations Law §76-f. The Appellate Division determined that Family Court speculated that the Hawaii Court would "likely entertain an application by the father to vacate his default, and then proceed on the merits of the mother's petition." The Second Department held that New York was the child's home state pursuant to the UCCJEA, and, therefore, the Hawaii Court lacked subject matter jurisdiction to make determinations on the mother's custody petition. The Court reasoned that Domestic Relations Law §76-f(3) provides: "[i]f a court of this state determines that it is an inconvenient forum and that a court of another state is a more appropriate forum, it shall stay the proceedings *upon condition that a child custody proceeding be promptly commenced in another designated state and may impose any other condition the court considers*

just and proper" (emphasis added). The statute, on its face, presumes that a child custody proceeding *will be* commenced in the designated state, not that there already have been child custody proceedings conducted in that state. Here, the Family Court stayed the father's custody proceeding 'pending the *reopening* of the mother's custody proceeding in Hawaii' (emphasis added). Merely reopening the mother's custody proceeding in Hawaii does not ensure that the father will not be prejudiced by the evidence previously received in Hawaii without his participation." The Appellate Division concluded: "Therefore, the Family Court should not have declined to exercise jurisdiction and designated Hawaii as a more appropriate forum without first being assured by the Hawaii Court that all of its prior orders issued without subject matter jurisdiction were vacated. Further, any stay of the father's New York custody proceeding should have been upon the condition that child custody proceedings be promptly recommenced in Hawaii such that all parties would have the opportunity to be heard in a hearing de novo (*see* Domestic Relations Law §76-f[3])."

In Matter of Dean v. Sherron, 2018 Westlaw 6714141 (4th Dept. Dec. 21, 2018), the mother appealed from a September 2017 Family Court order, which dismissed her custody petition for lack of jurisdiction. The Fourth Department reversed, on the law, reinstated the petition and remitted to Family Court for

further proceedings. The Appellate Division noted that a "period of temporary absence during the six-month time frame is considered part of the time period to establish home-state residency" pursuant to DRL §75-a[7] and that if a parent wrongfully removes a child from a state, the time following the removal is considered a temporary absence. The Fourth Department found that there were "disputed issues of fact whether the child's four-or five-month stay in North Carolina constituted a temporary absence from New York State, in light of allegations that respondent father withheld the child from the mother for purposes of establishing a 'home state' in North Carolina (citations omitted) and whether the mother's absence from New York State interrupted the child's six-month pre-petition residency period required by Domestic Relations Law §76(1)(a)."

Custody – Visitation – Grandparent – Denied

In Matter of Jones v. Laubacker, 2018 Westlaw 6714408 (4th Dept. Dec. 21, 2018), the parents in an intact family appealed from a May 2018 Family Court order, which, following a hearing, granted the paternal grandmother visitation with two children, including an infant born approximately 5 months following the filing of her initial petition, for two weekends per month. The Family Court order was stayed pending appeal. The Fourth Department reversed, on the law, and dismissed the petitions, finding that Family Court's order "lacks a sound and substantial

basis in the record.” Prior to a June 25, 2017 incident at the grandmother’s home, the older child had at least one overnight visit at the grandmother’s home every weekend. On that date, the father and his brother “engaged in a heated argument, which involved yelling,” and the father told the grandmother, "[N]o more weekends." An OCFS hot line report was made that same day. CPS investigated and the report was determined to be unfounded. The grandmother filed her first petition on June 28, 2017, which “accused the father of committing ‘an incident of domestic violence’ on June 25,” and noted that a CPS investigation of the incident had commenced. A police officer interviewed the grandmother, who urged him to arrest the father for harassment, but the District Attorney declined to press charges. On November 24, 2017 the younger of the two subject children was born, prompting the grandmother to file a second petition seeking visitation. The Appellate Division noted that the Court of Appeals has emphasized that "the courts should not lightly intrude on the family relationship against a fit parent's wishes. The presumption that a fit parent's decisions are in the child's best interests is a strong one,” citing Matter of E.S. v. P.D., 8 NY3d 150, 157 (2007). The Fourth Department found: “The parents here are fit. *** There was virtually no evidence to the contrary.” The Appellate Division concluded: “Although the grandmother and the child have an extensive preexisting

relationship, the grandmother exhibited a willingness to use her position in the legal system to undermine the parental relationship by initiating Family Court proceedings almost immediately, rather than making a good faith attempt to fix her family relationships without resorting to litigation. That evidence makes it difficult to draw any conclusion other than that the grandmother 'is responsible for escalating a minor incident into a full-blown family crisis, totally ignoring the damaging impact [her] behavior would have on the [family relationships] and making no effort to mitigate that impact' (citation omitted). There is now palpable animosity between the parties. Approximately three months after the litigation commenced, the parents legally changed their hyphenated surname to remove the grandmother's surname. *** Although animosity alone is not a sufficient reason to deny visitation (citation omitted), here, the animosity threatens to disrupt the harmonious functioning of the family unit."

Enforcement - Contempt – Health Insurance; Counsel Fees

In Estes v. Bradley, 2018 Westlaw 6519327 (2d Dept. Dec. 12, 2018), the wife appealed from a May 2016 Supreme Court order, which denied, as academic, her January 2016 motion to hold the husband in contempt, for failing to comply with an April 2013 order directing him to provide health insurance for her, and which granted her, without a hearing, counsel fees only

to the extent of $10,000. The Second Department reversed, on the law and the facts, and in the exercise of discretion, and remitted for further proceedings. The parties entered into a stipulation of settlement in April 2015, so-ordered in July 2015, which provided that each party would obtain his or her own health insurance, at his or her own expense, after the judgment of divorce was entered. Despite the fact that the judgment of divorce was entered while the wife's January 2016 motion was pending, the Appellate Division held that her request that the husband be found in contempt of the April 2013 order, which mandated him to provide her with health insurance during the pendency of this action, was not rendered academic. With regard to counsel fees, the Second Department found that "although the Supreme Court providently exercised its discretion in granting that branch of the defendant's motion which was for an award of an attorney's fee (citations omitted), we agree with the defendant that the court improvidently exercised its discretion in awarding her the sum of only $10,000." The Court concluded that $10,000 was "inadequate" and that "a hearing is necessary to determine the amount of a reasonable attorney's fee to which the defendant is entitled, in a sum to exceed $10,000."

Equitable Distribution - Marital Property Presumption

In Prokopov v. Doskotch, 166 AD3d 1408 (3d Dept. Nov. 29, 2018), the husband appealed from a December 2015 Supreme Court

judgment which directed equitable distribution. The parties were married in January 2002 and have two children born in 2002 and 2009. The wife commenced the divorce action in February 2013. The Third Department affirmed, rejecting the husband’s argument that Supreme Court erred by characterizing as a marital asset, a certain rental property acquired by his mother and gifted to him. The Appellate Division found: (1) that the property was acquired in June 2008, in the name of the husband's mother, who deeded the property to the husband in August 2008; (2) in September 2012, the husband deeded the property back to his mother; and (3) the husband made a $1,000 down payment to acquire the property and provided a $50,504.49 bank check to pay the balance due at closing. The husband testified that his mother provided the funds used to purchase the property, specifically, joint fund with his mother, from which $58,314 had been withdrawn in January 2007 and deposited into his account pending the closing. The husband denied ever having access to or depositing any money into the joint fund. The wife testified that the funds to buy the rental property were from the husband's salary, and that the husband's mother had no income to place in the joint fund. The wife also testified that the husband personally performed substantial renovations on the property, collected the rents and used the funds to pay marital expenses. Supreme Court found that the husband's explanation as

to his mother's interest in the property lacked credibility, and the Appellate Division noted that “no showing was made as to the actual source of funds deposited into that account, which was opened in August 2005.” The Court concluded: “It is also telling that, shortly after the wife informed the husband that she had consulted an attorney about a divorce, he transferred the property back to his mother. His explanation for doing so — to avoid arguments at home — was simply implausible. We conclude that the record evidence supports the court's determination to distribute the rental property as a marital asset.”

Evidence - Hearsay – Statements of Children – Family Offense

In Matter of Kristie GG. V. Sean GG., 2018 Westlaw 6683333 (3d Dept. Dec. 20, 2018), the father appealed from a March 2017 Family Court order, which, upon the mother’s family offense petition, found that he committed harassment in the second degree against the children and issued a 2-year order protection. The parties have 3 three children, born in 2000, 2002 and 2007, who, pursuant to a judgment of divorce, primarily reside with the mother in Otsego County and have visitation with the father. During a February 2016 visit in Otsego County, the father allegedly grabbed the middle child during an argument, in the presence of the other two children. On consent, Family Court granted the motion of the attorney for the children to preclude the parties from calling the children as witnesses. Over the

father's hearsay objections, two detectives testified as to the children's out-of-court statements about the incident. The mother also testified as to the children's statements. Video recordings of the police interviews with the children were admitted into evidence, over the father's objections. The father testified that he took the middle child by the arm to lead him outside the hotel but, after the child was disrespectful and hit the father's arm, the father grabbed the child by both arms to get him under control. The Third Department reversed, noting that "[o]nly competent, material and relevant evidence may be admitted in a fact-finding hearing," citing Family Court Act §834, and that "competent evidence excludes hearsay testimony unless an exception exists." Family Court relied upon Family Court Act §1046 (a) (vi): "previous statements made by the child relating to any allegations of abuse or neglect shall be admissible in evidence, but if uncorroborated, such statements shall not be sufficient to make a fact-finding of abuse or neglect." Clearly applicable to Family Court Act Article 10 and 10-A proceedings, courts have extended FCA 1046(a)(vi) to FCA Article 6 custody and visitation proceedings, and have allowed such out-of-court statements, so long as they relate to abuse or neglect and are sufficiently corroborated. Although this is a case of first impression in the Third Department, the First and Second Departments have concluded that the exception "has no

application to family offense proceedings under article 8 (citations omitted).” The Appellate Division concluded that Family Court erred in admitting the children's out-of-court statements during the fact-finding hearing. Even though the father consented to the AFC’s preclusion motion, the Third Department found that “his consent to the motion may have been based on a different understanding of its implication,” and reversed and remitted for a new fact-finding hearing.

Evidence - Medical Records – Foundation

In Matter of Jennings v. Domagala, 2018 Westlaw 6715079 (4th Dept. Dec. 21, 2018), the father appealed from an April 2017 Supreme Court order, which, after a hearing, granted the mother’s motion for modification of the child support terms of an incorporated agreement, which provided for joint legal and shared physical custody of the child, and an opt out of the CSSA, whereby the parties waived child support from each other. The Appellate Division reversed, vacated the child support award and remitted for a new hearing. The mother alleged that she was no longer able to work due to injuries she sustained in an automobile accident. Over the father’s objection, Supreme Court admitted into evidence two documents prepared by the mother's physician, to show that she was temporarily totally disabled. The Fourth Department found that the mother “failed to lay a proper foundation for the admission of those documents,” citing

CPLR 4518(a). The Appellate Division concluded: “Without those documents, plaintiff failed to meet her burden of establishing a substantial change in circumstances sufficient to warrant an upward modification of child support inasmuch as she ‘did not provide competent medical evidence of [her] disability or establish that [her] alleged disability rendered [her] unable to work’ (citations omitted).”

Family Offense - Extension of Order of Protection

In Matter of Jacobs v. Jacobs, 2018 Westlaw 6626785 (2d Dept. Dec. 19, 2018), the father appealed from a December 2017 Family Court order which, after a hearing, upon finding good cause to extend a 2-year April 2015 order of protection, which directed him to stay away from his son, extended the same for a period of five years. The Second Department affirmed, noting that Family Court Act §842 provides that upon motion, the Family Court may “extend the order of protection for a reasonable period of time upon a showing of good cause or consent of the parties. The fact that abuse has not occurred during the pendency of an order shall not, in itself, constitute sufficient ground for denying or failing to extend the order." The Appellate Division found that “the father made statements to the petitioner's then-employer, the Westchester County Department of Correction, which needlessly caused a significant police response to the petitioner's home while the petitioner's eight-

year-old son was visiting. In addition, since the imposition of the original order of protection, the father has commenced multiple court actions against the petitioner, all found to be lacking in merit." The Court concluded that "the father continued to interfere with the petitioner's peaceful existence and well-being," and the "finding of good cause to extend the order of protection is supported by the record."

Family Offense - Intimate Relationship

In Matter of Raigosa v. Zafirakopoulos, 2018 Westlaw 6519212 (2d Dept. Dec. 12, 2018), petitioner appealed from a January 2018 Family Court order, which, without a hearing, granted respondent's motion to dismiss her family offense petition for lack of subject matter jurisdiction pursuant to FCA §812(1)(e) [no "intimate relationship"]. The Second Department reversed, on the law, reinstated the petition, and remitted to Family Court for a hearing to determine whether there is subject matter jurisdiction pursuant to Family Court Act §812(1)(e), a new determination thereafter of the respondent's motion to dismiss, and further proceedings, if warranted. Petitioner alleged that the parties "have an intimate relationship," as they were living together as roommates. In dismissing the petition, Family Court found that the parties did not have an intimate relationship because their relationship was not sexual in nature. The relevant statute confers family offense

jurisdiction over “persons who are not related by consanguinity or affinity and who are or have been in an intimate relationship regardless of whether such persons have lived together at any time." (Family Ct Act §812[1][e]). The “[f]actors the court may consider in determining whether a relationship is an ‘intimate relationship’ include but are not limited to: the nature or type of relationship, regardless of whether the relationship is sexual in nature; the frequency of interaction between the persons; and the duration of the relationship” (Family Ct Act §812[1][e]). The Appellate Division concluded that “Family Court's determination that the absence of sexual intimacy between the parties by itself conclusively established that there was no ‘intimate relationship’ within the meaning of Family Court Act §812(1)(e) was improper.”