NYSBA FAMILY LAW SECTION, Matrimonial Update, June 2018

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Counsel Fees - After Trial – Increased; Equitable Distribution – Proportions – Business (26%), Separate Debt and Property; Maintenance - Durational

In Sheehan v. Sheehan, 2018 Westlaw 2123737 (2d Dept. May 9, 2018), both parties appealed from a March 2016 Supreme Court judgment after trial, which, among other things, awarded the wife 26% ($199,837) of the appreciated value ($768,603) of the husband's business, distributed the appreciated net cash value of the husband's separate property life insurance policies, awarded the wife maintenance of $2,100 for 3 years, awarded $25,000 in counsel fees to the wife, and failed to award the wife a credit for funds used by the husband to pay his separate debt. The Second Department modified, on the law and on the facts, by (1) deleting the award to the wife of a portion of the appreciated net cash value of the husband's two life insurance policies, and (2) increasing the wife's counsel fee award to $40,000, and otherwise affirmed. The parties were married in July 2000, and have two children. The husband owned a business (gas station and auto repair center), in which the wife worked part-time as a bookkeeper while also being the primary caregiver for the children. The wife filed the divorce action in August

2012. Given the wife's "direct contributions to the business, as well as her indirect contributions as a homemaker and primary caregiver for the parties' children in this long-term marriage," the Appellate Division found that "the court's award of 26%, or $199,836.65, was a provident exercise of discretion." With respect to the husband's life insurance policies, the Second Department found that it was undisputed that they were obtained prior to the marriage and reasoned: "While it would have been appropriate to distribute the appreciated cash value of the policies if the defendant had made contributions to them with marital funds (citations omitted), the evidence establishes that the premiums were not paid with marital funds. Therefore, the Supreme Court should not have awarded the plaintiff a portion of the appreciated net cash value of these policies ***." The Appellate Division held that Supreme Court "providently denied the plaintiff's request for a credit for an equitable share of funds used by the defendant to pay his separate debt during the marriage," because "the credible evidence established that the payments the defendant made toward his separate debt during the marriage were made with separate funds." The Second Department rejected both parties' challenges to the maintenance determination, noting that Supreme Court "limited the duration of the award to a reasonable time to allow the plaintiff to fulfill her plan to obtain her Associate's

Degree and training that will enable her to be self-supporting and regain self-sufficiency.” With regard to counsel fees, the Court concluded: “Considering the parties' relative circumstances and other relevant factors, the award of attorney's fees to the plaintiff in the sum of $25,000 was inadequate.”

Counsel & Expert Fees - After Trial – Denied – Billing Non-Compliance; No Expert Affidavit

In Greco v. Greco, 2018 Westlaw 2225194 (2d Dept. May 16, 2018), the husband appealed from a March 2015 Supreme Court order, which granted the wife’s post-trial motion for counsel fees to attorney 1 ($70,000), attorney 2 ($37,500) and $12,700 in expert fees. The Second Department modified, on the law and in the exercise of discretion, by reversing the awards to attorney 1 and the expert. The Appellate Division found that attorney 1 did not substantially comply with the requirement of billing every 60 days [22 NYCRR 1400.2, 1400.3(9)], and that the experts did not submit affidavits [Ahern v. Ahern, 94 AD2d 53, 58].

Counsel Fees - Appeal

In Greco v. Greco, 73 NYS3d 765 (2d Dept. May 16, 2018), the wife appealed from an April 2016 Supreme Court order, which granted her motion for counsel fees for her appeal from the financial aspects of a judgment of divorce, to the extent of

$12,000. The Second Department affirmed, stating: “Under the circumstances, we find no basis to disturb the award.”

Custody - Modification – Sole to Father; Mother Changes in Residence, Paramours, Sex Offender Contact; Facebook Posts

In Matter of Brent O. v. Lisa P., 2018 Westlaw 2048983 (3d Dept. May 3, 2018), the mother appealed from a January 2017 Family Court order, which, after a hearing, granted the father’s November 2015 petition (and supplemental petitions) to modify a November 2013 stipulated order, which had conferred sole legal and primary physical custody of the parties’ daughter born in 2005 to the mother, with visitation in North Carolina to the father, so as to grant him sole custody. Family Court also granted an order of protection prohibiting contact between the child and certain maternal relatives. The father subsequently moved to Oklahoma. There was no dispute that changed circumstances warranted modification. The Appellate Division affirmed and found “that the child has spent nearly her entire life in the care of her mother and that the two enjoy a close relationship,” but that Family Court’s “grave concern for the child's well-being and stability while with the mother is well-founded and supported by the evidence.” The Third Department noted: “The mother's own testimony established that, since the entry of the prior custody order, she has changed residences several times and moved from one relationship to another with

relative alacrity, inviting several of these individuals to spend the night, or longer, at her home. At times, the mother's routine involved shuttling the child back and forth between her residence and that of her on-again, off-again paramour, regardless of whether the two were in a ‘relationship’ and with no apparent consideration as to the disruption this may cause the child. Of particular concern is the mother's conduct in permitting the child to be present at family gatherings with a family member she knew to be a convicted sex offender, as well as her decision to expose the child to a convicted murderer. Further, as the mother acknowledged, the child had been subjected to sexual abuse while under her care. The mother's Facebook page, which could be viewed by the public, contained provocative pictures of herself, a number of sexually explicit ‘picture quotes’ and lewd remarks and expletives that she admitted she would not want her children to see. When questioned as to whether she would cease using Facebook if ordered to do so by the court, the mother indicated that she would but that it would be a ‘hardship.’ Charitably stated, the mother's choices in this regard reflect a deficiency of reasonable parental judgment and a lack of insight as to the adverse impact that her conduct has upon the child.” The Appellate Division cited testimony “that the child was failing core classes at school, yet the mother could not name one of the child's teachers” and

evidence that “the mother engaged in a course of conduct designed to alienate the child from the father and to interfere with the father-daughter relationship.” On at least one occasion, the mother changed residences with the child without informing the father or providing him with their new phone number, again in violation of the prior order. The Third Department found that “the evidence overwhelmingly establishes that he is far more willing and able to provide a stable and nurturing environment for the child. The father resides in a single-family home in Oklahoma with his wife of 10 years, who is gainfully employed as an executive for an airline company. Having retired from the United States Army in 2009, the father is able to care for the child whenever she is not in school. He has consistently exercised the parenting time afforded to him under the 2013 order, and has traveled to New York on multiple occasions to avail himself of additional visits with the child.” On the implicit issue of relocation, the Appellate Division noted: “Although an award of custody to the father would necessarily result in the child's relocation to Oklahoma, upon balancing the *Tropea* factors (citation omitted), we are satisfied that the father met his ‘burden of establishing, by a preponderance of the credible evidence, that the proposed relocation would be in the child's best interests.’”

Custody - Modification – Tri-Custody to Sole; Relocation (NC)

Permitted

In Matter of Nadine T. v. Lastenia T., 2018 Westlaw 2139938 (1st Dept. May 10, 2018), Lastenia T. appealed from an April 2017 Family Court order which, after a hearing, granted Nadine T.'s petition to modify a 2007 order, which had granted joint "tri-custody" to the parties and the birth mother, so as to award sole custody to Nadine and permitted her to relocate to North Carolina with the now 15 year old child. The First Department affirmed, noting that it was Nadine "who has solely provided the child with a safe, stable and loving home and tended to all of his educational, medical and therapeutic needs," and that after the relationship between Nadine and Lastenia ended, "Lastenia made no contact with the child for months at a time and made minimal efforts to participate in his upbringing." The Appellate Division held that with regard to the birth mother, "the record supports the finding that extraordinary circumstances existed so as to award custody to petitioner." The birth mother "handed over physical custody of the child to petitioner and Lastenia in 2003, when he was three months old, and, thereafter maintained very little contact with him." Further, the birth mother "has also taken no financial responsibility, or any other role in the child's care," which constitutes "an extended disruption of the birth mother's custody," such that Nadine has standing to litigate the child's best interests. With respect to relocation,

the First Department found that Nadine "demonstrated that her economic situation would be improved by the move as she would be able to continue to work as a home health aide, earning more per hour, and would also be able to work more hours because her mother and sister would be able to care for the child while she was at work."

Custody - Right to Counsel – Supreme Court

In DiBella v. DiBella, 2018 Westlaw 2048993 (3d Dept. May 3, 2018), the mother appealed from a January 2016 Supreme Court judgment, which, in the mother's 2013 divorce action, granted sole legal custody of the parties' 2 children (born in 2006 and 2008) to the father, modifying a December 2011 Family Court consent order providing for joint legal custody and equally shared physical custody, an arrangement to which the parties had previously stipulated in a July 2010 Family Court order. The grounds for divorce were not contested, and there being no other requests for ancillary relief, the issues of custody, visitation and child support came on for trial over 8 nonconsecutive days from May 2014 to September 2015. The mother had counsel for the first 4 trial dates in May, June and July 2014, and she discharged her counsel on the 5th day in October 2014. Supreme Court set the 6th and 7th days for May 27 and June 3, 2015. On May 27, 2015, the mother appeared and explained she had retained new counsel, but he was unable to attend that day and requested the

court to "extend" or "hold off" proceeding with the continuation of the trial until June 3, 2015. The Appellate Division found: “Supreme Court denied the mother's request for an adjournment, indicating that no notice of appearance had been filed by the mother's replacement counsel and that it could not rely solely upon her statement that she may be represented by counsel going forward. Supreme Court then proceeded with the trial, informing the mother that, under the circumstances, she was going to have to proceed pro se.” The mother contended on appeal, among other things, that she was deprived of her statutory right to counsel (FCA 262[a]) when Supreme Court compelled her to proceed with the continuation of trial without counsel. The Third Department reversed, on the law, holding: “In the absence of the requisite statutory advisement of her right to counsel (*see* Family Ct Act §262[a][v]) or a valid waiver of such right (citation omitted), we find that the mother was deprived of her fundamental right to counsel (*see* Family Ct Act §§261, 262[a][v]; Judiciary Law §35[8]; other citations omitted).” The Appellate Division remitted the action to Supreme Court for a new trial on the issues of custody, visitation and child support.

Custody - Third Party - Grandparent – Visitation Granted; Child in Foster Care

In Matter of Weiss v. Weiss, 2018 Westlaw 2224871 (2d Dept. May 16, 2018), the maternal grandmother appealed from a December

2016 Family Court order, which, upon remittitur from the Appellate Division in August 2016, dismissed her petitions for custody and visitation with a child who has lived with foster parents for virtually her entire life, upon the ground of lack of standing. The mother's parental rights had been terminated and the child had been freed for adoption. The Second Department held that a biological grandparent has standing to seek custody and visitation, even after parental rights have been terminated and the child has been freed for adoption. While the Appellate Division agreed that it was not appropriate to award custody to the grandmother, given that the grandmother "developed a relationship with the child early in her life and thereafter made repeated efforts to continue that relationship," supervised visitation was in the child's best interests. The Second Department modified, on the law, on the facts and in the exercise of discretion, and remitted for further proceedings before a different Family Court Judge to determine appropriate visitation.

Custody - UCCJEA – NY Jurisdiction; Proceedings in Another State

In Matter of Beyer v. Hoffman, 2018 Westlaw 2075877 (4th Dept. May 4, 2018), the father appealed from an August 2016 Family Court order, which dismissed his petition seeking custody of the parties' twin daughters, upon the ground that Pennsylvania is the home state of the children and the mother

had commenced a custody proceeding in Pennsylvania. The Fourth Department reversed, on the law, reinstated the petition, and remitted to Family Court for further proceedings. The children were born on June 5, 2015 and lived with both parties in New York until December 29, 2015, when the parties moved with the children to State College, Pennsylvania. In April 2016 the children and the mother moved to York, Pennsylvania without the father. The father returned to New York and filed for custody on June 6, 2016. The mother commenced a custody proceeding in Pennsylvania on August 9, 2016. The Appellate Division determined that "Family Court had jurisdiction to make an initial custody determination at the time the father commenced the instant proceeding (*see* Domestic Relations Law §§75-a[7]; 76 [1] [a]; other citation omitted) and Pennsylvania had such jurisdiction at the time the mother commenced the proceeding in that state." The Fourth Department agreed "that Family Court erred in declining to exercise jurisdiction and dismissing the proceeding without following the procedures required by the UCCJEA (citation omitted)." Specifically, Family Court failed "either to allow the parties to participate in the communication (citations omitted) or to give the parties 'the opportunity to present facts and legal arguments before a decision on jurisdiction [was] made' (citations omitted)." The Appellate Division held that Family Court "did not articulate its

consideration of each of the factors [DRL §76-f(2)(a)-(h)] relevant to the . . . petition . . . and we are unable to glean the necessary information from the record, [and] the court's [implicit] finding that New York was an inconvenient forum to resolve the [custody] petition is not supported by a sound and substantial basis in the record." The Fourth Department noted that "the events subsequent to the entry of the order we are reversing may be relevant to and can be considered on remittal."

Enforcement - Child Support – Willful Violation

In Matter of Olivari v. Bianco, 2018 Westlaw 2224926 (2d Dept. May 16, 2018), the father appealed from a December 2016 Family Court order of commitment, which confirmed a September 2016 Support Magistrate order (made after a hearing and finding a willful violation of a 2015 order of child support), and remanded him to jail for 90 days for failure to pay a $15,000 purge amount. The Second Department affirmed, finding that the father failed to establish his defense of inability to pay [FCA 455(5)], noting: "there was evidence at the hearing that the father chose to become indebted on a mortgage on a property in Florida and to pay his present wife's health and automobile insurance and rent, rather than paying the required child support. Thus, the evidence showed that the father diverted his income to these other expenses, including travel to Florida in connection with the property there, rather than comply with the

order of support (citation omitted), and used personal expenses as business deductions, making his income appear lower (citation omitted). Furthermore, the father, a licensed attorney and insurance agent, failed to show any attempt to secure employment with a law firm or insurance agency."

Family Offense - Harassment 2d - Found

In Matter of Doris M. v. Yarenis P., 2018 Westlaw 2139369 (1st Dept. May 10, 2018), Yarenis appealed from a June 2017 Family Court Order of protection, which, upon a fact-finding determination that she committed harassment in the first and second degree, directed that she stay away from the parties' shared apartment until June 30, 2018. The First Department modified, on the law, to vacate the finding of harassment in the first degree. The Appellate Division held that Family Court erred in determining that Yarenis' "actions of leaving water to boil over on the stove, burning the pots, allowing the bathtub to overflow on several occasions and screaming in the middle of the night while playing her music in a loud manner, constituted the family offense of harassment in the first degree, because there were no facts alleged in the family offense petition supporting such a finding." However, the First Department determined that Yarenis committed harassment in the second degree when she "summoned the police to the apartment and attempted to have [Doris] arrested about three times that day,"

which actions “served no legitimate purpose and only alarmed or seriously annoyed” Doris. The Court rejected Yarenis’ argument that a less drastic remedy was in order, given Doris’ testimony that she was afraid in her own home, because Yarenis “continued leaving the stove on unattended in violation of the May 8, 2017 and June 1, 2017 temporary orders of protection.”

Family Offense - Occurrences Outside NY; Remoteness in Time

In Matter of Rushane P. v. Boris L.R., 73 NYS3d 425 (1st Dept. May 10, 2018), petitioner appealed from an August 2017 Family Court order, which dismissed the family offense petition with prejudice. The First Department reversed, on the law, and reinstated the petition, holding that “Family Court erred in dismissing the petition, which alleged family offenses that occurred in New York, Pennsylvania, and Jamaica, on the ground that the only incident alleged to have occurred in New York happened in 2014, three years before the filing of the petition.” The Appellate Division noted that subject matter jurisdiction is not "limited by geography” and Family Court may render findings of fact regarding acts which occur outside its jurisdiction. The Court further reiterated the amendment to FCA §812(1), which provides that "a court shall not ... dismiss a petition[] solely on the basis that the acts or events alleged are not relatively contemporaneous with the date of the petition.”

Maintenance - Durational - Increased to Non-Durational; Health Insurance

In Greco v. Greco, 2018 Westlaw 2225174 (2d Dept. May 16, 2018), the wife appealed from an April 2015 Supreme Court judgment, which among other things, awarded her maintenance of $4,500 per month for 3 years, and failed to direct the husband to pay for her health insurance. The parties were married in 1999 and have 2 children. The husband commenced the divorce action in May 2010. The Second Department modified, on the law, on the facts and in the exercise of discretion, by: (1) awarding the wife $4,500 per month in maintenance until the earliest of the following events: the wife 's remarriage or cohabitation, the death of either party, or until the wife begins to draw Social Security benefits or reaches the age of 67 or such age that she would qualify for full Social Security benefits, at which time the maintenance award will be reduced to $2,000 per month; and (2) directing the husband to pay her health insurance premiums until the earliest of such time as the defendant is eligible for Medicaid or Medicare, or she obtains health insurance through employment or remarriage or cohabitation. The Appellate Division held: “Here, the amount of maintenance awarded by the Supreme Court was consistent with the purpose and function of a maintenance award considering, among other things, the equitable distribution award and the absence of child-

rearing responsibilities because the plaintiff was awarded full custody of the children. However, taking into consideration all the relevant factors, including the fact that the defendant is suffering from a psychiatric condition and was unable, for the foreseeable future, to be self-supporting, it was an improvident exercise of the court's discretion to limit the maintenance award to a period of three years." The Court found that "Supreme Court improvidently exercised its discretion in failing to direct the plaintiff to pay the defendant's health insurance premiums."

Maintenance - Modification – Hearing Granted; Payee Counsel Fees Reversed

In Isichenko v. Isichenko, 2018 Westlaw 2124041 (2d Dept. May 9, 2018), the former husband (husband) appealed from a December 2015 Supreme Court order, which, without a hearing, denied his motion for, among other things, a downward modification of maintenance awarded in a July 2011 judgment of divorce, and granted the former wife's (wife) cross motion for costs in the form of attorney's fees of $15,000, upon the ground that the husband's motion "lacked a basis in law or fact." The Second Department modified, on the law, by (1) deleting the denial of the husband's motion for downward modification of maintenance, and (2) denying the wife's cross motion, and remitted to Supreme Court for further proceedings. The husband

alleged, as changed circumstances: a loss of employment, which significantly reduced his annual income; and a substantial increase in the wife’s income and net asset value. Supreme Court found that the husband’s alleged income reduction “did not constitute a change of circumstances sufficient to warrant a downward modification of his maintenance *** obligation, and that a change in the [wife’s] income could not be a basis for a reduction.” Holding that Supreme Court erred by denying the husband’s motion for maintenance modification without a hearing, the Appellate Division found that the husband “demonstrated, prima facie, that his gross annual income has been substantially reduced from the $750,000 in income that was imputed to him for the purpose of the spousal maintenance award in the parties' divorce judgment. Moreover, the plaintiff's statements that he was only able to obtain employment at a salary that is significantly lower than the salary he was earning shortly before the parties' divorce were supported by the sworn submissions of job recruiters, colleagues, and a vocational expert. This evidence established a genuine issue of fact as to whether the reduction in his income was based on a decline in his opportunities for employment, thereby presenting a substantial change in circumstances meriting a downward modification of his maintenance payments (citations omitted).” As to the $15,000 counsel fee award, the Second Department found

that “Supreme Court's granting of the defendant's cross motion for an award of costs against the plaintiff in the form of attorney's fees was improper, since the plaintiff's motion was not so lacking in merit as to justify such an award.”

Procedure - Arbitration – Religious Tribunal Confirmed

In Zar v. Yaghoobzar, 2018 Westlaw 2028166 (2d Dept. May 2, 2018), the husband appealed from a July 2016 Supreme Court order, which denied his CPLR 7510 petition to confirm an August 2015 award of a Rabbinical Court, and for a judgment thereon pursuant to CPLR 7514, and which granted the wife's motion to vacate the award and to strike the husband's affirmative defense (the arbitration award) in her March 2015 divorce action, and directed both parties to file and exchange affidavits of net worth and retainer statements and to appear for a preliminary conference. The Second Department reversed, on the law, granted the husband’s petition to confirm the arbitration award and for a judgment thereon, denied the wife's motion to vacate the award and strike the husband's affirmative defense, and remitted to Supreme Court for entry of an appropriate judgment. The parties were married in 1968 and have two adult children. The wife discontinued her April 2013 divorce action in August 2013, after the parties agreed to submit to binding arbitration before the Beit Din Tzedek Bircat Mordechai (hereinafter the Beit Din), "any matter relating to the dissolution of their marriage and

divorce," including "any issues of division of property." Both parties participated in the arbitration. Supreme Court's July 2016 order determined that the Beit Din's award was "irrational, violative of public policy, and unconscionable on its face." The Court rejected the wife's contention that she was "coerced by the husband to sign the agreement to arbitrate and that she could not understand the agreement because of her limited comprehension of English," because in the context of a proceeding to confirm an award, only "a party who neither participated in the arbitration nor was served with a notice of intention to arbitrate" could raise such grounds under CPLR 7511[b][2][ii]. The Appellate Division noted: "Judicial review of an arbitration award is extremely limited," citing CPLR 7510 and 7511, and found that given the record, "Supreme Court lacked any basis upon which to conclude that the award was irrational." The Second Department held that Supreme Court erred by finding that "the award was per se violative of public policy because the arbitrator failed to apply Domestic Relations Law §236(B)," upon the ground that "public policy does not generally preclude spouses from charting their own course with respect to financial matters affecting only themselves." The Appellate Division concluded that "Supreme Court's determination that the Beit Din's award was unconscionable on its face *** is not a statutory ground upon which an arbitration award may be

reviewed, let alone set aside (*see* CPLR 7511).

Procedure - Support Magistrate – Proof of Service of Objections

In Matter of Cynthia B.C. v. Peter J.C., 72 NYS3d 827 (1st Dept. May 3, 2018), the mother appealed from a May 2016 Family Court order, which denied her objections to a Support Magistrate's order. The First Department dismissed the appeal as taken from a nonappealable paper. Family Court denied the mother’s objection because she did not file proof of service of a copy of her objection on the father, as required by FCA §439[e]. The Appellate Division held that this defect "is a failure to fulfill a condition precedent to filing timely written objections to the Support Magistrate's order, and consequently, a waiver of [the] right to appellate review.”