NYSBA FAMILY LAW SECTION, Matrimonial Update, March 2020

Matrimonial Update

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

Agreements – Prenuptial-Consideration; Enforcement – Automatic Orders

In Matter of Brady v. Brady, 2020 Westlaw 502162 (4th Dept. Jan. 31, 2020), the wife appealed from a December 2018 Supreme Court order, which denied her motion seeking a declaration that the parties' prenuptial agreement was unenforceable and an order directing the husband to reacquire certain shares in a corporation. The Fourth Department affirmed, holding that the wife "failed to sustain her initial burden of establishing that the agreement was unenforceable as a matter of law" upon her alleged grounds of lack of consideration, unconscionability, unfairness, duress, bad faith and coercion. Regarding lack of consideration, the Appellate Division held that "the marriage itself was the consideration for the agreement." [Ed. Note: Remember that a post-marriage agreement requires consideration (benefit to which promisor is not otherwise legally entitled as an inducement to contract) to avoid failure for lack of consideration. See Whitmore v. Whitmore, 8 AD3d 371 (2d Dept. 2004)]. As to the wife's request that the husband reacquire certain shares, the Fourth Department held that she "failed to

establish that plaintiff transferred those shares in violation of Domestic Relations Law §236(B)(2)(b)."

Appeals – Appealable Paper; Child Support – Modification–Health Insurance; Enforcement – Plenary Action Required

In Nicol v. Nicol, 2020 Westlaw 501424 (4th Dept. Jan. 31, 2020), the former husband appealed from an April 2018 Supreme Court order (denominated decision), which denied his motion seeking: downward modification of his child support obligation due to an increase in health insurance premiums and enforcement of the former wife's obligation under the parties' incorporated separation agreement to make payment on a jointly held student loan, together with an award of damages therefor. The Fourth Department modified, on the law, by vacating so much of the order as denied the motion for downward modification of child support and remitted for a hearing thereon, holding that the former husband established the requisite prima facie substantial change in circumstances [DRL 236(B)(9)(b)(1)], given that his share of the health insurance premiums had increased from $50.15 per week to $113 per week and amounted to nearly 18% of his gross income. As to the former husband's breach claim, which he brought by DRL 244 motion, the Appellate Division held that the proper procedure "would be the commencement of a plenary action" and did not address the merits. Regarding the former husband's appeal from a "decision," which is not generally permitted [CPLR

5501(c), 5512(a)], although not raised by the parties, the Fourth Department concluded that "the paper appealed from meets the essential requirements of an order." Justice DeJoseph vigorously dissented on this point and would have dismissed the appeal, noting that the decision "has no ordering paragraphs" and opined that "the law in the Fourth Department has now effectively changed."

Attorney & Client - Disqualification – Denied

In Matter of Lopresti v. David, 2020 Westlaw 465398 (2d Dept. Jan. 29, 2020), the mother appealed from an April 2018 Family Court order which, among other things, granted the father's request to disqualify her attorney. The Second Department reversed, on the facts and in the exercise of discretion, holding that Family Court improvidently exercised its discretion by finding that the mother's attorney engaged in ex parte communications with the child as a represented party. The Appellate Division found that "although there was evidence that the child had forwarded email communications that she had written to the attorney for the child to the mother and the mother's attorney, the father presented no evidence that the mother's attorney solicited those emails or otherwise communicated with the child."

Attorney and Client - Privilege – Joint Representation

In Feighan v. Feighan, 2020 Westlaw 808754 (2d Dept. Feb.

19, 2020), the husband appealed from a January 2019 Supreme Court order, which granted so much of the wife's motion for a subpoena for the files of an attorney who represented both parties in the creation of a 2013 trust and who represented the husband regarding a 2016 trust. The Second Department modified, on the law, by denying so much of the wife's motion as granted the subpoena for the 2016 trust files. The Appellate Division held that the 2013 joint representation precluded the invocation of the attorney-client privilege, but given that the attorney's representation of the wife ended in 2013 and the services rendered to the husband in 2016 "did not constitute the same matter as the services provided to the parties in 2013," the privilege applied.

Custody – Agreement – AFC Cannot Veto; Parent Capacity to Consent in Issue

In Matter of Erica X. v. Lisa X., 2020 Westlaw 825692 (3d Dept. Feb. 20, 2020), the attorney for the child (AFC) appealed from a June 2018 Family Court order, which modified a March 2017 order (joint legal and physical custody to the mother and great aunt) pertaining to a child born in 2016 and granted the maternal aunt's January 2018 petition, by awarding her sole legal and physical custody, with parenting time to the mother. The parties appeared in Family Court in May 2018, at which time the mother was "unable to care for the child due to an

unspecified disability" and Family Court stated that the mother was "not in a position to make decisions." Family Court proposed the modification contained in the order appealed from, to which the mother, aunt and great aunt all agreed, over the objection of the AFC. The Third Department, after noting the general rule that no appeal lies from an order entered on consent, reversed, on the law, and remitted for further proceedings, finding "substantial cause to question the validity of the mother's consent to Family Court's order," while leaving the order appealed from in place as a temporary order. The Appellate Division stated that while Family Court "cannot relegate the AFC to a meaningless role, the AFC cannot veto a proposed settlement reached by the parties."

Custody - Equally Shared; Right of First Refusal

In Matter of Yegnukian v. Kogan, 2020 Westlaw 465349 (2d Dept. Jan. 29, 2020), the father appealed from a January 2019 Family Court order which, after a hearing, denied so much of the father's July 2018 petition as sought equally shared physical custody. The father also sought joint legal custody, which was granted; the mother cross-petitioned in November 2018 for sole legal custody. The parties are the unmarried parents of a child born in May 2014. The mother resides in Forest Hills, works in Manhattan and the maternal grandparents cared for the child many weekday afternoons following morning nursery school. The father

resides in Forest Hills in a home owned by his mother, from where he works in real estate, but also owns an apartment in Manhattan. Family Court found the father's request for equal custody "untenable, because he did not request such relief in his petition and, especially because, according to the court, the father had testified that he was planning to move away from Forest Hills and was purchasing a new residence in Harlem" which would "subject the child to a lengthy commute to and from school multiple times each week." The Appellate Division determined that the foregoing finding was not supported by the record, in that there was no testimony that he intended to have the child stay with him in Harlem, and that the evidence showed that the father did not use his Manhattan apartment on school nights, but, rather, stayed in the Forest Hills home. The Second Department further noted the father's flexible work schedule and his desire to care for the child when the mother was working, as well as the father's work and travel schedule and modified, on the facts and in the exercise of discretion, by, among other things: (1) deleting the Thursday to Sunday access in alternate weeks (3 nights) and replacing it with Thursday to Monday access (4 nights); (2) deleting the Wednesday to Thursday access in alternate weeks (1 night) and replacing it with Tuesday to Friday access (3 nights); and (3) adding a provision directing that when either parent is unavailable to care for the child,

prior to making child care arrangements with a nonparent, to first afford the other parent the opportunity to care for the child.

Custody - Modification – Child's Mental Health; School Absences and Performance

In Matter of McGee v. McGee, 2020 Westlaw 594815 (4th Dept. Feb. 7, 2020), the mother appealed from an August 2018 Family Court order which, after a hearing, modified a prior order (physical custody to mother) by awarding the parties joint custody of the subject child with physical custody to the father. The Fourth Department affirmed, finding that the father established a change of circumstances, including: a significant decline in the child's school grades, failing 3 of her classes, multiple instances of tardiness and excused absences from school while residing with the mother, and a significant increase in the child's anxiety and depression, "in part as a result of living in the mother's home." The Appellate Division held that the custody award to the father was in the child's best interests, based upon the foregoing facts and given that the mother works 6 nights per week and the child is alone at the mother's home during those times. In contrast, the child's school grades improved while living with the father under a temporary order; the father provided the child with a tutor, transported her to summer school and a part-time job; and the

father’s wife is able to be with the child while he is at work.

Custody - Relocation (SC) – Granted – Children’s Wishes (9&10 y/o); Economic Factors

In Matter of Masiello v. Milano, 2020 Westlaw 559476 (2d Dept. Feb. 5, 2020), the mother appealed from a January 2019 Family Court order which, after a hearing and in camera interviews, denied the mother’s 2018 petition (supported by the AFC) seeking to modify a May 2014 stipulation and judgment of divorce so as to permit the children, ages 10 and 9 at the time of trial and for whom she had been the primary caregiver, to relocate with her to South Carolina, and granted the father’s petition for sole custody. The Second Department reversed, on the facts and in the exercise of discretion, to permit the relocation and remitted to Family Court to establish a schedule for the father. The Appellate Division noted: the children’s express wishes to relocate with the mother; the mother’s 2015 MS diagnosis and support she would receive from her mother and extended family in SC, which was not available in NY; her gainful employment and residence with her mother in SC since an August 2018 order of temporary custody to the father; the mother and children’s reduced living expenses with the maternal grandmother; and evidence that the mother would foster a positive relationship with the father.

Custody – Third Party – Extraordinary Circumstances

In Matter of Miner v. Torres, 2020 Westlaw 501476 (4th Dept. Jan. 31, 2020), the father appealed from an October 2016 Family Court order which awarded sole custody of the subject child to the maternal grandmother. The Fourth Department affirmed, noting that at the time the father sought custody of the child, from whom he had been absent since she was 8 months old and who had been removed from the mother's home at age 13 months, he "was not a caregiver from the child, had not been visiting the child, and had not been part of the child's life for half of her 16 months." The Appellate Division held that the finding of extraordinary circumstances "was further supported by evidence of the father's history of domestic violence, including violence toward the mother, *** in the presence of another child and while the mother was pregnant with the subject child, violence toward the mother of one of the father's other children, and also violence toward children," noting in conclusion that the father admitted that he had failed to comply with an order of protection in favor of one of his other children.

Disclosure – Penalties

In Jenny HB v. C. Joel B, 2020 Westlaw 536249 (1st Dept. Feb. 4, 2020), the plaintiff wife appealed from a January 2019 Supreme Court judgment of divorce, which brought up for review a June 2016 order granting the husband's motion to strike her pleadings for failure to comply with discovery and which

referred the issues of equitable distribution and the husband's counterclaim for divorce to a referee, to hear and report. The First Department affirmed, holding that Supreme Court "did not abuse its discretion in striking the wife's pleadings," given that "the wife did not comply with repeated discovery demands or explain why she was unable to do so." The Appellate Division noted that the wife was allowed to testify and present evidence on issues outside the scope of the husband's direct testimony and was also permitted to call witnesses but declined.

Equitable Distribution - Failure of Proof; Separate Property Not Found; Evidence – Business Records

In Iwasykiw v. Starks, 2020 Westlaw 501453 (4th Dept. Jan. 31, 2020), the husband appealed from a March 2018 Supreme Court judgment of divorce which distributed the parties' marital property. The Fourth Department upheld so much of the judgment as denied the husband any share of the wife's retirement accounts and personal property from one of the parties' residences, finding that the husband "submitted no evidence that [the wife] contributed to her retirement accounts during the marriage or that any alleged increase in the accounts' value during the marriage was attributable to [him]" and that he "presented no documentary evidence of the value of the personal property that he contends must be equitably distributed." The Appellate Division agreed with the husband that Supreme Court

erred in determining that the wife's interest in an LLC was her separate property. The Fourth Department noted that the LLC, which includes an interest in real property, was acquired during the marriage, "presumptively rendering it marital property." Although the wife may have used proceeds from a 2007 sale, 3 years before the marriage, to form the LLC, the Appellate Division concluded that the wife "failed to establish that she maintained the proceeds from the [2007 sale] separate from the marital property" and "failed to present sufficient evidence tracing the source of the funds used to purchase the assets at issue to rebut the presumption that those funds were marital property." The Fourth Department modified the judgment and remitted to Supreme Court to equitably distribute the LLC and its subject real property holdings. The Appellate Division agreed with the husband that Supreme Court erred in admitting into evidence certain credit card statements and in relying on those statements when distributing marital debt, holding that the uncertified credit card statements should not have been admitted into evidence because the wife failed to lay a proper foundation for business records under CPLR 4518(a), and remitted for a hearing on this issue. [Ed. note: A CPLR 3122-a certification could have solved this problem].

Family Offense - Aggravating Circumstances; Harassment 2d and Menacing 3d – Found

In Matter of Judith LC v. Lawrence Y, 2020 Westlaw 476657 (1st Dept. Jan. 30, 2020), the father appealed from a May 2018 Family Court order which found that he committed harassment 2d and menacing 3d, determined that there were aggravating circumstances and granted a 5-year order of protection. The First Department affirmed, noting that Family Court credited the mother's testimony over the father's testimony regarding, among other things, the following incidents, some witnessed by the children: the father grabbed the mother's jaw and face "so forcefully that the mother believed the father might kill her and she was sore for hours afterward"; the father "was annoyed because the mother would not have sex with him and poked her hard with his finger all night long to prevent her from sleeping, and would shake her awake when she fell asleep"; and the father "physically lifted her up under her chest and swung her into the apartment while she was holding the then 4-year-old child, almost causing physical injury to her." The Appellate Division held that the record supported the finding of aggravating circumstances and the 5-year order of protection, "as the father engaged in a repeated pattern of causing the mother physical injury, sometimes in the presence of the children, thus exposing them to injury."

Paternity - Equitable Estoppel - Granted

In Matter of DSS v. Donald AC, 2020 Westlaw 423315 (1st

Dept. Jan. 28, 2020), respondent appealed from a May 2018 Family Court order which, after a hearing, estopped him from obtaining a genetic markings test and adjudged him as the father of the child. The First Department affirmed, holding that "[c]lear and convincing evidence demonstrates that respondent, who does not deny that he is the biological father of the subject child's older and younger brothers, also held himself out as her father." The Appellate Division noted that: the child calls respondent "Daddy" and "has a familial relationship with his parents and relatives"; respondent "was present at the hospital shortly after the child was born, attended her birthday parties, and bought her gifts and clothing." The Court concluded that Family Court properly found that it was in the child's best interests to estop respondent from disputing paternity.

In Matter of Lorraine DS v. Steven W., Jr., 2020 Westlaw 889817 (1st Dept. Feb. 25, 2020), the putative father appealed from a February 2019 Family Court order which, after a hearing, found that he was equitably estopped from denying paternity of the then 15-year-old child and adjudicated him to be the father. The First Department affirmed, holding that "respondent held himself out as the father of the child and *** the child *** considered respondent to be his father." The Appellate Division noted that: the child "lived with respondent and his mother for approximately five years and believed that respondent was his

father, and respondent never attempted to dissuade the child from believing otherwise"; following his separation from the mother "respondent regularly sent text messages and visited with the child, and indicated to the mother that the child would have his own space for weekend visits in respondent's new home"; "[r]espondent attended the child's basketball games and graduations and had the child as his best man at his wedding to his current wife" and "introduced the child as his son to the guests at the wedding and referred to him as his child on social media."

Notes on Prior Items:

In Arthur v. Galletti, 176 AD3d 412 (1st Dept. Oct. 1, 2019), the mother's motion for reargument and/or leave to appeal to the Court of Appeals was denied. 2020 NY Slip Op. 61752(U) (1st Dept. Jan. 30, 2020, Mot. No. M-8057)[See AAML NY Chapter Bulletin, November 2019, Vol. 5 No. 11 at 2].

In Matter of Susan II v. Laura JJ, 176 AD3d 1325 (3d Dept. Oct. 17, 2019), the mother's motion for leave to appeal to the Court of Appeals was denied. 2020 Westlaw 728736 (Mot. No. 2019-1072, Feb. 13, 2020) [See AAML NY Chapter Bulletin, November 2019, Vol. 5 No. 11 at 7].

Legislative and Court Rule Update

Income Cap Adjustments – CSSA and Maintenance

Effective March 1, 2020, the CSSA income cap will be

$154,000 and the maintenance guidelines income cap will be $192,000.

Internet Mapping, Part Deux

As previously reported (see AAML NY Chapter Bulletin, September 2018, Vol. 4, No. 9 at 5 and February 2019, Vol. 5, No. 2 at 8), CPLR 4511(c) was added, **effective December 28, 2018**, to allow a court to take judicial notice of what is commonly known as "Google Maps" and internet or GPS types of mapping services. That statute has been repealed and replaced, **effective retroactively to December 28, 2018,** by new CPLR 4532-b, a substantially similar statute, which states:

> An image, map, location, distance, calculation, or other information taken from a web mapping service, a global satellite imaging site, or an internet mapping tool, is admissible in evidence if such image, map, location, distance, calculation, or other information indicates the date such material was created and subject to a challenge that the image, map, location, distance, calculation, or other information taken from a web mapping service, a global satellite imaging site, or an internet mapping tool does not fairly and accurately portray that which it is being offered to prove. A party intending to offer such image or information in evidence at a trial or hearing shall, at least thirty days before the trial or hearing, give notice of such intent, providing a copy or specifying the internet address at which such image or information may be inspected. No later than ten days before the trial or hearing, or later for good cause shown, a party upon whom such notice is served may object to the request to admit into evidence such image or information, stating the grounds for the objection. Unless objection is made pursuant to this subdivision, the court shall take judicial notice and admit into evidence such image, map, location, distance, calculation or other information.

A.01489/S.01264, L. 2019, Ch. 223, signed August 30, 2019.