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Agreements - Prenuptial – Overreaching – Summary Judgment Denied

In Carter v. Fairchild-Carter, 159 AD3d 1315 (3d Dept. Mar. 29, 2018), the husband appealed from an August 2016 Supreme Court order, which, in his August 2014 divorce action, denied his motion for summary judgment to enforce the parties' 2008 prenuptial agreement. The Third Department affirmed. The parties were both represented by counsel, although the wife claimed that she was presented with the agreement "shortly before the wedding day," and the husband represented to her that revisions were made, such that she would receive half the value of the land and house in which they resided, and half of all marital acquisitions. Notably, the agreement only provided that the wife would get 50% of the value of the house to the extent that it exceeded $800,000. However, the home was assessed at $515,800 as of the date of the prenuptial agreement and appraised at $590,000 as of the date of the commencement of the divorce action. The wife further alleged that she did not have the time to read the revised agreement, or take it back to he lawyer, and just signed it because se felt pressured. The Third Department held that "these facts, if credited, give rise to the inference of overreaching." Justice Rumsey concurred, expressing "concern

that the majority's determination that the wife met her burden based upon allegations that she was pressured into signing the prenuptial agreement on the day prior to the wedding without reading it establishes a dramatically lower standard for challenging prenuptial agreements that contravenes our long-standing precedent. I would not find overreaching in this case but for the wife's allegation that the husband's affirmative misrepresentation of the value of a parcel of his separately-owned real property, in which she was to share any appreciation in value that occurred during the marriage, deprived her of the benefit of the prenuptial agreement."

Child Support - Modification – Termination – Child's Conduct

In Matter of Jones v. Jones, 2018 Westlaw ___ (4th Dept. Apr. 27, 2018), the attorney for the child appealed from a January 2017 Family Court order, which granted the father's petition seeking modification of child support, by terminating his obligation for the eldest of the parties' 3 children (a daughter, age 18 at the time of the hearing), based upon the mother's conduct. The Fourth Department affirmed, but upon a different ground, noting: "Visitation with the father was subject to the wishes of the daughter (citations omitted) and the mother and daughter both testified unequivocally that the daughter refused to have anything to do with the father by her own choice and for her own reasons." The Appellate Division held

that “Family Court nevertheless properly relieved the father of his obligation to support the daughter on the ground that the daughter, by her conduct, forfeited her right to support.” The Court concluded: “The father made consistent efforts to establish a relationship with the daughter by participating in counseling, inviting her to family functions, and giving her cards and gifts, but those efforts were rebuffed.”

Child Support - Modification – 2010 Amendments

In Gordon-Medley v. Medley, 2018 Westlaw 1747826 (3d Dept. Apr. 12, 2018), the husband appealed from a May 2016 Supreme Court judgment which, among other things, modified a 2003 Family Court child support order pertaining to the parties’ child born in 1996. The Third Department affirmed, holding that Supreme Court properly relied upon DRL 236(B)(9)(b)(2), as amended effective October 13, 2010, pursuant to which "[a] court may modify an order of child support where . . . three years have passed since the order was entered, last modified or adjusted," except that "if the child support order incorporated without merging a valid agreement or stipulation of the parties, the amendments regarding the modification of a child support order. . . shall only apply if the incorporated agreement or stipulation was executed on or after this act's effective date." The Appellate Division reasoned that “because the prior child support order was not incorporated into a later agreement, the

statutory amendment was applicable. As the wife was entitled under the amendment to a modification of the child support order due to the passage of more than three years, without any requirement that she demonstrate a change in circumstances (*see* Domestic Relations Law §236[B][9][b][2][ii][A]; [citation omitted]) and the husband does not challenge Supreme Court's calculation of the amount of child support, we will not disturb the child support aspect of the judgment."

Custody – Modification – Domestic Violence, Residence & School Changes

In Matter of Greene v. Kranock, 2018 Westlaw ___ (4th Dept. Apr. 27, 2018), the mother appealed from a November 2016 Family Court order, which modified a prior order by granting the father primary physical placement of the subject child. The Fourth Department affirmed, holding that "there was a change in circumstances based on the undisputed evidence at the hearing of domestic violence in the mother's household (citations omitted), the mother's frequent changes of residence (citations omitted), and the child's repeated changes of school (citations omitted)."

Enforcement - Visitation – Contempt

In Matter of Mendoza-Pautrat v. Razdan, 2018 Westlaw 1937307 (2d Dept. Apr. 25, 2018), the mother appealed from a July 2016 Family Court order which, after a hearing, dismissed so much of her petition as sought to hold the father in civil

contempt for alleged violations of October 2014 custody and visitation orders (which awarded sole custody of 4 children to the mother and granted visitation to the father), upon the ground that said violations were not willful. The Second Department reversed, on the law, on the facts, and in the exercise of discretion, granted the petition to impose civil contempt sanctions against the father, and remitted to Family Court, to adjudicate the father in civil contempt and to impose an appropriate civil contempt sanction in the nature of a fine. The mother alleged that the father: "improperly withdrew three of the children from school early on the last day of classes in June 2015, and thereafter spent one week on vacation with the children"; "failed to timely provide her with notice of his planned summer vacation time with the children"; "failed to allow her daily phone contact with the children during the vacation"; and "failed to complete certain training for parents of a child with autism, again in violation of the October 2014 orders." The Appellate Division held: "In order for contempt sanctions to be imposed pursuant to Judiciary Law §753(A), 'willfulness' need not be shown (citations omitted)." The Second Department found that the "record established that the father violated unequivocal mandates of the Family Court, of which he was aware," as alleged in the mother's petition, and that Family Court "should have held the father in civil contempt of court

pursuant to Judiciary Law §753(A).”

Equitable Distribution – Refinance Mandated; Separate Property Credit

In Giannuzzi v. Kearney, 2018 Westlaw 1629752 (3d Dept. Apr. 5, 2018), both parties appealed from a May 2016 Supreme Court judgment which directed equitable distribution in wife’s 2013 divorce action. The parties were married in 1998 and had no children. The wife inherited over $1 million in IBM stock before the marriage and kept the same in accounts in her name throughout the marriage. The wife was a teacher, and the husband eventually became a financial planner and managed the wife’s stock holdings. The parties acquired a primary residence in Broome County and seven Florida properties. Supreme Court determined that the wife's IBM stock was her separate property, awarded the former marital residence to the wife, awarded the commercial property and the property in Florida where he resided to the husband, and awarded the wife a credit of $115,000 for her contribution of separate property to the purchase and improvement of the Florida property awarded to the husband. The judgment also directed the sale of the six remaining Florida properties, with the net proceeds to be distributed 60% to the wife and 40% to the husband. The Appellate Division rejected the husband’s contention that Supreme Court should have found the IBM stock to be marital property under various theories of

transmutation: (a) because the parties filed joint income tax returns reporting income derived from the IBM stock; (b) the parties utilized dividends received from the IBM stock to maintain the marital standard of living; and (c) the IBM stock was pledged as collateral to secure the loan used to purchase several of the Florida properties. The Third Department held: “Here, the wife's assertion that the IBM stock was her separate property was not contrary to any position that she had taken by reporting income derived from her IBM stock on the parties' joint income tax returns as dividends and capital gains (citation omitted). [Ed. note: read the decision for the remainder of the detailed legal analysis adverse to the husband’s theories]. The Court concluded that “Supreme Court erred by making no provision for the release of her personal liability for the mortgage loan on that property,” and directed the husband to refinance the mortgage or obtain a release of the wife's liability within 90 days. Failing those alternatives, the Third Department directed that the property be sold and the net proceeds be first applied toward any balance remaining due on the wife’s $115,000 separate property credit.

Evidence - Expert Testimony – Sexual Abuse; Recordings

In Matter of Donald G. v. Hope H., 2018 Westlaw 1629777 (3d Dept. April 5, 2018), the mother appealed from a July 2016 Family Court order, which, after a hearing, modified a 2015

consent order, pursuant to which the parties shared joint legal and physical custody of their child born in 2011, by granting sole legal and physical custody to the father with supervised visitation to the mother. The father alleged that the child had been sexually abused, and that the mother had coached the child to claim that the father was the perpetrator. Family Court determined that the mother had coached the child to make sexual abuse allegations against the father and had repeatedly prevented the father from seeing the child during his scheduled time. The Third Department affirmed, rejecting the mother's contention that Family Court erred by "allowing the child's treating sexual abuse counselor, who was qualified as an expert in sexual abuse treatment, to opine upon the respective fitness of each parent as custodians." The Appellate Division noted that the counselor "had a Master's degree in social work, had over 23 years of experience as a psychotherapist and 'hundreds of hours of training' as a trauma specialist, had been specializing in the treatment of sexually abused children for about 10 years, and had been providing sexual abuse counseling at the child advocacy center where the child was treated for about five years." The counselor testified that she had conducted 17 treatment sessions with the child for the purpose of an "extended assessment" to determine whether an injury that the child had suffered had been caused by sexual abuse or by an

accident. The mother participated in nine of these sessions and the father participated in two sessions. The Third Department noted further: "*** the counselor opined that the child had been sexually abused. She further opined that, although she could not determine who had abused the child, the father was not the perpetrator, and that the mother had coached the child to claim that the father had abused her. The counselor based her opinion regarding the coaching partially upon statements made by the child." As to the mother's argument that Family Court erred in receiving into evidence three audio recordings of various comments she made, the Appellate Division held that the claim was "waived as to two of the recordings – one of which was admitted for impeachment purposes, and one of which was admitted as factual evidence – as it was not preserved by an appropriate objection," but stated that if "the contention had been preserved, we would have found that it lacked merit, as the mother identified the voice on each recording as her own and acknowledged that the recordings fairly represented statements that she had made."

Procedure - Support Magistrate – Duties Upon Willful Violation

In Matter of Carmen R. v. Luis I., 2018 Westlaw 1720655 (1st Dept. Apr. 10, 2018), the mother appealed from a June 2017 Family Court order, which denied her objections to a March 2017 Support Magistrate order, finding that the father willfully

violated a prior child support order, but deferred the issue of incarceration to a post-dispositional hearing. The First Department reversed, on the law, sustained the mother's objections, and remanded to the Support Magistrate for a final order of disposition. The Appellate Division held that "the Support Magistrate acted outside the bounds of his authority when, after issuing a written fact-finding order in which he determined that the father had willfully violated a child support order, he deferred the issue of a recommendation as to the father's incarceration to a 'post-dispositional hearing.'" The Court noted that this course of action "contravened Family Court Rule §205.43(g)(3), which states that, upon a finding of willful violation, the findings of fact shall include 'a recommendation whether the sanction of incarceration is recommended,' and Rule §205.43(f), which requires that the written findings be issued within five court days after completion of the hearing." The First Department found that "the Support Magistrate improperly set the matter down for 'post-dispositional review' to commence on May 1, 2017, 54 days later. That hearing lasted several months. *** The Family Court then compounded the Support Magistrate's error of law by denying the mother's objections as premature [finding the order was not final], leaving her with no recourse to effectively challenge the further delay that ensued." The Appellate Division

concluded: “Accordingly, the Family Court should have considered the mother's objections, and, upon doing so, should have exercised its authority to remand the matter to the Support Magistrate for an immediate recommendation as to incarceration, or to make, with or without holding a new hearing, its own findings of fact and order based on the record (Family Court Act §439[e]).”

Visitation – As Agreed – Modification Dismissal Reversed

In Matter of Kelley v. Fifield, 159 AD3d 1612 (4th Dept. Mar. 23, 2018), the father appealed from a September 2016 Family Court order which, *sua sponte* and without a hearing, dismissed the father’s petition for modification of a prior order, which had granted him supervised visitation “as the parties can mutually agree.” The father alleged changed circumstances, including that: the mother had not allowed him any contact in 3 years; the mother had alienated the child from him; and he had been incarcerated and was seeking correspondence and supervised visitation to reconnect with the child. The Fourth Department reversed, on the law, reinstated the petition and remitted for further proceedings. The Appellate Division held: “Where, as here, a prior order provides for visitation as the parties may mutually agree, a party who is unable to obtain visitation pursuant to that order ‘may file a petition seeking to enforce or modify the order’ (citations omitted). We agree with the

father that the court erred in dismissing the modification petition without a hearing inasmuch as the father made 'a sufficient evidentiary showing of a change in circumstances to require a hearing' (citation omitted). *** [W]e conclude that the father adequately alleged a change of circumstances insofar as the visitation arrangement based upon mutual agreement was no longer tenable given that the mother purportedly denied the father any contact with the child (citation omitted). In addition, we note that, although the father is now incarcerated, there is a rebuttable presumption that visitation is in the child's best interests."

Visitation - In NY Only; No Unaccompanied Minor Travel

In Matter of Annalyn DCC v. Timothy R., 159 AD3d 560 (1st Dept. Mar. 22, 2018), the father appealed from a July 2017 Family Court order, which denied his request for modification of a prior order, granted the mother's request for modification and directed that the father's visitation be in New York State. The First Department affirmed, holding that Family Court "properly found that the father failed to demonstrate a change in circumstances to warrant, among other things, allowing the parties' six-year-old child to travel as an unaccompanied minor to the United Kingdom for parental access time" and that "the court properly ordered that the father's visitation with the child take place within the state of New York as in the child's

best interest.”

Visitation - Third Party – Grandparent – Granted

In Matter of Mastronardi v. Milano-Granito, 159 AD3d 907 (2d Dept. Mar. 21, 2018), the mother and children appealed from a January 2016 Family Court order which, after a hearing, granted the visitation petition of the paternal grandparents, following the death of the father. The Second Department affirmed, holding that “Family Court properly determined that visitation between the paternal grandparents and the children was in the children's best interests” and that “the estrangement between the paternal grandparents and the children resulted from the animosity between the mother and the paternal grandparents, and the record supported the forensic evaluator's determination that the paternal grandparents' conduct was not the cause of the animosity.”