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Agreements - Residence Sale – Court Imposed Terms Reversed

In Sitbon-Robson v. Robson, 95 NYS3d 797 (1st Dept. Apr. 4, 2019), the wife appealed from a May 2018 Supreme Court order, which directed that if the marital residence was not sold by June 30, 2018, the parties were to confer with the broker who would set the asking price, and if not sold by September 30, 2018, the parties were permitted to apply for a receiver to sell the residence. The First Department modified, on the law, to delete Supreme Court's foregoing directives. The parties entered into a prior stipulation which addressed the pricing and sale of the marital residence. The Appellate Division noted that "the parties did not challenge the validity of the stipulation or consent to the alteration of those terms," and Supreme Court therefore "lacked the authority to reform those terms to what it thought was proper."

Agreements - Set Aside – Unconscionability – Disclosure and Hearing Ordered

In Mizrahi v. Mizrahi, 2019 Westlaw 1782170 (2d Dept. Apr. 24, 2019), the wife appealed from an April 2016 Supreme Court order, which, in her January 2016 divorce action, denied her motion to set aside the parties' January 2015 separation

agreement and granted the husband's cross motion to dismiss her unconscionability claim, and *sua sponte* (based upon the agreement's loser pays clause) awarded the husband $4,000 in counsel fees. The parties were married on August 15, 1996 and have two children together. The Second Department reversed, on the law, and remitted to Supreme Court for financial disclosure and a hearing, holding that the wife "raised an inference that the parties' separation agreement was invalid, sufficient to warrant a hearing." The Appellate Division found that the January 2015 agreement "was the product of a mediation conducted by the attorney who prepared the document." The husband had counsel and the wife consulted with an attorney. The agreement states, in bold print, that the wife's consulting attorney advised her not to sign the agreement "based upon the fact that there has been no discovery in the matter whatsoever, and [the attorney's] considered opinion that the support provisions in the agreement are not adequate to meet the [plaintiff's] and children's basic needs." The wife had no income and the husband represented his income to be $100,000 per year. The agreement provided, among other things, that the husband would: pay child support of $3,000 per month; pay $500 per month in maintenance; provide health insurance for the children; pay 75% of the children's uninsured medical expenses; and pay the plaintiff a lump sum of $45,000 for a share in his business. The Appellate

Division noted that the wife's rent was over $5,200 per month, while her combined support was $3,500 per month and that she was in the process of being evicted due to missed rental payments. The Second Department concluded: "Given that the agreement's support provisions were insufficient to cover the rent for the marital residence and other basic needs of the plaintiff and the children, as well as the lack of financial disclosure regarding the value of the defendant's business, condominium, and actual income, questions of fact existed as to whether the separation agreement was invalid, sufficient to warrant a hearing (citations omitted). Given the lack of any financial disclosure, the Supreme Court should have exercised its equitable powers and directed disclosure regarding the parties' finances at the time the agreement was executed, to be followed by a hearing to test the validity of the separation agreement."

Agreements – Set Aside – Duress, Coercion, Fraud & Unconscionability–Summary Judgment Denied in Part; Ratification Not Found

In Shah v. Mitra, 2019 Westlaw 1549204 (2d Dept. Apr. 10, 2019), the parties were married in 2001 and have two children. The wife appealed from a January 2019 Supreme Court order, which among other things, denied her motion to dismiss the husband's counterclaim based upon unconscionability and granted the husband's cross-motion for summary judgment upon the same

counterclaim, so as to set aside certain portions of a December 2015 postnuptial agreement. The husband cross-appealed from the dismissal of his counterclaims upon the grounds of fraud, coercion and duress, and from the denial of his cross-motion for summary judgment upon the same counterclaims. The December 2015 agreement provided “that it would be considered a marital settlement agreement in the event the parties divorce.” The wife commenced a divorce action in June 2016, seeking incorporation of the agreement. The Second Department modified, on the law, by denying the husband’s cross-motion for summary judgment upon his unconscionability counterclaim (and which had resulted in the setting aside of certain provisions of the agreement), and otherwise affirmed. The Appellate Division rejected the wife’s ratification claim, holding that her documentary evidence “failed to establish, as a matter of law, that the defendant ratified the agreement.” With regard to his fraud counterclaim, the husband alleged that the wife promised him that if he signed the agreement, she would “fully commit to working on the parties['] marital issues and that there will be no divorce." He further alleged that the wife further represented that the agreement would "prevent [a] divorce" and that at the time that she made such representations, “she knew such representations were false.” The Second Department, as did Supreme Court, found that “the factual allegations underlying the defendant's claims

of fraudulent inducement are flatly contradicted by the terms of the agreement. Contrary to the defendant's allegations, the unambiguous terms of the agreement explicitly preserved both parties' 'right to obtain a judgment of divorce from the other' and further provided that, in the event that either party sought to exercise their right to a divorce, the agreement would be incorporated but not merged into a judgment of divorce. The agreement also contained a clause which provided that its terms 'may not be changed orally but only by a written agreement signed by both parties.' Inasmuch as the defendant's answer does not contain any other allegedly false misrepresentations attributable to the plaintiff, we agree with the court's determination to grant those branches of the plaintiff's motion which were pursuant to CPLR 3211(a) to dismiss the defendant's first counterclaim. *** Furthermore, under such circumstances, we also agree with the court's determination to deny that branch of the defendant's motion which was, in effect, for summary judgment on his first counterclaim." As to the issue of coercion, the husband's counterclaim alleged that in the three months leading up to the execution of the agreement, the wife told him that "if he did not sign the [agreement] . . . the marriage . . . would be over." With respect to duress, the Appellate Division found that the husband's counterclaim stated that the wife "exerted pressure" on him "by representing to

[him] that unless he executed the [agreement], their marriage would terminate" and held that the husband's counterclaims for coercion and duress "are not supported by sufficient allegations from which it could reasonably be found that the agreement is unenforceable on the grounds of duress or coercion," noting that "the exercise or threatened exercise of a legal right [here, starting a divorce action] [does] not amount to duress (citations omitted). Nor are the defendant's allegations sufficient to allege coercion (citations omitted)." With respect to the issue of unconscionability, the Second Department held that "the defendant's pleadings, as amplified by his submissions in opposition to the plaintiff's motion and in support of his cross motion (citation omitted), are sufficient to allege both procedural and substantive unconscionability (citation omitted)." The husband alleged "that although the agreement was prepared by a mediator, the mediator was not independent and that the financial terms contained therein were based on the [wife's] wishes" and that "the process was rushed, that his interaction with the mediator consisted of a single, hour-long session, and that he was compelled to sign the agreement before consulting with his attorney." The husband claimed that the agreement required him "to waive his right and interest in virtually all marital property, including most retirement assets, the [p]laintiff's lucrative medical practice, the

marital residence, other real property accumulated during the marriage and reasonable spousal maintenance and child support." Further, the husband stated that although there existed a "tremendous disparity in the parties' respective incomes," he was required to match the plaintiff's contributions towards the children's operating account. The Court concluded that the husband sufficiently stated a cause of action alleging unconscionability, and noted that while the wife disputes many of the husband's factual allegations, including his description of the events leading up to the execution of the agreement, the effect of the substantive terms of the agreement, and his valuation of the parties' marital assets and income, the documentary evidence submitted in support of her motion failed to "utterly refute[ ] [the defendant's] factual allegations as a matter of law (citation omitted)." The Appellate Division rejected the husband's argument that he was entitled to judgment as a matter of law upon his unconscionability counterclaim, and held that Supreme Court erred by granting him summary judgment thereon. The Court concluded that the husband's evidentiary submissions upon his cross-motion "failed to demonstrate, prima facie, that the agreement is one 'such as no person in his or her senses and not under delusion would make on the one hand, and as no honest and fair person would accept on the other' (citation omitted)."

Counsel Fees - After Stipulation – Increased

In Licostie v. Licostie, 2019 Westlaw 1782182 (2d Dept. Apr. 24, 2019), the wife appealed from a September 2017 Supreme Court order which granted her motion for counsel fees only to the extent of $2,500. The parties' stipulation reserved the wife's right to move for counsel fees. The Second Department modified, on the facts and in the exercise of discretion, by increasing the counsel fee award to $7,500, considering "in particular, the disparity in the parties' incomes." To the same effect, also in a case with a stipulation allowing the wife to move for counsel fees, is D'Angio v. D'Angio, 2019 Westlaw 1782227 (2d Dept. 2019), where the award was increased from $2,500 to $15,000, also in consideration of the disparity in the parties' incomes.

Counsel Fees – After Trial; Maintenance - Non-Durational – Affirmed

In Jankovic v. Jankovic, 170 AD3d 1174 (2d Dept. Mar. 27, 2019), the husband appealed from a July 2016 Supreme Court judgment, rendered upon a January 2015 decision after trial in the husband's 2011 action, which awarded the wife $333 per month in non-durational maintenance and counsel fees of $15,000. The Second Department affirmed. The parties were married in 1978 and all of their children are emancipated. As to maintenance, the Appellate Division held that Supreme Court property considered

"the 30-year duration of the marriage, the age of the defendant, her health, and her limited education, as well as her limited future earning capacity and the disparity in the parties' respective incomes." With respect to counsel fees, the Second Department found that Supreme Court was within its discretion to consider the disparity in the parties' incomes and "particularly the plaintiff's refusal to pay defendant any of the sums awarded to her under a pendente lite order in the action, the complexity of the issues involved, and the relative merits of the parties' positions."

Counsel Fees - Sanctions; iPad Access Not Disclosed

In Strauss v. Strauss, 2019 Westlaw 1768592 (1st Dept. Apr. 23, 2019), the husband appealed from a February 2018 Supreme Court order, which granted the wife's motion for sanctions against him and his counsel, and from a May 2018 order of the same court which awarded her attorneys $180,000 in counsel fees. The First Department affirmed the sanctions order and modified the counsel fee order, on the law and the facts, by vacating the award and remitting for a hearing thereon. The husband obtained access to the wife's iPad and private text messages, "falsely told her that he did not have the iPad and that it was lost, and provided the text messages to his counsel, who admittedly failed to disclose to opposing counsel or the court the fact that he was in possession of the iPad and text messages, until two years

later when they disclosed that they intended to use the text messages at trial." The Appellate Division held that the wife "demonstrated that such conduct implicated criminal laws and, while [the husband] asserts that he needed to preserve the information for use in the custody trial, he also concedes that he had other evidence that would have supported his position at trial. Thus, there would have been no reason to rely on the text messages other than to harass and embarrass plaintiff (22 NYCRR §130-1.1[c][2]). The foregoing frivolous conduct supports the imposition of sanctions (22 NYCRR §130-1.2)." With regard to the issue of counsel fees, the First Department noted that the wife's motion did not include an affirmation from her attorneys explaining its invoices, and held that Supreme Court "insufficiently explained in its decision."

Custody – Modification – Education; Hygiene; Rejection of Therapy; School Suspensions

In Matter of Richard I., Jr., v. Darcel I., 2019 Westlaw 1799257 (1st Dept. Apr. 25, 2019), the mother appealed from an April 2018 Family Court order which, after a hearing, modified a prior order so as to grant the father sole legal and physical custody of the subject child. The First Department affirmed, finding that while in the mother's custody, "the child struggled in school, was often late to school and had poor hygiene. The child was also suspended twice from school for violent behavior,

and the mother failed to enroll him in therapy despite recommendations by the school. On the other hand, the father worked with the school to help the child improve, enrolled the child in individual therapy and participated in sessions with him, and consistently provided for the child's care and well-being (citations omitted).” The Appellate Division noted: “The forensic evaluator found that both parents had a strong relationship with the child, but that the father was more willing than the mother to facilitate the noncustodial parent's relationship with the child (citation omitted).”

Custody - School Change – Denied

In Verfenstein v. Verfenstein, 95 NYS3d 856 (2d Dept. Apr. 3, 2019), the mother appealed from an August 2017 Supreme Court order, which, after a hearing, denied the mother’s motion for permission to enroll the child in the United Nations International School (UNIS), a private school in Manhattan. The parties married in 2009 and had one child, who is biracial, and separated in 2010, at which time they agreed that the child would live with the mother in Queens. When the child began kindergarten, the parties agreed upon a public school near the father’s home in Port Washington (Nassau County) and that the child would live with him on weekdays during the academic year. The father commenced the divorce action in 2016 and the mother moved in August 2016 for permission to enroll the child in UNIS,

"contending that the child's educational and emotional well-being as a biracial child would be better suited by being in an ethnically and cultural diverse academic environment." An October 2016 stipulation resolved custody issues other than the school choice and a forensic evaluation was ordered. The Second Department affirmed, holding that the mother's contention was not supported by the evidence, and noting that the mother "conceded that she did not know the percentage of biracial children attending UNIS" and that the child had excelled academically. The Court concluded: "No evidence was presented that the child had been denied his biracial identity in the Port Washington school district, or that his status as a biracial child in that school district had hindered his academic or personal development."

Custody - Third Party – Maternal Aunt – Alcohol Abuse; Supervised Visitation to Father

In Matter of Haims v. Lehmann, 2019 Westlaw 1782129 (2d Dept., Apr. 25, 2019), the maternal aunt appealed from a December 2017 Family Court order which, after a hearing: awarded her joint legal custody with the father (sole physical custody to her) and failed to award her sole legal custody of a daughter born in November 2011 to her sister (deceased in June 2015) and the father; discontinued the father's therapeutic supervised visitation; and awarded the father unsupervised visitation,

including every weekend, Friday through Sunday, effective August 2018. The father cross-appealed from so much of the same order as awarded joint legal custody and sole physical custody to the maternal aunt. The Second Department modified, on the law and the facts, by: (1) awarding the maternal aunt sole legal custody; (2) reinstating the father's therapeutic supervised visitation and deleting the unsupervised visitation; and (3) remitting to Family Court to specify a schedule for the father's aforesaid visitation. The parents separated in March 2013 and the child primarily resided with the mother until May 2015, when the mother was hospitalized and she stayed with the maternal aunt. Following the mother's death in June 2015, the child remained with the maternal aunt and her family. The maternal aunt filed for guardianship in August 2015, which proceeding was later converted, upon consent, to a custody proceeding. The Appellate Division held that "the maternal aunt sustained her burden of demonstrating the existence of extraordinary circumstances" including the evidence that "the father had abused alcohol for nearly 20 years, had a history of relapses during prior attempts to attain sobriety, and was only at the beginning stages of treatment to achieve sobriety during this most recent period of abstinence." The Second Department determined that Family Court "should not have awarded joint legal custody of the child to the parties given the hostility

and antagonism between them" and "should have awarded sole legal custody of the child to the maternal aunt." With regard to the father's visitation, the Court concluded that Family Court's award "lacked a sound and substantial basis in the record."

Custody - Third Party – Standing – Equitable Estoppel

In Matter of Chimienti v. Perperis, 2019 Westlaw 1646344 (2d Dept. Apr. 17, 2019), Perperis, the biological mother of two children born in September 2014 and May 2016, appealed from a March 2018 Family Court order providing for joint custody with physical custody and final decision-making authority to her upon consent, based upon a September 2017 order rendered following a hearing and which determined that Chimienti had established standing via equitable estoppel. The Second Department affirmed, noting that the Court of Appeals in Matter of Brooke S.B. "expressly left open the issue of whether, in the absence of a preconception agreement, a former same-sex, nonbiological, nonadoptive partner of a biological parent could establish standing based upon equitable estoppel." The Appellate Division held that Family Court's finding that Chimienti "demonstrated by clear and convincing evidence that Perperis created and fostered a parent-child relationship between Chimienti and the children is entitled to great weight" upon credibility grounds. The parties began a relationship in 2014 before the older child was conceived and remained together until early 2017, after the

birth of the younger child in May 2016. Perperis allowed Chimienti access to the children for about 4 months following their separation, but then refused to allow access, and these proceedings ensued. The Court concluded by noting that Perperis "held out ***[Chimienti] to others as the co-parent of the children."

Custody - UCCJEA- Another Proceeding Pending

Matter of Kawisiiostha N. v. Arthur O., 170 AD3d 1445 (3d Dept. Mar. 28, 2019), the mother appealed from an August 2017 Family Court order which, *sua sponte*, dismissed her July 2017 petition seeking custody of 2 children born in 2009 and 2010, upon the ground that another court had continuing exclusive jurisdiction. The parents and children lived in the territory of the Pawnee Nation of Oklahoma, until December 2015, when the mother moved to NY with the children without the father's consent. In December 2015, the father filed for custody in the Tribal Court; the mother failed to appear and the Tribal Court granted the father full custody in February 2017. Family Court, upon the father's petition, enforced the Tribal Court order directing the return of the children to the Pawnee Nation. The Third Department affirmed, holding that a New York court may not exercise custody jurisdiction where another proceeding is pending in another state, unless that court terminates the proceeding, DRL 76-e(1), a circumstance not here present.

Equitable Distribution - Debt – Student Loan

In Ragucci v. Ragucci, 170 AD3d 1481 (3d Dept. Mar. 28, 2019), the husband appealed from a January 2018 Supreme Court judgment, which held him solely responsible for a $224,000 student loan for the college education of the parties' middle child, born in 1990. The Third Department affirmed. The subject child attended a private college at a cost of $36,000 per year, and college savings accounts from the paternal grandfather were insufficient to cover the total costs. The husband testified that he and the wife told the child that her chosen college was cost prohibitive and that, if she wanted to attend, she would be responsible to pay for her education. The Appellate Division found: "Significantly, only the husband's personal information and signature appear on the loan application. We further note that it is undisputed that the husband was in charge of the family's finances during the marriage. Ultimately, the principal balance on the student loan totaled more than $154,000." The husband testified that, with the assistance of his father, he made the student loan payments starting in 2009, and stopped making payments in April 2012 when his father became ill. The husband mistakenly believed that the child had thereafter taken responsibility for the loan repayments; apparently, the child had instead been making payments on other loans. The student loan went into default, resulting in imposition of more than

$43,000 in additional fees and collection costs. The Court concluded: “Supreme Court found that the wife had no knowledge of the student loan. The wife testified that she was not aware of the loan prior to this divorce action, and that she believed that the grandfather had contributed to the child's education costs, as with the parties' other children. The husband did not assert in his testimony that he and the wife ever discussed the loan, and further admitted that he had never asked the wife to contribute to the loan repayments. In 2012, he listed the loan in his interrogatories as his individual obligation. Moreover, the husband testified that it was his understanding that, as the co-signer on the loan, he was obligated to make payments on the loan in the event of a default. Under these circumstances, we cannot say that Supreme Court abused its discretion in allocating the student loan debt solely to the husband.”

Equitable Distribution – Proportions–Business (10% & 40%); Valuation Date; Maintenance - Durational

In Cotton v. Roedelbronn, 170 AD3d 595 (1st Dept. Mar. 26, 2019), the wife appealed from an October 2017 Supreme Court judgment, which awarded her 10% of the husband’s business interests valued at $19.94 million and 40% of two other business interests valued at $3.28 million and $655,943, respectively, and maintenance of $20,000 per month for 3 years. The First Department affirmed, rejecting the wife’s contention that the

date of commencement valuation of the businesses was improper, and finding that the husband's business assets were actively managed. As to the proportions, the 10% award was upheld because "the value of these businesses was primarily derived from efforts made by plaintiff and his partners prior to the marriage, and that defendant made little, if any, contribution to the growth of these businesses" and, further, that the wife "at times acted as a hindrance to plaintiff's business dealings." The Appellate Division upheld the 40% award, declining to increase it to 50%, noting the Referee's finding that while the wife "made no direct contribution to these business entities, *** she shared in the parties' restrained lifestyle that allowed these particular investments to grow." The First Department affirmed the maintenance award, citing both the Referee's finding that the wife's statement of net worth was "riddled with misstatements, inaccuracies and unsubstantiated expenses" and expert testimony "that this amount and duration would be sufficient to meet defendant's needs and allow her to re-enter the employment market."

Equitable Distribution – Proportions - Marital Residence (5%); Separate Property – Found

In Larowitz v. Lebetkin, 170 AD3d 578 (1st Dept. Mar. 26, 2019), the husband appealed from an October 2015 Supreme Court judgment, which, in the wife's 2011 action for divorce, valued

the marital residence at $1.6 million, awarded him 5% of the appreciation thereof, and determined the wife's Merrill Lynch account to be her separate property. The date of the marriage is not specified; however, the Court's decision refers to 1995 as being "after the marriage" and 1982 being "well before the marriage." The First Department affirmed, rejecting the husband's argument that a 5% award is "only for spouses who commit heinous domestic violence," while noting that "he received 30% of two other assets and 50% of a third asset." The Appellate Division found that the husband's challenge to the neutral expert's marital residence appraisal, based on his testimony alone, was unavailing. The Court found that the wife "attested on her net worth statement, and testified at trial, that the Merrill Lynch account was opened in 1982, well before the marriage, for her and her sister's benefit, and was funded by gifts from her father."

Family Offense – Harassment 2d - Found

In Matter of Jasna Mina W. v. Waheed S., 170 AD3d 572 (1st Dept. March 26, 2019), the respondent appealed from a March 2018 Family Court order which, after a hearing, found that he committed harassment in the second degree. The First Department affirmed, holding that Family Court's order was properly based upon petitioner's testimony which "described physical contact, including poking and pinching her in order to harass her into

having sex, and also a course of conduct including persistent unwanted communications, name calling and threats, all of which were intended to and did cause her alarm or seriously annoy her, and which served no legitimate purpose."

Maintenance - Durational – Affirmed; Percentage of Bonus

In Rogowski v. Rogowski, 2019 Westlaw 1781817 (2d Dept. Apr. 24, 2019), the husband (as a *pro se* appellant) appealed from a March 2010 Supreme Court judgment which, following trial of the wife's 2008 divorce action, awarded the wife maintenance of $2,500 per month for 5 years and 60% of his annual employment bonus in excess of $14,200. The Second Department affirmed, holding that Supreme Court properly considered the statutory maintenance factors and noting: "Given that the parties agreed that the plaintiff would quit work and care for the children, and given the evidence adduced regarding the parties' respective incomes and future employment prospects, the court did not improvidently exercise its discretion in determining the amount or duration of maintenance. Also, contrary to the defendant's contention, the award of a portion of the defendant's annual employment bonus as a part of maintenance did not constitute an improper open-ended obligation (citations omitted)."