NYSBA FAMILY LAW SECTION, Matrimonial Update, November 2018

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Agreements - Interpretation – Pension DRO

In McPhillips v. McPhillips, 2018 Westlaw 5020373 (2d Dept. Oct. 17, 2018), the husband appealed from February 2016 and March 2017 Supreme Court orders, which, in effect, denied his motions for leave to enter his proposed domestic relations order and an amended domestic relation order, and granted the wife's cross motion for leave to enter her proposed domestic relations order. The Second Department modified the February 2016 order, on the law, by denying the wife's cross motion and modified the March 2017 order, on the law, by granting the husband's motion, except to the extent that the wife shall not be required to share in the cost of his election of a survivor benefit for his second wife. The parties' stipulation, incorporated into a January 1994 divorce judgment, provided for a "fifty/fifty division of all of [the husband's] pension benefits accumulated from the date of this marriage, May 7, 1977, through the date of service of the summons and complaint, January 28, 1989," and that the wife is "to be the recipient of 50 percent of any and all benefits payable to the [husband] upon his retirement which were accumulated during that period of time." The husband retired in July 2010, and in 2014, the parties each submitted a

proposed DRO. The wife’s proposed DRO calculated her share of the husband’s pension benefits based on "a fraction for which the numerator shall be credited service accrued between May 7, 1977 and January 28, 1989, and the denominator shall be the total number of months of service credit . . . which [the husband] has *at the time of retirement*." The husband’s proposed DRO employed a fraction in which "the numerator . . . shall be the total number of months of credited service between the [husband's] date of initial credited service in the Retirement System, or the date of the parties' marriage, that being May 7, 1977, whichever is later, up to the date of the division of marital assets, that being January 28, 1989, and the denominator shall be the total number of months of credited service which the Participant had in the Retirement System *as of the date of the division of marital assets, that being January 28, 1989*" (emphasis added). The Appellate Division held that the formula set forth in the wife’s proposed DRO conflicts with the stipulation of settlement, which provided for a "fifty/fifty division of all pension benefits accumulated from the date of this marriage, May 7, 1977, *through the date of service of the summons and complaint, January 28, 1989*," and that the wife is "to be the recipient of 50 percent of any and all benefits payable to the [husband] upon his retirement *which were accumulated during that period of time*" (emphasis added). The

Second Department noted that the “stipulation of settlement made no reference to the formula set forth in *Majauskas v Majauskas* (61 NY2d 481), nor can such a reference be implied from the unambiguous terms of the stipulation.” The Court concluded that since the wife’s share of the husband’s pension is limited to 50% of "*any and all* benefits payable to the defendant upon his retirement which were accumulated" from the date of the marriage, to wit: May 7, 1977, through the date of the service of the summons and complaint, January 28, 1989, the wife shall not be required to share in the cost of the defendant's election of a survivor benefit for his second wife.”

Child Support - CSSA – COLA Vacated; $143,000 Cap Imposed

In Matter of Murray v. Murray, 164 AD3d 1451 (2d Dept. Sept. 26, 2018), the mother appealed from a September 2017 Family Court order, which denied her objections to a June 2017 Support Magistrate Order rendered after a hearing, reducing the father’s child support obligation. The parties were divorced in January 2002. An October 2009 consent Family Court order set the father’s child support obligation for two children at $740.56 per week, payable through the SCU. In March 2017, the SCU notified the parties of a proposed COLA order increasing the father’s obligation to $822 per week for the remaining unemancipated child. The mother objected to the COLA order and after a hearing, the Magistrate capped the application of the

CSSA to the parties' combined parental income of $371,697 at $143,000 and directed the father to pay $360 per week for the then 20 year old child who was entering her third year of college. On appeal, the Second Department affirmed, finding that the Support Magistrate "providently exercised her discretion in applying the child support percentage to $143,000 of the parties' combined parental income," given that the mother "failed to demonstrate why *** it was unjust or inappropriate for the Support Magistrate to decline to apply the child support percentage to the parties' combined parental income over the statutory cap."

Child Support - Modification – 2010 Amendments – Denial Vacated

In Fasano v. Fasano, 164 AD3d 1421 (2d Dept. Sept. 26, 2018), the mother appealed from a June 2017 Supreme Court judgment which denied her motion to modify an October 2012 stipulation, which set the father's child support obligation for two children at $1,500 per month. The October 2012 stipulation varied from the CSSA, which would have required $1,994 per month on the first $130,000 of combined parental income (CPI) and $2,576 on the entire CPI. The stated reason for deviation was to allow the father to retain the marital residence as a place for the children. The wife commenced a divorce action in December 2013, and moved in June 2014 for upward modification, based upon the father's sale of the marital residence and move to a

different school district, and significant uninsured health expenses for one child who had been hospitalized for mental illness. On appeal, the Second Department reversed, on the law and the facts, holding that Supreme Court should have granted the motion for upward modification, based upon "a substantial change in circumstances" as defined by DRL 236(B)(9)(b)(2)(i), and remitted for a new determination and calculation under the CSSA.

Counsel Fees - After Trial; Equitable Distribution – Business, Enhanced Earnings, Separate Property; Maintenance - Durational

In Belilos v. Rivera, 164 AD3d 1411 (2d Dept. Sept. 26, 2018), both parties appealed from an October 2015 Supreme Court judgment, which awarded the wife maintenance of $5,000 per month for 5 years, restored $150,000 of the wife's inherited separate property, which had been placed in a joint account, to the wife, awarded the wife 25% of the husband's enhanced earning capacity from advanced degrees and certifications and 50% of the husband's business interests, and awarded the wife $75,000 in counsel fees and $15,000 in expert witness fees. The Second Department affirmed. As to the inheritance, the wife established that she received $150,000 from her uncle, which was deposited into a joint account because she had no bank accounts in her name alone, and further, the husband admitted at his deposition that he intended to return the $150,000 to the wife "to make

things right.” The Appellate Division upheld the 50% award of the business interests, and as to the 25% enhanced earning capacity award, found that the wife “demonstrated that she substantially contributed to the defendant’s acquisitions of his advanced degrees and certifications.” The Court upheld the maintenance, counsel fee and expert witness fee awards as appropriate exercises of discretion.

Counsel Fees – After Trial; Equitable Distribution – Law Practice & Valuation, Marital Residence Proportions; Maintenance Denied

In Giallo-Uvino v. Uvino, 2018 Westlaw 5020409 (2d Dept. Oct. 17, 2018), the wife appealed from an April 2016 Supreme Court judgment of divorce which, upon a February 2016 decision of the court made after an inquest, among other things: (1) valued the husband’s law practice as of the date of trial and determined that the practice had no value; (2) awarded her only 55% of the net proceeds of the sale ($561,266.75) of the marital residence; (3) declined to award her an attorney's fee and expert fees, and (4) determined that the wife was not entitled to an award of maintenance. The Second Department modified, on the law, on the facts, and in the exercise of discretion: (1) by awarding the wife 70% of the net proceeds of the sale of the marital residence; and (2) by awarding the wife an attorney's fee of $70,000. The parties were married in June 2000, and have

one child. The wife worked as a registered nurse, and the husband was an attorney with his own law practice. In July 2012, the wife commenced this action for divorce and the husband appeared in the action. He failed to appear for the trial in July 2015, and Supreme Court held an inquest. The Appellate Division held that "Supreme Court providently exercised its discretion in valuing the [husband's] law practice as of the date of trial, rather than the date of commencement of the action," given that the wife "failed to establish that the defendant, who was disbarred during the pendency of this action (citation omitted) intentionally lost his license in order to devalue his law practice (citation omitted) *** [and] failed to establish that the defendant's business had any value as of the date of trial." As to maintenance, the Second Department found: "considering the relevant factors, including, inter alia, the duration of the marriage, the present and future earning capacity of the parties, and the ability of the party seeking maintenance to become self-supporting, the Supreme Court did not improvidently exercise its discretion in declining to award maintenance to the plaintiff." The Appellate Division held that "Supreme Court improvidently exercised its discretion in awarding the plaintiff only 55% of the net proceeds of the sale of the marital residence" [and] [b]ased on the circumstances of this case, we find that the plaintiff is entitled to 70% of the

net proceeds of the sale of the marital residence." As to counsel fees, the Court concluded that "Supreme Court improvidently exercised its discretion in declining to award the plaintiff an attorney's fee," and a factor to be considered is "whether either party has engaged in conduct or taken positions resulting in a delay of the proceedings or unnecessary litigation (citations omitted)." Here, the Second Department found that the husband failed "to timely provide certain financial documentation which unnecessarily prolonged the litigation, [and] the court should have awarded the plaintiff an attorney's fee in the sum of $70,000."

Counsel Fees – After Trial; Equitable Distribution – Bank Accounts, Credits & Marital Residence Sale; Maintenance – Amount Reduced & Duration Increased, Health Insurance, Imputed Income, Life Insurance, Tax-Free

In Gorman v. Gorman, 2018 Westlaw 5274250 (2d Dept. Oct. 24, 2018), the wife appealed from a December 2015 Supreme Court judgment which, after trial, awarded her only $4,500 per month in maintenance for 8 years, distributed marital property, and imputed annual income to her of $26,000, and the husband cross-appealed from so much of the judgment as failed to award him a share of bank accounts, as awarded maintenance, and $20,000 in counsel fees to the wife. The Second Department modified, on the law, on the facts, and in the exercise of discretion, by: (1)

decreasing the amount of maintenance to $2,750 per month and making the same tax-free to the wife, but increasing the duration until the earliest of the wife's remarriage, her attainment of the age at which she becomes eligible for full Social Security benefits, or the death of either party; (2) requiring the husband to maintain $500,000 in life insurance for the wife so long as he is obligated to pay maintenance; (3) by directing the husband to provide health insurance for the wife until she becomes eligible for coverage through employment or through Medicare, whichever shall first occur; and (4) providing that the parties' joint checking account and savings accounts ($95,981.18 + $44,458.50), be equally divided between the parties, with a $1,600 credit to the wife. The parties were married on May 16, 1987. The wife worked as a legal secretary for a period of time, and left the workforce to become a homemaker and to care for the parties' two children (now in their mid-to-late twenties), while the husband worked in various capacities connected with the US military, including defense contracting in Iraq. The husband commenced the action in August 2011. As to maintenance, the Appellate Division found that “considering the relevant factors, including the ages of the parties, the long duration of the marriage and the extended absence of the defendant from the workforce, the distribution of the marital assets, the parties' respective past and future

earning capacities, and the availability of retirement funds and pensions, the Supreme Court providently exercised its discretion in awarding the defendant durational, as opposed to lifetime, maintenance (citations omitted). However, rather than providing for a durational limitation of eight years and subjecting that award to termination upon the plaintiff's remarriage, under the circumstances of this case, the maintenance award should continue until the earliest of the defendant's remarriage, her attainment of the age at which she becomes eligible for full Social Security benefits, or the death of either party (citations omitted).” As to imputed income to the husband of $151,192, the Second Department found that “from 2008 through late 2013, the plaintiff was employed overseas in Iraq and, as a result of such employment, received a significantly augmented salary, enhanced overtime, and no-cost room and board. In December 2013, the plaintiff returned to the United States, taking up residence in Ohio, where he resides with his fiancée. As of the time of trial, the plaintiff was employed by the Department of Defense as a quality assurance inspector at a salary of $81,079 per year. The plaintiff did not submit a current statement of net worth. He acknowledged that his earnings are deposited into a joint checking account with his fiancée and that all of his monthly expenses are shared with his fiancée. The plaintiff also acknowledged that he regularly

gambles, to the point that he has received free hotel accommodations, airfare, vacations (including a cruise), and other free or discounted items because of his frequent gambling. In 2013, he reported gambling winnings of $11,250 on his tax return. He acknowledged winning $1,800 over two days of gambling in September 2014." The Appellate Division concluded that the imputed income to the husband should be $100,000. With regard to imputed income to the wife, the Court stated: "While we agree with the defendant that the Supreme Court should not have imputed income to her based on statistical information from the New York State Department of Labor that was not admitted in evidence at trial (citation omitted), there was evidence, nonetheless, that the defendant had earned $15 per hour as a legal secretary during the early part of the marriage. Even though she has been out of the work force for an extended period of time and does not have a college degree, she is in good health and has a sufficient employment history to warrant the conclusion that she is capable of earning at least the sum of $26,000 annually, which is the amount of income imputed to her by the court." The Second Department concluded on the issue of maintenance that the husband should pay the wife $2,750 per month, "which sum shall be neither tax deductible by the plaintiff nor taxable to the defendant." As to life insurance, the Appellate Division directed the husband "to purchase,

pursuant to Domestic Relations Law §236(B)(8)(a), a life insurance policy in the amount of $500,000, designating the defendant as sole irrevocable beneficiary for only as long as the plaintiff is obligated to pay maintenance to the defendant." On the issue of health insurance, the Appellate Division held that Supreme Court "should have directed the plaintiff to provide health insurance for the plaintiff until she becomes eligible for coverage through employment or through Medicare." As to the marital residence, the Court held that "Supreme Court providently exercised its discretion in directing the sale of the marital residence because the parties' children have reached majority, there is no need of a spouse as a custodial parent to occupy the residence for the children (citation omitted), and neither party submitted a market-based valuation of the marital residence. With regard to the bank accounts, the Court directed and equal division as to their commencement date values, but since the husband "purchased a diamond engagement ring for $3,200 for his fiancée prior to commencement of this action, and failed to prove that it was separate property," the wife is entitled to a 50% credit for the ring's purchase price ($1,600). Finally, the Second Department held that given "the relative financial circumstances of the parties and the relative merits of the parties' positions at trial, the Supreme Court providently exercised its discretion in awarding the defendant

$20,000 in attorney's fees."

Custody - Relocation (FL) – Initial Custody Determination

In Matter of Ivan J. v. Kathryn G., 164 AD3d 1151 (1st Dept. Sept. 25, 2018), the father appealed from a November 2017 Family Court order which, after a nine day hearing, granted the mother's petition for custody and permitted her to relocate with the parties' child to Florida. The Second Department affirmed, noting that where, as here, there is no prior custody order, the Tropea factors "do not govern, and relocation should be considered as one factor in determining the child's best interests." The Appellate Division found that the mother's "plan for caring for the child reflected an ability and willingness to be regularly and fully available for the child in ways that the father cannot and does not." The mother had obtained employment in Florida with the prospect of increasing salary and responsibility, and, further the child had a close relationship with a sister in Florida.

Custody - Relocation – Radius Clause Not Determinative

In Matter of Jaimes v. Gyerko, 2018 Westlaw 5274177 (2d Dept. Oct. 24, 2018), the father appealed from a June 2017 Family Court order which, without a hearing, granted the mother's motion to dismiss his petition to modify a March 2014 stipulated order, to enjoin her from relocation with the parties' children from Mamaroneck to Woodbridge, CT, and to

appoint an attorney for the children. The Second Department reversed, on the law, denied the mother's motion, and remitted to Family Court for a hearing on the father's petition, holding that while the proposed relocation was within the 55 mile radius permitted by the March 2014 order, the father argued that the relocation would not be in the children's best interests. Therefore, the Appellate Division held that Family Court should not have granted a summary dismissal of the father's petition pursuant to CPLR 3211(a)(1), because the parties' agreement was "not dispositive, but rather, is a factor to be considered along with all of the other factors a hearing court should consider when determining whether the proposed relocation is in the best interests of the children."

Custody - Summary Judgment Suspending Visits

In Matter of Kenneth J. v. Lesley B., 2018 Westlaw 4778935 (1st Dept. Oct. 4, 2018), the father appealed from a June 2017 Family Court order, which granted the mother's motion for summary judgment and suspended all visitation and contact of any kind between the parties' child and he. The First Department reversed, and restored the pending petitions, holding that Family Court erred in modifying the existing order without a hearing, in reliance upon an in camera interview with the child, motion papers, unsworn letters from a therapist, and an unsworn and uncertified mental health report, which was "not in

admissible form, as is required on a motion for summary judgment."

Custody - Third Party – Grandparent v. Great Grandparent

In Matter of Cornell SJ v. Altemease RJ, 164 AD3d 1184 (1st Dept. Sept, 27, 2018), the children's (ages 9 and 11) adoptive mother, their maternal great-grandmother, appealed from a June 2017 Family Court order which granted guardianship to her son, the children's grandfather. The First Department modified, on the law and the facts, to the extent of remanding to Family Court to establish visitation for the great-grandmother. The Appellate Division found that the great-grandmother abandoned the children for 5 days without any adult care after an argument with her son, and she returned briefly and then left again and failed to contact the children, provide for them or visit them for almost 11 months. The Court found that the grandfather had been the children's primary caregiver and took care of all of their needs. The First Department concluded that Family Court erred by conditioning visitation upon the children's consent and the parties' agreement.

Custody - Third Party – Grandparent

In Miner v. Miner, 164 AD3d 1620 (4th Dept. Sept. 28, 2018), the maternal grandparents and the attorney for the child appealed from a February 2018 Family Court order, which granted sole custody of the children to the father. The Fourth

Department affirmed, holding that the grandparents failed to establish extraordinary circumstances based upon an "extended disruption of custody," given that the longest period they had custody of the children was 7 months, following which the father regained custody. The Appellate Division found that the grandparents failed to establish standing by reason of alleged domestic violence against the mother, given that the charges against the father were dismissed.

Custody – Visitation Transportation; Counsel Fees – After Trial, Reduced; Equitable Distribution – Debt, Pension (No Survivorship); Maintenance – Durational, Reduced

In Button v. Button, 2018 Westlaw 5292748 (3d Dept. Oct. 25, 2018), the husband appealed from a February 2017 Supreme Court judgment, which determined custodial and visitation issues, directed child support of $525 bi-weekly, counsel fees of $7,500 to the wife, equitable distribution of debt and the husband's NYS pension, and maintenance of $550 bi-weekly. The parties were married in October 2006 and have 3 children, born in 2012, 2013 and 2015. The parties were in their mid-30s at the time of trial and both in good health. The wife moved with the children from the marital residence in April 2015 and commenced this action in June 2015. Supreme Court continued temporary orders of custody and child support that had been entered in Family Court. The Appellate Division rejected the husband's

argument that a reduction of his visitation was error, but agreed that Supreme Court erred by requiring that he provide all transportation and by failing to provide specific times for holiday visits. The Third Department noted “that it was unnecessary for Supreme Court to consider whether a change in circumstances had occurred because the temporary custody order was issued without the benefit of a full plenary hearing (citations omitted) and, further, did not address holiday and vacation schedules.” The Court noted that the wife and children live with the wife's parents — a 45-minute drive from the marital residence where the husband continues to reside and that she “did not have a vehicle and arranged for her transportation needs entirely by borrowing vehicles from her parents and a sibling.” As of the time of trial, the wife was to graduate from nursing school in May 2018 and begin full-time employment as a registered nurse. The Appellate Division did not disturb the schedule, given that the husband received an additional 4 weeks in the summer and also received a holiday schedule, but found: “In light of the 1½-hour round trip between the parties' residences, the requirement that the husband provide all transportation unduly impairs his mid-week dinner visit; thus, we modify the judgment to provide that the parties shall equally share transportation for the mid-week dinner visits. We also modify the holiday and vacation schedules to include exchange

times, as follows: Christmas Eve shall begin at 6:00 p.m. on December 23 and end at 8:00 p.m. on December 24; Christmas Day shall begin at 8:00 p.m. on December 24 and end on December 26 at 8:00 a.m., when the Christmas vacation begins; all other holidays shall begin at 6:00 p.m. the day preceding the holiday and end at 8:00 a.m. the day after the holiday; and the winter and spring school vacations shall begin at the end of the last school day prior to the vacation period and shall end at 6:00 p.m. on the last day of the vacation period.” With regard to equitable distribution, the Appellate Division noted that the former marital residence had stipulated equity of $36,600, and the husband has a defined benefit pension plan with New York State. There was additional marital debt, which Supreme Court ordered be assumed $40,106 by the husband and $3,430 by the wife. The wife wanted the residence to be sold, but Supreme Court awarded the same, with its debt, to the husband. Supreme Court “appeared to equally divide the marital portion of the husband's New York retirement according to the *Majauskas* formula.” With regard to the marital debt, the Third Department stated: “we cannot say that Supreme Court's distribution of the marital home and the parties' debt is unjust or inequitable.” As to the issue of the pension, the husband argued that the court erred in ordering that he provide the wife with "the minimum survivor benefit" for his pension plan. The Appellate Division

stated: “We take judicial notice of the applicable rules of the New York State and Local Retirement System. A participant may designate a former spouse to receive a portion of the preretirement ordinary death benefit and may name others to receive the remainder of that benefit. However, only one beneficiary, or alternate payee, may be named for retirement benefits. We agree with the husband that it would be inequitable to require that he name the wife as a beneficiary of his retirement benefits and thereby preclude him from sharing those benefits with any other person, such as a subsequent spouse. In that regard, we note that the marital portion of the pension is small, the parties are relatively young and the wife has the prospect of gaining employment that should enable her to provide for retirement. Therefore, we modify the judgment by specifically awarding the wife one half of the martial portion of the husband's pension according to the *Majauskas* formula, including one half of the marital portion of the ordinary preretirement death benefit, but excluding any requirement that the husband elect any option that would continue postretirement benefits to the wife following his death.” The Third Department agreed with the husband that the maintenance award was excessive and held: “Although Supreme Court properly awarded maintenance to the wife — who had been the primary caretaker of the children since the birth of the oldest child — while she obtained

training as a registered nurse that would allow her to obtain employment and become self-sufficient, the maintenance award must be reassessed in light of its failure to consider the wife's needs and the husband's ability to pay.” The Court noted that “neither party could continue to enjoy the predivorce standard of living, which was sustained only by incurring substantial debt, and the parties' negative net worth established that they were in significant financial distress at the time of trial. The obligations imposed on the husband by the judgment total approximately $48,806 annually. Payment of those obligations from his gross earnings of $73,083 would leave him with very little income to cover his own living expenses. At the time of trial, the wife's own living expenses were modest. She incurred no housing expenses because she and the children were residing with her parents, and she had no vehicle of her own. Thus, her direct expenses were limited to gas, food and clothing. Accordingly, we reduce the amount of the maintenance award to $200 biweekly, retroactive to the date of commencement of the action and continuing until July 1, 2018.” The Court recalculated the child support award, given reduced maintenance, and found that the presumptively correct amount of the husband's basic child support obligation for three children is $694.81 biweekly. With respect to counsel fees, the Appellate Division agreed that “Supreme Court abused its discretion by awarding the

wife $7,500 in counsel fees." The Court concluded: "As aptly noted by Supreme Court, the marital debt exceeded the net value of the parties' assets; indeed, upon equitable distribution, each has a negative net worth. However, inasmuch as the husband was employed and the wife was unemployed while she completed her nursing education, Supreme Court properly found that the wife was the less monied spouse. Although the husband's income is greater than the wife's, his earnings are modest and are largely devoted to payment of maintenance, child support and marital debt. The fact of the matter is that neither party has sufficient assets or income for payment of counsel fees. Although an award of counsel fees to the wife was appropriate, upon consideration of the parties' financial circumstances, we reduce the award to $3,750."

Enforcement - Money Judgment – Credit for Payments Made

In Stern v. Stern, 2018 Westlaw 5020059 (2d Dept. Oct. 17, 2018), the husband appealed from an October 2015 Supreme Court order, which granted the wife's July 2014 motion for a money judgment against him for $353,400, plus prejudgment interest. The Second Department reversed, on the law and the facts, denied an award of prejudgment interest, and remitted for a hearing and a new determination of the motion for a money judgment. The parties were married in August 1980 and the wife commenced this action for divorce in May 2006. A September 2006 preliminary

conference order provided as to pendente lite relief: "Status quo [voluntary support payments and household expenses] to be maintained. No motion at this time." During the matrimonial trial, the wife moved for emergency pendente lite relief and a January 2009 order directed the husband to pay the wife's car insurance and $200 per week as interim maintenance. The parties were divorced by an April 2010 judgment of divorce, which directed the husband to pay the wife maintenance retroactive to the date of the commencement of this action, May 26, 2006, and continuing until October 25, 2009. The judgment of divorce also provided that the husband was entitled to credits against his maintenance obligation "for payments of *pendente lite* spousal maintenance actually made pursuant to Court Order." The husband argued in opposition to the wife's motion that he was entitled to credits totaling $393,516.53 against his maintenance obligation. The Appellate Division held that the husband "is entitled to credits against his maintenance obligation as established in the judgment of divorce with regard to the plaintiff's share of such expenses such as mortgage, real estate taxes, and automobile insurance payments" and rejected the wife's contention that the husband's voluntary payments made pursuant to the preliminary conference order, which does not specifically enumerate the payments to be made, cannot qualify as "payments of *pendente lite* spousal maintenance actually made

pursuant to Court Order." The Court concluded that to deny the husband a credit for payments made on account of the wife's expenses "would not only be inequitable by providing a windfall for the benefitted spouse, but it would also discourage voluntary support payments during the pendency of matrimonial actions and likely cause a precipitous rise of pendente lite motion practice by nonmonied spouses." The Second Department concluded: "The amount of credit to which the defendant is entitled cannot be determined on this record. While some payments documented by the defendant appear to be for the benefit of the plaintiff only and could qualify for a credit against maintenance, others are plainly for the children, professional expenses, and other expenses which would not be within the ambit of expenses which the plaintiff would be responsible to pay out of the maintenance she receives." As to prejudgment interest, the Court found that the husband "correctly contends that prejudgment interest should not be assessed against him since he made substantial payments in good faith pursuant to the preliminary conference order, negating a finding of willfulness which would trigger such an award."

Family Offense - Harassment 2d, Menacing 3d – Found

In Matter of Erin C. v. Walid M., 2018 Westlaw 5259568 (1st Dept. Oct. 23, 2018), respondent appealed from a May 2017 Family Court order, which found that he had committed the family

offenses of menacing in the third degree (PL §120.15) and harassment in the second degree (PL §240.26[3]) and granted petitioner a six-month order of protection against him. The First Department affirmed. The Appellate Division held that petitioner's testimony met her burden of proof by a fair preponderance of the evidence, and "showed that she arrived home on the evening of February 25, 2016, to find respondent extremely agitated, and he began to 'stalk' her around the apartment, screaming insults at her with such intensity that she was forced to lock herself in her bedroom, fearing physical injury." The Court further found that "respondent continued to send petitioner multiple text messages, which were combative and insulting, for no legitimate purpose, through the night and over a period of days, at a time when, by all accounts, he was distraught that the parties, were not reconciling."

Family Offense - Violation – Dismissed

In Matter of Scobie v. Zimmerman, 2018 Westlaw 5288914 (3d Dept. Oct. 25, 2018), petitioner appealed from a September 2017 Family Court order which, *sua sponte* at the initial appearance, dismissed her petition seeking to find respondent in willful violation of a "refrain from" order of protection. The Third Department affirmed and found: "The petition contains what purports to be quotations from a conversation between respondent and his attorney in the county courthouse while petitioner was

in an adjoining room. Although petitioner asserts that respondent made a threat to her life and said that she would disappear, the quoted language does not directly refer to petitioner. Even if it did, there is no allegation that respondent directed his remarks toward petitioner or that he intended for her to overhear him. Indeed, there is no allegation that respondent was aware that petitioner was nearby or listening to his private conversation with his attorney. The allegations in the petition are facially insufficient to demonstrate any acts that would constitute menacing, harassment or any other willful violation of the order of protection."

LEGISLATIVE ITEM

The legislation regarding court appointed special advocates, as detailed in the September 2018 Bulletin (Volume 4, No. 9), was signed and effective October 1, 2018. A01050/S02059-A, Laws of 2018, Chapter 291.