

NYSBA FAMILY LAW SECTION, Matrimonial Update, April 2017

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Agreements - Fraud Claim - Statute of Limitations

In *Kany v. Kany*, 2017 Westlaw 1082686 (1st Dept. Mar. 23, 2017), the wife appealed from a September 2015 Supreme Court order, which granted the husband's motion for summary judgment dismissing her complaint. The wife sought to set aside the parties' 1995 written agreement, upon the ground that the husband had fraudulently concealed certain supplemental retirement benefits from her. The agreement provided that the wife waived any claim to "any participation or interest that [the husband] may now or in the future have in any retirement plan" and that the wife "had made her own independent investigation of [the husband's] business affairs and was waiving further disclosure." The First Department affirmed, holding that since "the disclosures in [the husband's] net worth statement and in the benefits booklet issued by his employer put [the wife] on inquiry notice that [the husband] was entitled to supplemental retirement benefits, the complaint is time-barred," citing CPLR 213(8).

Child Support - CSSA - Opt-Out Agreement

In *Bitic v. Bitic*, 2017 Westlaw 776986 (2d Dept. Mar. 1, 2017), the wife appealed from a January 2015 Supreme Court

judgment, which, in an action commenced in 2010 after 11 years of marriage and 2 children, awarded her child support based upon a November 2012 open court stipulation which provided less than CSSA child support, following Supreme Court's denial of her motion to vacate the stipulation. The Second Department determined that Supreme Court properly upheld the stipulation, which otherwise complied with the CSSA, but did not state the dollar amount of the presumptively correct child support award. The Appellate Division noted the stipulation recited that the parties: were "advised of the calculations" under the CSSA; received a copy of the CSSA; and were "fully aware" of the CSSA amount which could be awarded by the Court.

Counsel & Expert Fees and Maintenance - Distributive Award as Factor

In *Ostrower v. Ostrower*, 2017 Westlaw 902399 (2d Dept. Mar. 8, 2017), the wife appealed from a March 2014 Supreme Court judgment, which, upon a November 2013 decision after trial, failed to award her maintenance and expert fees, and awarded counsel fees only to the extent of \$87,000. The parties were married in 1967, had 3 emancipated children, and the wife commenced the action for divorce in 2007. On appeal, the Second Department affirmed, citing the "substantial distributive award" to the wife (a stipulated amount, but unspecified) as a proper basis for the denial of maintenance and expert witness fees. As

to counsel fees, the Appellate Division affirmed, noting that "the bulk" of both parties' fees were paid from marital funds, such that Supreme Court properly limited the award to \$87,000, which was the balance owed to the wife's attorneys.

Custody - Third Party - Granted

In *Matter of Williams v. Frank*, 2017 Westlaw 902408 (2d Dept. Mar. 8, 2017), the mother appealed from a December 2015 Family Court order which, after a hearing, granted her petition to modify a December 2004 order (awarding custody of the child born in 2003 to the maternal grandmother), only to the extent of granting her visitation, while awarding sole legal and residential custody to the maternal grandmother. On appeal, the Second Department affirmed, finding that the child has been in the exclusive care of the maternal grandmother since he was 10 months old. The December 2004 order in favor of the grandmother was rendered upon the default of the mother and the father. The Appellate Division noted that the mother was arrested in 2004, deported in 2005 and did not return to the US until March 2011. The Court concluded that the maternal grandmother "sustained her burden of demonstrating extraordinary circumstances based upon the mother's prolonged separation from the subject child," and that the award was in the child's best interests.

Custody - Third Party - Non-Biological "Tri-Custody"

In *Dawn M. v. Michael M.*, 2017 Westlaw 923725 (Sup. Ct.

Suffolk Co., Leis, J., March 8, 2017), the parties were married in July 1994 and were unable to conceive a child. In April 2001, the wife, Dawn M., met Audria G., who eventually moved in with Dawn and Michael M., her husband, and the 3 parties engaged in intimate relations beginning in 2004. The 3 parties wanted to have a child together, but a fertility doctor refused to inseminate Audria because she was not married to Michael, leading Michael and Audria to engage in relations. The child (J.M.) was born in January 2007. Dawn's health insurance was used to cover Audria's pre-natal and birth expenses, and she accompanied Audria to most of the doctor visits. The 3 parties continued to live together and care for the child until October 2008, when Dawn and Audria left the marital residence with the child. Michael commenced a custody proceeding against Audria, which they resolved by stipulating to joint legal custody, residential custody with Audria and liberal visitation to Michael. Dawn commenced the divorce action in 2011, following which, she testified, that Michael no longer considered her to be J.M.'s parent. Supreme Court accepted as credible the testimony of Audria and Dawn that J.M. was raised with two mothers and calls both women "mommy." Notably, Supreme Court found that when J.M. was in the hospital at age 2 for ear surgery, Michael told a nurse that both women were J.M.'s mothers, so that both could be in the recovery room. An in

camera interview found J.M. to be a well-adjusted 10 year old boy "who loves his father and his two mothers," knows nothing of the parties' litigation and does not know that Michael opposes "tri-custody and court-ordered visitation" with Dawn. Citing Matter of Brooke B., 28 NY3d 1 (2016), Supreme Court found that all 3 parties agreed to conceive and raise a child together as parents, and that "tri-custody is the logical evolution of the Court of Appeals' decision in Brooke S.B." Michael's visitation was from Saturday to Sunday late afternoon, 3 times per month. Supreme Court imposed a legal "tri-custodial arrangement as Audria and defendant already share joint legal custody" and rejected Audria's request that her visitation be "carved out" of Michael's time, upon the ground that Dawn and Audria live together. Supreme Court awarded Dawn weekly Wednesday night visitation, one week long school recess per year and two weeks in each summer. The Court concluded: "Defendant's assertion that plaintiff should not have legal visitation with J.M. is unconscionable given J.M.'s bond with plaintiff and defendant's role in creating this bond. A person simply is responsible for the natural and foreseeable consequences of his or her actions especially when the best interest of a child is involved. Reason and justice dictate that defendant should be estopped from arguing that this woman, whom he has fostered and orchestrated to be his child's mother, be denied legal visitation and

custody."

Custody - Third Party - Standing

In Matter of Smith v. Cooks, 2017 Westlaw 902410 (2d Dept. Mar. 8, 2017), the maternal grandmother appealed from an October 2015 Family Court order which, without a hearing, granted the father's motion to dismiss her petition for custody. The grandmother's August 2015 petition alleged that the parents had joint legal custody, with residential custody to the mother, but that mother was about to commence a term of incarceration. The Second Department affirmed, holding that the petition "failed to allege the existence of extraordinary circumstances relating to the father, who had joint custody of the child."

Enforcement - Charging Lien; Equitable Distribution Judgment

In Sprole v. Sprole, 2017 Westlaw 923057 (3d Dept. Mar. 9, 2017), the wife appealed from a November 2015 Supreme Court order, which granted the husband's motion to access his share of equitable distribution pursuant to a September 2015 judgment directing that investment accounts be equally divided, which was affirmed on appeal. 145 AD3d 1367 (3d Dept. 2016), and restrained the wife's access thereto until further order of the court. The wife's prior 2 attorneys had charging liens on the wife's share of proceeds. The Third Department affirmed, holding that there were no issues of fact requiring a hearing, and rejected the wife's argument that her attorney was required to

initiate a separate action to enforce his charging lien, determining that such a claim may be properly pursued by motion within the action to which the lien pertains, citing Judiciary Law 475.

Enforcement - Medical Record Access - Contempt Denied

In *Elkin v. Labis*, 2017 Westlaw 985733 (1st Dept. Mar. 15, 2017), the father appealed from an April 2015 Supreme Court order which denied his motion to hold the mother in contempt of an August 2014 order concerning his access to the child's medical information, and granted the mother's cross motion for counsel fees in the sum of \$2,000. On appeal, the First Department affirmed, holding that the mother confirmed with the child's pediatrician that the father had received all of the child's medical records to date and that no additional records had been created since that time, such that the father's rights were not prejudiced nor was the wife's conduct willful.

Equitable Distribution - Fraudulent Conveyances to Trust; Bankruptcy

In *Hirsch v. Hirsch*, 2017 Westlaw 1068369 (2d Dept. Mar. 22, 2017), the intervenor bankruptcy trustee appealed from an April 2013 Supreme Court judgment, which rejected the wife's fourth proposed amended judgment of divorce and awarded relief as stated in the husband's proposed judgment. The wife commenced the action in 1997, and the economic issues proceeded to trial

and a decision was rendered in May 2002, which found that the husband had a family trust which was his alter ego, and that the husband engaged in transfers to the trust which "were made to impair the plaintiff's equitable distribution claim." Supreme Court awarded the wife 50% of the marital estate (or over \$2.4 million dollars) plus a \$2.1 million dollar distributive award. The husband filed a chapter 11 bankruptcy petition prior to entry of judgment on the May 2002 decision, and a subsequent judgment was held to be void by the Bankruptcy Court. The wife received an unsecured claim against the bankruptcy estate of over \$2.3 million dollars, and she then moved for relief from the automatic stay so that she could obtain a Supreme Court judgment. The husband converted to a Chapter 7 case, and a trustee was appointed, who successfully moved to modify the automatic stay, so that the wife could obtain a judgment setting aside the fraudulent transfers, and get her fourth amended judgment signed. The husband received a bankruptcy discharge in November 2011. The Second Department held that Supreme Court should have signed the fourth amended judgment, which would have effectuated the findings after trial that the transfers to the trust were fraudulent, and which would have provided the wife with a distributive award reflective of her share of equitable distribution. The Appellate Division concluded: "Thus, the only way that the plaintiff may receive any of the \$2,343,707.94

remaining to be paid to her as equitable distribution is by remedying the fraudulent transfers to the HFT [trust] found in the May 2002 decision after trial. The provisions subjecting the assets of the HFT to the husband's bankruptcy estate are based on explicit findings in the decision after trial, and are meant to effectuate the plaintiff's equitable distribution award. Accordingly, the proposed fourth amended judgment sought by the plaintiff and the Trustee strictly conforms to the May 2002 decision after trial, is effective in light of the bankruptcy proceedings, and should have been entered by the Supreme Court."

Equitable Distribution - Proportions; Separate Property Not Found; Maintenance - Nondurational

In *Gafycz v. Gafycz*, 2017 Westlaw 776927 (2d Dept. Mar. 1, 2017), the husband appealed from a June 2014 Supreme Court judgment which, among other things, awarded the wife 100% of 2 marital properties and 25% of certain other properties he claimed to be separate, and \$1,000 per month in non-durational maintenance. The Second Department held that with regard to the distributions of 100% of 2 properties to the wife, Supreme Court "properly took into consideration its finding that defendant secreted assets, willfully failed to comply with court orders, and was deliberately evasive in his testimony." With respect to the 25% award, the Appellate Division noted that the properties were purchased during the marriage (presumed to be marital

property) by the husband and his father, and the father later deeded his interest to the husband. Given that the husband "failed to establish that he purchased his half-interest in the properties using separate *** funds," it was proper for Supreme Court to equally divide the husband's half share by awarding the wife 25% of such properties.

**Equitable Distribution - Separate Property - Marital Funds Used;
Maintenance - Durational**

In Arthur v. Arthur, 2017 Westlaw 805170 (3d Dept. Mar. 1, 2017), the husband appealed from a March 2016 Supreme Court judgment which, among other things, awarded her \$25,000 as her share of marital funds used to repair his separate property homes, imputed \$109,512 in annual income to him, and awarded the wife \$2,000 per month in maintenance for 2 years. On appeal, the Third Department affirmed, holding that Supreme Court properly credited the wife's testimony that the parties spent approximately \$50,000 to repair 2 homes owned by the husband pre-marriage, and rejected the husband's testimony that the expenditures were \$10,000 and from his separate property. Neither party offered documentary evidence. The parties were married in 2005 and had 2 children born in 2006 and 2008, and the divorce action was commenced in June 2013. The Appellate Division upheld the imputation of income, noting that despite the husband's present unemployment, Supreme Court "properly

considered his 40-year employment history, his Master's degree in finance, his recent salaries in the public sector, as well as his quarterly income from several family trusts." As to maintenance, the Third Department held that the award was proper, based upon "the wife's inability to support herself ***, to-date unsuccessful search for permanent employment, her role as a caregiver to the parties' young children and the fact that the marital assets distributed to her are not substantial enough to generate independent income," and that the "short duration *** reflects the relatively short duration of the marriage and the wife's employment potential given her advanced education [a Ph.D. degree]."

Family Offense - Aggravated Harassment 2d & Harassment 2d & Disorderly Conduct - Not Found

In Matter of Donna C. v. Kuni C., 2017 Westlaw 1082627 (1st Dept. Mar. 23, 2017), the mother appealed from an April 2016 Family Court order which, after a hearing, dismissed her petition for failure to establish a prima facie case. On appeal, the First Department affirmed, holding that the 3 text messages sent by the father, which contained foul and disparaging language, did not rise to the level of harassment, and it could not be said that the messages served "no legitimate purpose," because the same concerned the parties' children.

Family Offense - Willful Violation of Order of Protection

In Matter of Lisa T. v. King E.T., 147 AD3d 670 (1st Dept. Feb. 28, 2017), respondent appealed from June 2015 and July 2015 Family Court orders, which, respectively, found that he willfully violated 2 temporary orders of protection, and issued a one year order of protection. The First Department affirmed, one justice dissenting, noting that respondent was on notice of the conduct prohibited by an October 2013 temporary order and that the order could be extended. The Appellate Division further held that respondent's April 2014 email contained statements "clearly intended to harass petitioner, in violation of the order of protection that was entered the same day." The Court concluded that Family Court Act 846-a prescribes the procedure and penalties for failing to obey a temporary order of protection, and permits the court to issue a new order of protection, upon a finding pursuant to FCA 842 "on the record that the conduct alleged in the petition is in violation of a valid order of protection," with which statute Family Court complied, following a hearing and a finding of a willful violation.