NYSBA FAMILY LAW SECTION, Matrimonial Update, December 2017

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Agreements - Interpretation – Cohabitation

In Campello v. Alexandre, 2017 Westlaw 5615725 (3d Dept. Nov. 22, 2017), the former husband appealed from a September 2016 Supreme Court order, which denied his motion to enforce the terms of the parties' stipulation incorporated into a September 2014 judgment. The stipulation provided that the husband's maintenance obligation would terminate if the wife cohabited "permanent[ly]" with a man who is not her spouse, and she and this individual must hold themselves out to be married pursuant to Domestic Relations Law §248 [payee is habitually living with another person and holding himself or herself out as the spouse of such other person, although not married to such other person] and *Northrup v Northrup* (43 NY2d 566 [1978]). The Appellate Division affirmed, noting that "the record reveals that the wife resided with a man and that she had been described in a newsletter published by his employer as his 'partner' and that she "had co-signed a lease with her male companion and had listed him as the contingent beneficiary on her life insurance policy," but there "was no proof that she had described him as her spouse in these or any other instances." The Court concluded: "This proof does not rise to the level required to

establish that the wife held herself out as another man's spouse within the meaning of *Northrup* and Domestic Relations Law §248."

Child Support - CSSA – Imputed Income; Over the Cap; Equitable Distribution – Debt; Separate Property - Commingling

In Schorr v. Schorr, 154 AD3d 621 (1st Dept. Oct. 31, 2017), the husband appealed from a July 2016 Supreme Court judgment, which awarded child support, denied his separate property credits, and directed the parties to repay a $124,000 loan from the wife's father. The First Department affirmed. The Appellate Division found that when "calculating the child support award, the court properly imputed income to defendant by including significant funds he received from his parents to pay his expenses (citation omitted).' The Court noted that the evidence at trial supported the finding "that defendant inflated his expenses on his tax returns so as to deflate his reported net income, and otherwise manipulated his income" and that he used funds from his father's estate to pay some of his personal expenses. The First Department held that Supreme Court "properly articulated its rationale for including combined parental income above the statutory cap, i.e., to maintain the standard of living provided the child during his parents' marriage and taking into account his reasonable needs." As to the loan from the wife's father, the Appellate Division found that Supreme Court "providently exercised its discretion in directing the

parties to repay the loan from the proceeds of the sale of the marital residence, given that the father "testified credibly that $124,000 remained unpaid under two promissory notes for monies borrowed from him to purchase the marital residence." The First Department concluded that the husband was not entitled to a separate property credit, because he "failed to prove that his premarital assets that were admittedly commingled [for about one year] with marital funds were not marital property."

Child Support - CSSA – Imputed Income; Over the Cap; Custody – Domestic Violence

In Zappin v. Comfort, 2017 Westlaw 5578406 (1st Dept. Nov. 21, 2017), the father appealed from an August 2016 Supreme Court judgment, which granted the mother sole legal and physical custody, granted him supervised visitation, and granted a 5 year stay away order of protection. The First Department affirmed, noting that the determination finding that "it was in the child's best interests to award sole custody to defendant has a sound and substantial evidentiary basis" and "was based in part on the court's findings that plaintiff committed acts of domestic violence against defendant, both during her pregnancy with the child and after the child was born, rendering joint custody impossible." The Appellate Division agreed that the evidence that the father "had physically and verbally harmed the child's mother, engaged in abusive litigation tactics, and

lacked the emotional restraint and personality to look after the child's best interests provides a sound and substantial basis for the court's finding that unsupervised visitation would have 'a negative impact on the child's well-being.'" The Court further noted that the father "made repeated false allegations of abuse to the Administration for Child Services and the police, which rendered supervised visitation appropriate." The First Department determined that Supreme Court "detailed its reasons for issuing a five-year order of protection, and found that plaintiff committed numerous family offenses, including assault in the third degree *** and harassment in the second degree." The Court concluded that Supreme Court "was not required to make a finding of 'aggravating circumstances' before issuing the order of protection (*compare* Domestic Relations Law §252 *with* Family Court Act §842)." With respect to child support, the Appellate Division held that Supreme Court "properly imputed income to plaintiff based on his income in 2014. Although he presented no direct evidence of it, plaintiff claims that he was terminated from his position at his law firm because of the negative publicity he received after he had been sanctioned during these proceedings in 2015. (Citations omitted). Even if he was terminated for that reason, the sanctions — and therefore his unemployment — resulted from his own misconduct at trial, not from the court's conduct in

sanctioning him or publicly releasing the sanctions order." As to income over $143,000, the First Department found: "In setting a child support income cap of $250,000, the court cited the parties' incomes in the mid- to high $200,000s and their upper-middle class lifestyle, and thus properly considered the parties' financial resources and the child's standard of living had the marriage not dissolved."

Child Support - CSSA – Opt-Out Sufficient

In Matter of Frederick-Kane v. Potter, 2017 Westlaw 5615984 (3d Dept. Nov. 22, 2017), the father appealed from a May 2016 Family Court order, which granted the mother's March 2015 petition to modify a 1999 stipulated order, incorporated into a November 2000 judgment of divorce, setting the father's child support obligation for 2 children at $150 per week. Family Court found that the judgment of divorce failed to comply with the CSSA and remitted to the Support Magistrate for a *de novo* determination, which, following the father's objections, confirmed the father's obligation at $748.41 bi-weekly. The Third Department reversed, on the law, and remitted to Family Court. The Appellate Division held that Family Court erred, upon the ground that "the stipulation, as well as the order of support, recite that the parties had been advised of and fully understood the child support provisions of the CSSA and that the application of the statute would result in the presumptively

correct amount of child support to be awarded. The stipulation then sets forth the presumptive amount of child support that would be awarded under the CSSA and the agreed-upon figures used to calculate that amount, states that the parties are deviating from the presumptive amount and provides a detailed explanation of the reasons for the deviation therefrom. Thus, the opt out provisions of the stipulation fully comply with the CSSA. (Citations omitted). That the judgment of divorce does not explicitly set forth the CSSA recitals is not determinative, as the statute only requires the inclusion of such recitals in the 'agreement or stipulation . . . presented to the court for incorporation in an order or judgment' (Family Ct Act §413[1][h]." The Court concluded: "the parties' 1999 stipulation expressly provides that either party may petition a court for a modification of child support based upon 'a change of circumstances.' Through this clear and unqualified language, the parties plainly expressed an intent to dispense with the 'unanticipated and unreasonable change of circumstances' standard in favor of a less burdensome 'change of circumstances' standard."

Custody - Visitation – Supervised – Violation

In Matter of Montalbano v. Babcock, 2017 Westlaw 5506681 (4th Dept. Nov. 17, 2017), the father appealed from a July 2016 Family Court order, which awarded the mother sole legal custody

of the subject child. The Fourth Department affirmed. The mother alleged that the father took the parties' son on a boat ride in violation of an order requiring that his visitation be supervised. The mother's petition included a screenshot of a Facebook post in which the father stated that the child himself had operated the boat for the first time, and had raced another boat at 70 miles per hour. The Appellate Division held that “the father's alleged conduct in allowing a 13-year-old child with no prior experience to operate a boat in that manner ‘would support a finding of neglect’ (citations omitted) and that the child's statements about the incident were corroborated by the screenshot (citation omitted) which was properly admitted in evidence at the fact-finding hearing based on the mother's testimony that it accurately represented the father's Facebook page on the date in question and that she had communicated with the father through his Facebook page in the past.” The Fourth Department concluded that “there is a sound and substantial basis in the record for the court's award of sole legal custody to the mother *** and that an award of sole custody to the mother was in the child's best interests.”

Divorce - DRL 230 Residency Requirements

In Gruszczynski v. Twarkowski, 57 Misc3d 662, NY Law Journ. Nov. 7, 2017 at 21, col. 1 (Sup. Ct. N.Y. Co., Cooper, J., Oct. 26, 2017), the parties traveled from Poland to be married in New

York on December 6, 2013, and then returned to Poland. In September 2016, plaintiff commenced the within New York divorce action, seeking only a divorce pursuant DRL 170(7) and alleging that: there are no children, no assets to divide, and no request by either spouse for spousal maintenance. Plaintiff moved for an uncontested divorce. The Clerk rejected the papers, based upon the failure to meet the residency requirements. Plaintiff again moved for a divorce, requesting a waiver of the residency requirements, supported by affidavits from both parties, "describing how they traveled to New York City specifically to avail themselves of this state's right to marry, a right not afforded to them by their own country. They also set forth their need to avail themselves of New York's no-fault divorce law so that they can dissolve a marriage that neither party wishes to continue. They stress that if New York refuses to entertain the proceeding, they will face the prospect of being unable to find any forum in which they can be divorced." Supreme Court found: "Plaintiff, joined by defendant, makes a compelling argument that, under the circumstances presented here, a strict application of Domestic Relations Law §230 is inequitable and discriminatory. Having accepted New York's invitation to come and exercise their right to marry as a same-sex couple, the parties now find that they are being deprived of the equally fundamental right to end the marriage. Thus, they face the

unhappy prospect of forever being stuck in their made-in-New York marriage, unable to dissolve it here or in their home country. Clearly, equity demands that the parties be spared such an excruciating fate (see Dickerson v Thompson, 88 AD3d 121, 124 [3d Dept 2011] [reversing trial court's dismissal of action to dissolve Vermont same-sex civil union and noting 'absent Supreme Court's invocation of its equitable power to dissolve the civil union, there would be no court competent to provide plaintiff the requested relief and she would therefore be left without a remedy']).” Supreme Court noted that “Poland *** refuses to recognize the relationship simply because the spouses are husband and husband rather than husband and wife.” The Court granted the motion and concluded that “the residency requirements found under the five subdivisions of Domestic Relations Law §230 are elements of a cause of action for divorce and not a jurisdictional requisite” and that “it would be incumbent on defendant to raise the lack of residency as an affirmative defense to the action.” The Court noted that defendant “has joined in the request that the divorce be granted irrespective of the residency requirement.”

Equitable Distribution - Proportions (60%/40%) – Criminal Conduct and Legal Fees

In Linda G. v. James G., 2017 Westlaw 5326824 (1st Dept. Nov. 14, 2017), the First Department stated the issue: “The

primary issue on this appeal is whether there can be an unequal distribution of the marital home under the ‘just and proper’ standard set forth in Domestic Relations Law §236(B)(5)(d)(14) where a spouse's criminal conduct and subsequent incarceration impacts the family. We agree that Supreme Court providently exercised its discretion in awarding the wife the greater value of the marital residence. However, we modify the court's ruling to provide for a 60%/40% division rather than a 75%/25% division.” The parties were married in June 1989 and have 2 children born in 1996 and 2001. The husband began working for Ernst & Young (E & Y) in 1991 and was made partner in 1996. In October 2007, due to an SEC insider trading investigation, the husband resigned, at a time when he was earning $1.25 million per year. The wife began employment with JPMorgan Chase in 1982 and left in 2000 to become a stay-at-home mother, at which time she was earning approximately $200,000 with annual bonuses nearing $500,000. In 2010, the husband was indicted on charges of conspiracy and insider trading. The husband maintained his innocence and claimed that a woman with whom he was having an affair stole his BlackBerry and used the information to engage in insider trading. He was found guilty and served a one year and one day sentence in federal prison from May 2010 through January 2011. The SEC investigation and criminal trial depleted the joint assets of the parties. The divorce action was

commenced on January 26, 2010. Both parties were unemployed from October 2007 through February of 2010, when the wife returned to JP Morgan, earning $300,000 with a bonus of $500,000. The husband began working at Sherwood Partners after his release from incarceration and testified that, as of 2013, his base salary was $226,000. Supreme Court distributed the marital home 75% to the wife and 25% to the husband and found that the wife was entitled to a 50% credit for the husband’s criminal legal fees, because it is "not necessary to have a finding of marital waste" in order to impose financial responsibility on a party for the "expenses arising from his criminal activit[y]." Supreme Court took into account the husband's "adulterous and criminal behavior" in awarding the wife 75% of the marital home. The First Department found that “the husband's adulterous conduct is not sufficiently egregious and shocking to the conscience to justify making an unequal distribution of the marital home. However, we hold that the impact of the husband's criminal conduct on the family may be considered in making an unequal distribution.” In modifying to a 60%/40% division in favor of the wife, the Appellate Division found: “The parties were required to spend down their savings from 2007 through 2010 when the husband was forced to resign due to the SEC investigation. He refused to take a plea bargain and insisted on going to trial, blaming a woman with whom he had an extramarital affair

for his insider trading. He was convicted of a felony and lost his license to practice law. The husband's post-incarceration earnings at the time of the trial dropped significantly to less than 20% of his prior income. His income never returned to the level he earned prior to the conviction." The First Department concluded that "to hold the wife responsible for the accumulation of substantial legal fees for which she shares no culpability would be inequitable" and affirmed the portion of the judgment awarding the wife a 50% credit for the legal fees arising from the husband's criminal activity.

Evidence - Expert Cross Examination

In Montas v. Abouel-Ela, 154 AD3d 589 (1st Dept. Oct. 24, 2017), plaintiff appealed from an April 2016 Supreme Court judgment rendered upon a jury verdict in favor of defendant. The First Department affirmed, holding that plaintiff "has not demonstrated conduct by defendant's counsel that would warrant reversal. Defendant's counsel was properly permitted to cross-examine plaintiff's expert rebuttal witness about the circumstances surrounding his suspension from chiropractic school for falsely reporting that he had seen patients, a matter relevant to his credibility (citations omitted). Although the conduct was 30 years ago, the witness opened the door to its relevancy by claiming that his expert knowledge of biomechanics came, in part, from his training as a chiropractor. Counsel's

comments about the plaintiff's expert in summations were within the broad bounds of rhetorical comment."

Family Offense - Weapons Surrender Reversed

In Matter of Rhoda v. Avery, 2017 Westlaw 5163013 (2d Dept. Nov. 8, 2017), respondent appealed from a December 2016 Family Court order of protection, made after a hearing, upon a finding that he committed harassment in the second degree against his mother in law, and which directed him to stay away from her until December 20, 2017, and to immediately surrender any and all handguns, pistols, revolvers, shotguns, and any other firearms owned or possessed to the police. The Second Department modified, on the law and the facts, by deleting the provision directing respondent to surrender the aforementioned firearms. The Appellate Division held that petitioner "established, by a fair preponderance of the evidence, that [respondent] committed acts which constituted the family offense of harassment in the second degree, warranting the issuance of an order of protection." The Court found that Family Court "erred in directing the appellant to surrender any firearms in his possession during the pendency of the order of protection. The direction that the appellant surrender any firearms he owned or possessed was not warranted inasmuch as the court did not find, nor did the evidence indicate, 'that the conduct which resulted in the issuance of the order of protection involved (i) the

infliction of physical injury . . . , (ii) the use or threatened use of a deadly weapon or dangerous instrument . . . , or (iii) behavior constituting any violent felony offense (Family Ct Act §842-a[2][a]), or that there is a substantial risk that the [appellant] may use or threaten to use a firearm unlawfully against the person or persons for whose protection the order of protection is issued' (Family Ct Act §842-a[2][b])."