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EDITOR:
BRUCE J. WAGNER

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MATRIMONIAL UPDATE

By Bruce J. Wagner
McNamee, Lochner, Titus & Williams, P.C., Albany

COURT OF APPEALS NOTES

Argued June 2, 2016 and marked "Pending Undecided" on July 5, 2016: In Matter of Estrellita A. v. Jennifer L.D., 26 NY3d 901 (September 1, 2015), the Court granted leave to appeal to the birth mother, Jennifer L.D., from a Second Department order. 123 AD3d 1023 (2d Dept. Dec. 24, 2014). The Appellate Division affirmed a September 2013 Family Court order which, after a hearing, granted Estrellita's petition to the extent of awarding her visitation, and directed that Jennifer retain legal and physical custody of the child (born in November 2008), and final decision making authority, "after thoughtful consideration of [Estrellita's] input before making a decision." Notably, upon Jennifer's October 2012 child support petition, a January 2013 Family Court order determined that [Estrellita] "is a parent to [the child]; and as such is chargeable with the support of the child." Further, when denying Jennifer's motion to dismiss Estrellita's visitation petition for lack of standing, Family Court's April 2013 order found that Jennifer was judicially estopped from arguing that Estrellita was not a parent, and noted that the relief sought by Jennifer was known as "having your cake and eating it too."

Also argued June 2, 2016 and marked "Pending Undecided" on July 5, 2016: In Matter of Brooke S.B. v. Elizabeth A. C.C., 26 NY3d 901 (September 1, 2015),

the Court granted leave to appeal to the attorney for the child from a Fourth Department order. 129 AD3d 1578 (4th Dept. June 19, 2015). The Fourth Department affirmed a Family Court order, which dismissed the petition of the same-sex former partner of the child's mother, upon the ground that petitioner was not married to respondent and did not adopt the child, and thus lacked standing to seek custody or visitation. The Appellate Division found that Petitioner had "failed to sufficiently allege any extraordinary circumstances" to establish such standing.

AGREEMENTS – INTERPRETATION – CAMP, PRIVATE SCHOOL, TAX REFUNDS

In Frances v. Frances, 140 AD3d 1114 (2d Dept. June 29, 2016), the plaintiff former wife appealed from a February 2015 Supreme Court order, which granted so much of the defendant former husband's motion which was to enforce the parties' January 2010 stipulation, incorporated into their March 2010 divorce judgment, by directing her to pay him, among other things, 50% of the refund received from the parties' 2009 joint tax return, and 50% of the school tuition and camp expenses for the parties' youngest child. On appeal, the Second Department modified, on the law, by denying those portions of defendant's motion seeking to direct plaintiff to pay defendant 50% of the refund received from the parties' 2009 joint tax return, and 50% of the camp expenses for the parties' youngest child. The January 2010 stipulation was made "in full and complete satisfaction of all claims each [party] may have against the other under any law" and provided that they had divided their respective property to their mutual satisfaction, be it "marital property" or "separate property" and each party waived any rights to a distributive award." The Appellate Division found: "the parties agreed that the plaintiff would prepare the parties' 2009 joint tax return. However, the stipulation was silent as to how any refund from the 2009 joint tax return would be distributed. While the defendant would ordinarily have a right to 50% of the marital portion of the 2009 tax refund, as such portion of the refund would constitute marital property," he "waived any right to the distribution of such tax refund in the stipulation, which did not specifically provide for the distribution of any refund in connection with the 2009 joint tax return." The Court concluded as to this issue that "Supreme Court should have denied that branch of the defendant's motion which was to direct the plaintiff to pay him 50% of the refund received from the parties' 2009 joint tax return." As to school tuition, the Second Department held that "Supreme Court properly granted that branch of the defendant's motion which was to direct the plaintiff to pay him 50% of the school tuition expenses for the parties' youngest child," which required an equal sharing thereof at a similar Orthodox Jewish school through high school graduation, and which did not require agreement or consultation. Given that the stipulation did not contain any provision directing the plaintiff to contribute to the child's camp expenses, the Appellate Division held that "Supreme Court should have denied that branch of the defendant's motion which was to direct the plaintiff to pay him a 50% share of the child's camp expenses."

CHILD SUPPORT – CSSA – OVER $141,000; BONUS INCOME

In Bandyopadhyay v. Bandyopadhyay, 2016 Westlaw 3561752 (4th Dept. July 1, 2016), the mother appealed from a December 2014 Supreme Court order which, among other things, set her child support obligation to the father for two children at the rate of $441 per week, plus 57% of whatever bonus income she might receive from her employment, minus credits for the costs of airline travel for her and their children to Texas. The mother's CSSA income was $96,428 (56.36%) and the father's income was $74,664 (43.64%), yielding $171,092 in combined parental income. The Fourth Department modified, on the law and in the exercise of discretion, by limiting child support to the $141,000 cap, thus reducing the mother's obligation to $378.84 per week, and by vacating the provision regarding the percentage of the bonus. The Appellate Division held that "blind application" of the CSSA to income over the cap, "without express findings or record evidence of the children's actual needs, constitutes an abdication of judicial responsibility and renders meaningless the statutory provision setting a cap on strict application of the formula." The Court also stated: "We adopt the court's finding that the mother, in her current job, has no history of bonuses upon which any additional income might be imputed to her beyond her base salary."

CHILD SUPPORT – COLLEGE & PRIVATE SCHOOL–WAIVER OF AGREED SHARES

In Matter of Murphy v. Murphy, 140 AD3d 1168 (2d Dept. June 29, 2016), the father appealed from a September 2015 Family Court order, which denied his objections to an April 2015 Support Magistrate order determining that the mother did not waive the 70%/30% sharing of private school and college tuition provided in the parties' incorporated August 2000 agreement, for a 9 year period prior to her enforcement petition. On appeal, the Second Department modified, on the law and the facts, holding that Family Court should have granted the father's objections, upon the ground that the mother waived her right to a 70% share of such expenses. The Appellate Division noted that the mother "acknowledged at the hearing that she had affirmatively requested that the father pay half of the children's tuition bills, including making the notation 'your half' or similar direction, on some, though not all of the tuition statements she sent to the father." The Court concluded: "the mother's acceptance of the 50% payments for nine years, demonstrated that she intentionally abandoned her right to a 70% contribution prior to the filing of her enforcement petition."

CUSTODY – SEXUAL ABUSE CORROBORATION

In Matter of Leighann W. v. Thomas X. 2016 Westlaw 3748567 (3d Dept. July 14, 2016), the father appealed from two August 2014 orders which, upon Family Court's finding that he was in default, modified a 2009 order by terminating his visitation with their daughter born in 2005, based upon a March 2013 allegation of his sexual abuse of her, and granted the mother and child a 2 year order of protection. The father also appealed from a July 2015 order, which denied his motion to vacate the aforesaid 2 orders. On appeal, the Third Department reversed the August 2014 orders, on the law, dismissed the mother's petitions, and dismissed the appeal from the July 2015 order as moot. The father was absent on the final day of the hearing; his counsel declined Family Court's offer to classify the absence as a pure default, and fully participated in the hearing. The Appellate Division held that the orders were not entered upon default, and, further, determined that the child's sexual abuse allegations were not sufficiently corroborated, FCA §1046(a)(vi), given that the proof "did not rise above repetition to include additional evidence such as expert testimony that the child's behavior or her statements were consistent with abuse, physical evidence of abuse, or the sworn testimony or in camera statements of the child herself." The Court concluded that the mother did not meet her burden of proof for modification of visitation or establishing that the father committed a family offense.

CUSTODY – SOLE – FAILURE TO FOLLOW TEACHER RECOMMENDATIONS

In Funaro v. Funaro, 2016 Westlaw 3748545 (3d Dept. July 14, 2016), the father appealed from a September 2014 Supreme Court order which, among other things, awarded the wife sole legal and physical custody of the parties' child born in 2006. On appeal, the Third Department affirmed, finding that the wife had the more flexible work schedule, was primarily responsible for the child's health and educational needs, and that the parties "rarely agreed on what was best for the child." The Appellate Division cited both parties' testimony that "they could not agree to send the child to summer school or to counselling, even though both were recommended by the child's teachers." The Court noted that while the wife wanted to follow both recommendations, the husband, who did not speak to the teachers about the same, "refused to consent because he knew what the child needed to do to remain on track academically during the summer." On the subject of counselling, the Third Department stated: "the husband explained that he spent hours talking to and 'analyzing' the child and he did not believe it was necessary – an approach we find unsettling."

CUSTODY – RELOCATION (GA) GRANTED – MILITARY REMARRIAGE

In Matter of Ventura v. Huggins, 2016 Westlaw 3703186 (2d Dept. July 13, 2016), the father appealed from a June 2015 Family Court order which, after a hearing, granted the mother's April 2013 petition to relocate to Georgia with their child born in 2010, and denied his June 2013 petition to modify a January 2012 order, so as to award him sole custody. On appeal, the Second Department affirmed, noting that Family Court credited the mother's testimony, which demonstrated: "that she wanted to relocate to Georgia with her new husband, who had been stationed there as a member of the military"; and "that relocation would enhance the child's life economically, emotionally and educationally, and that the relationship between the child and the father could be preserved through suitable visitation arrangements."

CUSTODY – VISITATION – FAMILY REUNION OUT OF STATE

In Matter of Carroll v. Chugg, 2016 Westlaw 3561848 (4th Dept. July 1, 2016), the mother appealed from a March 2015 Family Court order which modified a prior order, to the extent of permitting the father to take the child to a family reunion in Montana during his summer visitation with the child. On appeal, the Fourth Department affirmed, finding: "Contrary to the mother's contention, there is a sound and substantial basis in the record for Family Court's determination that the child would benefit from visiting her relatives in Montana."

Editor's Note: If you wish to submit an article for consideration for inclusion in the Bulletin, please send it to me in MS Word at wagner@mltw.com by the 15th of each month, for the next succeeding month, with a copy to ekarabatos@soklaw.com.