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MATRIMONIAL UPDATE

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COURT OF APPEALS NOTE:

In Matter of Odunbaku v. Odunbaku, 2016 Westlaw 6781215 (Nov. 17, 2016), the Court of Appeals held "that if a party is represented by counsel, the time requirements set out in [Family Court Act §439(e)] for objections to a support magistrate's final order, when the order is served by mail, do not begin to run until the order is mailed to counsel," citing Matter of Bianca v. Frank, 43 NY2d 168 (1977). A Support Magistrate Order, with an FCA §439(e) notice regarding the time period for objections, was mailed to the mother and the father, only, and not to the parties' attorneys, on July 24, 2013. The mother did not immediately inform her counsel of the order, and the mother's counsel filed objections on September 3, 2013, 41 days after Family Court's service by mail upon the parties, or 6 days late. Family Court, citing 22 NYCRR §205.36(b), which allows the Clerk to serve the parties "or their attorneys," dismissed the mother's objections as untimely and the Appellate Division affirmed [131 AD3d 617 (2d Dept. 2015)]. The Court of Appeals reversed and remitted to Family Court.

AGREEMENTS - PRENUPTIAL – INTERPRETATION – TEMPORARY RELIEF

In Davis v. Davis, 39 NYS3d 531 (2d Dept. Nov. 2, 2016), the husband appealed from September and

October 2015 Supreme Court orders directing him to pay temporary maintenance (amount unspecified) and $5,000 in temporary counsel fees. The parties were married in 2013 and entered into a prenuptial agreement. The Second Department affirmed, holding that the counsel fee award was a proper exercise of discretion and noting that the prenuptial agreement "did not expressly preclude an award of pendente lite maintenance, nor did defendant expressly waive such an award."

CHILD SUPPORT - MODIFICATION – 2010 AMENDMENTS AND REVIEW & ADJUSTMENT

In Matter of Thompson v. Sussman, 2016 Westlaw 6773740 (2d Dept. Nov. 16, 2016), the parties' October 2005 stipulation was incorporated into a June 2007 judgment, provided for a nearly equal sharing of custody, and required the husband to pay $900 per month in child support, which deviated from the CSSA. A July 2013 COLA order [FCA 413-a] was issued by the SCU, which increased the father's monthly obligation to $994. In the mother's September 2014 modification proceeding, Family Court rendered a November 2015 order which applied the 2010 FCA 451 amendment's "15% or more change" provisions, upon the basis that the SCU had issued an order in July 2013. On the father's appeal, the Second Department reversed, on the law, holding that the 2010 amendments did not apply, given that the parties' stipulation pre-dated the same, and further, that FCA 413-a(4) expressly provides that the review and adjustment process does not "expand" a party's rights to file for child support modification. The Appellate Division concluded that even though the father's income increased from $82,000 in 2005 to $107,000 in 2014, the mother's 2014 income was $165,000, and the mother having failed to prove that the children's needs were not being met, she did not satsify either the Boden or Brescia standards for modification, and her petition should be denied.

CUSTODY - INJUNCTION PREVENTING PARENTAL CONTACT WITH PEDIATRICIAN

In Elkin v. Labis, 2016 Westlaw 6782919 (1st Dept. Nov. 17, 2016), the father appealed from an August 2014 Supreme Court order which, without an evidentiary hearing, granted the mother's motion for a permanent injunction against the father, which: prohibited him from "directly contacting the subject child's pediatrician and her medical practice"; ordered the father to request medical records or information about the child from the doctor and her practice by contacting the mother in writing, whereupon the mother had 2 days to forward the request for information to be sent directly to the father; and limited such requests to 6 times per calendar year, excluding emergency hospitalizations. The First Department affirmed, noting "the physician's assertions that the father had called her office 'incessantly . . . before visits and after visits' and would constantly be annoying to the front desk, 'to the point that [they] were dreading his phone calls.' Moreover, the father did not dispute that he made such multiple

requests for information, and admitted that he was motivated to obtain the child's medical records to support his pending habeas corpus motion."

CUSTODY - THIRD PARTY – JUDICIAL ESTOPPEL

In Paese v. Paese, 2016 Westlaw 6604674 (2d Dept. Nov. 9, 2016), the father appealed from a September 2015 Supreme Court order which denied him access to one of the mother's children from a prior relationship, based upon lack of standing. On appeal, the Second Department reversed, on the law, finding that the father had moved in with the mother, "raised the subject child as his daughter," and later married the mother, while also noting that the mother had sought and received child support from the father for both the subject child and 2 children the parties had together, thus judicially estopping the mother from arguing that the father was a non-parent, citing Matter of Brooke S.B. v. Elizabeth A. C.C., 28 NY 3d 1 (2016).

CUSTODY - VISITATION – CHILD'S WISHES (12 Y/O); FORFEITURE NOT FOUND

In Matter of Ronald C. v. Sherry B., 2016 Westlaw 6839381 (1st Dept. Nov. 22, 2016), the father appealed from an October 2015 Family Court order, which denied his petition for visitation with his twin daughters (born in 2003). On appeal, the First Department reversed, on the facts and in the exercise of discretion, and remanded to Family Court to fix "reasonable rights of visitation." The father had been paying child support since 2005, and his 2006 petition for visitation was dismissed for lack of service, due to the mother's relocation and her failure to provide the father with her new address. In 2013, the father hired an investigator who found the mother and he then petitioned again for visitation. Following various temporary orders, which progressed from permitting the father to write letters, to supervised therapeutic visitation, to unsupervised visitation, the Court held a hearing in October 2015 and an in camera meeting with the children. Family Court, giving "substantial weight" to the children's "strong opposition" to visitation and based upon its finding that the father had forfeited his right to visitation, dismissed his petition. The Appellate Division held that "the presumption that petitioner and the twins should visit with each other was not rebutted" and that Family Court "placed too much weight on the expressed wishes of the twins." The First Department concluded that the twins' concerns "[a]t most *** bespeak the need for more therapeutic support and perhaps more time to try to help petitioner gain the children's trust and affection."

ENFORCEMENT - CHILD SUPPORT – STATUTE OF LIMITATIONS

In Matter of Gibbs v. Gibbs, 2016 Westlaw 6816800 (4th Dept. Nov. 18, 2016), the mother appealed from an April 2015 Family Court order, which denied her objection to a Support Magistrate order. The Fourth Department affirmed. A September 1969 support order directed the father to pay child support for their child born in 1969, and a May 1986 judgment established accumulated arrears. The mother commenced a February 2014 proceeding seeking enforcement of the 1986 judgment and child support arrears from the date of the judgment until the child's 21st birthday in 1990. The Appellate Division held that the Support Magistrate erred in determining that the 6-year statute of limitations [CPLR 213(1)] governs the 1986 judgment and noted that the 20-year statute of limitations [CPLR 211(b)] applies, which expired in May 2006, thus rendering the mother's February 2014 proceeding to be untimely. The Court rejected the mother's argument that CPLR 207 tolled the statute of limitations, given the father's testimony and evidence which established that "he resided in New York during the relevant period."

EQUITABLE DISTRIBUTION - FOLLOWING FOREIGN JUDGMENT – VALUATION DATE

In Drake v. Mundrick, 2016 Westlaw 6816775 (4th Dept. Nov. 18, 2016), both parties appealed from an April 2015 Supreme Court judgment which distributed marital property. On appeal, the Fourth Department reversed, on the law, and remitted to Supreme Court, for a new trial and determination of equitable distribution. In May 2007, a foreign divorce action was commenced, which resulted in a dissolution of the parties' marriage. The wife commenced this action for equitable distribution in September 2011, following the foreign judgment. Supreme Court used the May 2007 date of commencement of the foreign action as the valuation date for marital property. The Appellate Division held that Supreme Court erred in using 2007 instead of 2011 as the valuation date, given that the foreign action for divorce was not "an action in which equitable distribution [was] available."

FAMILY OFFENSE - HARASSMENT 2D – INTENT NOT PROVED

In Matter of Etman v. Adjoor, 2016 Westlaw 6465379 (2d Dept. Nov. 2, 2016), the husband appealed from an October 2015 one-year order of protection, which, after a hearing and a finding that he committed harassment in the second degree, directed him to stay away from the wife. On appeal, the Second Department reversed, on the law and the facts, and dismissed the petition. The Appellate Division held that the wife failed to show that the husband's conduct was committed with the requisite intent to "harass, annoy or alarm" her, as required by Penal Law §240.26(1).

MAINTENANCE - DURATIONAL – DECREASED

In Castello v. Castello, 2016 Westlaw 6605162 (2d Dept. Nov. 9, 2016), the husband appealed from a September 2013 Supreme Court judgment which, following trial of the wife's August 2012 action, among other things, imputed annual income of $240,000 to him, and awarded the wife maintenance of $5,500 per month until her age 63 years, 10 months and eligibility for Social Security, to terminate sooner upon her remarriage or the death of either party. The parties were married in 1986 and had 4 children, 2 of whom were unemancipated at the time of trial. The wife, age 49 in August 2012, was the primary caregiver and a homemaker, and the husband, age 50 in August 2012, owned a construction company. The Second Department modified, on the facts and in the exercise of discretion, by decreasing the duration to 8 years from the September 2013 judgment (to the wife's age 58). The Appellate Division noted that the wife was in good health, had no medical issues, had many years of phlebotomy experience, a cosmetology license, and a real estate license which could be renewed "with minimal effort." Notably, the wife testified that she could make real estate referrals while working full-time at another job.

In Sansone v. Sansone, 2016 Westlaw 6773367 (2d Dept. Nov. 16, 2016), the husband appealed from a June 2014 Supreme Court judgment, which, among other things, directed him to pay the wife maintenance of $6,000 per month until her age 59½, and $4,000 per month until her age 67 or her receipt of full Social Security benefits, a total duration of 22 years. The parties were married for 11 years at the time of commencement of the action in 2011. The wife had a limited work history (part-time bank teller), and an MS diagnosis prior to the marriage. The Second Department modified, on the facts and in the exercise of discretion, by directing maintenance of $6,000 per month for 6 years, and then $4,000 per month until her age 62, or such age that she would first qualify for Social Security benefits.

MAINTENANCE – DURATIONAL – INCREASED

In Duval v. Duval, 2016 Westlaw 6605105 (2d Dept. Nov. 9, 2016), the wife appealed from a February 2015 Supreme Court judgment which, following trial in her March 2011 action, awarded her maintenance of $12,000 per month for 8 years, or until the husband retires, whichever first occurs. The parties were married in August 1991, had 2 children (1 emancipated) and are both 56 years old. The wife was a stay at home mother. In 1999, the wife's father retired and the husband took over his father-in-law's insurance agency. The Second Department modified, on the law, the facts, and in the exercise of discretion, by directing maintenance of $12,000 per month until the wife's 65th birthday.

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.