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MATRIMONIAL UPDATE

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AGREEMENTS - INTERPRETATION – CHILD SUPPORT & COLLEGE CREDIT

In Meshel v. Meshel, 2017 Westlaw 213962 (1st Dept. Jan. 19, 2017), the mother appealed from a March 2016 Supreme Court order, which denied her motion to direct the father to cease deducting the parties' son's college room and board costs from his child support payments for the parties' daughter, and granted the father's cross motion to direct her to pay his counsel fees of $3,000. On appeal, the First Department modified, on the law and the facts, to deny the father's cross motion for counsel fees, and otherwise affirmed. The parties' incorporated stipulation provided for primary physical custody of their 2 children to the mother and for $6,000 per month in child support from the father to the mother, subject to "a full credit against all such monthly child support payments for any and all amounts he contributes toward the cost of the son's room and board while away at college," up to $24,000 per year. A July 2013 stipulation modified the earlier stipulation by transferring sole custody of the son to the father and reducing child support for the daughter to $5,000 per month. The son started college away from home in the fall of 2015, and the father began deducting $1,473 per month for room and board from child support. The Appellate Division held that Supreme Court "correctly concluded that the revised stipulation did not modify the divorce judgment's provision regarding college room and

board credit," reasoning that "the revised stipulation was completely unambiguous and clear that the only modification made was the $1,000 reduction in child support." The First Department reversed the counsel fee award, made under Part 130, determining that although the mother "did not prevail on the central issue in this enforcement proceeding, we do not find her motion to be frivolous."

CHILD SUPPORT - CSSA – CAPPED AT $141,000

In Matter of Peddycoart v. MacKay, 145 AD3d 1081 (2d Dept. Dec. 30, 2016), the father appealed from a February 2016 Family Court order, which denied his objections to a November 2015 Support Magistrate order directing him to pay child support of $542 per week for the parties' daughter born in 2009. On appeal, the Second Department modified, on the law, the facts, and in the exercise of discretion, by reducing child support to $378 per week. The Appellate Division held that the Support Magistrate erred by applying the CSSA to all of the combined parental income of $202,208 (mother $36,112 and father $166,096), based upon her findings that "the mother lived with her parents, she worked part-time as a registered nurse in a nursing home, the father's newborn child by a different mother enjoyed the benefits of his substantial income, and the subject child was in need of the full measure of support." The Second Department found that the Support Magistrate: recognized the mother's student loan obligations, but did not consider the father's debts and expenses; did not adequately consider the father's expenses with respect to his second child; did not consider that for a period of time, the father's girlfriend stayed home to care for the newborn child and the father was having trouble covering all of the household expenses; did not consider the other types of support that the father provided to the subject child, including health insurance coverage and college savings contributions; failed to weigh the "unrefuted testimony that the child was with the father approximately 100 days out of the year, and that he pays for all of her expenses when she is with him." Finally, with regard to the issue of "actual needs," the Appellate Division noted that: the child attends public school and has no special needs or learning disabilities; the mother testified that she had no childcare expenses and lived rent-free at her parent's house; the mother spent about $50-70 per week on food for the child; and there were no extraordinary expenses.

CHILD SUPPORT - CSSA - CAPPED AT $141,000; COUNSEL FEES; EQUITABLE DISTRIBUTION – MARITAL RESIDENCE SALE; MAINTENANCE - DURATIONAL

In Sprole v. Sprole, 145 AD3d 1367 (3d Dept. Dec. 29, 2016), the wife appealed from a September 2015 Supreme Court judgment which determined the issues of child support, counsel fees, equitable distribution and maintenance. The parties were married in 1994, have two daughters (born in 1996 and 2005), and the husband commenced the divorce action in 2009. In March

2013, the parties consented to an order of joint legal custody of the older daughter, with physical custody to the mother, and sole legal and physical custody of the younger daughter to the father, for whom he waived child support from the mother. Supreme Court, noting the husband's annual income of $415,000 and the wife's lack of income since 1996, awarded her maintenance of $8,000 per month for 5 years; capped CSSA child support at $141,000 and directed the husband to pay $1,997.50 per month; and directed the husband to pay $200,000 of the wife's counsel fees. Marital assets were distributed equally, with the exception of the husband's interest in the closely held company for which he served as the chief executive officer, of which the wife was awarded 30% of the stipulated value, to be paid in five annual installments of $60,000 with a balloon payment of $600,000 in the sixth year. The judgment also directed that the marital home be listed for immediate sale, with the net proceeds therefrom to be divided equally between the parties. As to maintenance, the Third Department affirmed, finding that the "wife was relatively young, in good health, has a Bachelor's degree and could return to full-time employment given that the child in her custody was 18 years old and attending college, yet she had made no effort to secure employment throughout the six-year period during which this divorce action was pending." The Appellate Division noted further in upholding the maintenance award that "the wife stands to receive substantial sums from the equitable distribution award, including roughly $200,000 from the sale of the marital residence, $900,000 for her share in the husband's business and nearly $140,000 for her portion of the remaining marital assets." The Third Department upheld child support capped at $141,000, based upon: the husband's payment of all of the expenses of the younger daughter in his custody, having waived child support from the wife for this child; the older child was enrolled in college and had access to a college savings account containing nearly $85,000, and that the husband had agreed to pay any remaining costs associated with the children's attendance at a four-year university and remained responsible for 100% of the children's insurance coverage as well as any outstanding medical, dental and optical expenses. The Appellate Division also affirmed the direction that the marital residence be sold and held that Supreme Court did not abuse its discretion in ordering that the home be sold at a public auction in the event that it remained on the market for six months. As to counsel fees, the Third Department held that Supreme Court "providently exercised its discretion in limiting the husband's contribution towards the wife's counsel fees to $200,000."

CHILD SUPPORT – IMPUTED INCOME; COUNSEL FEES – AFTER TRIAL; EQUITABLE DISTRIBUTION - MARITAL RESIDENCE – FORECLOSURE AND BANKRUPTCY AS FACTORS; MAINTENANCE - DURATIONAL

In Pfister v. Pfister, 2017 Westlaw 112523 (3d Dept. Jan. 12, 2017), the husband appealed from a June 2015 Supreme Court judgment which, in the wife's action commenced in November 2011 (1998 marriage), directed him to pay child support of $340 per week for 3 children (born in 2000, 2003 and 2010) and maintenance of $200 per week for 3 years, awarded the wife the marital

residence, 25% of the value of his business, and $7,500 in counsel fees. On appeal, the Third Department affirmed, noting that Supreme Court properly imputed income of $44,447 per year to the wife and $85,000 per year to the husband, based upon the husband's ownership of a property maintenance business in which he claimed earnings of $63,000 in 2010 and $43,000 in 2013, which earnings he stated declined post-commencement. The wife has two Master's degrees, is a certified school counselor, and earned $18,000 in 2010 from part-time work; she disclosed 2013 income of $16,000, but the evidence established that she also worked a second part-time job, earning approximately $2,125 per month. Both parties had received Chapter 7 Bankruptcy discharges. Supreme Court found that the husband earned more than $120,000 per year until 2009, and that he historically paid for the family's expenses through the business accounts. Supreme Court rejected the wife's argument that she should not be required to work full time. The Appellate Division found no abuse of discretion in Supreme Court's determination to impute income to the wife according to her actual earnings derived from the two part-time jobs, consistent with the findings of the Bankruptcy Court. In affirming the maintenance award, the Third Department cited, among other things, the wife's contributions to the husband's business and noted that the parties' standard of living was maintained through the accumulation of debt, which the husband discharged in bankruptcy. With respect to the distribution of the business, while no trial was had in the action and the parties consented to written submissions, neither party produced any expert opinions; there was uncontradicted evidence that the husband and his former partner agreed in 2012 that the business was worth $55,200 for purposes of a buyout, and the Appellate Division found no abuse of discretion in the use of this figure for valuation or the award of a 25% share to the wife. As to the marital residence, the equity was $42,376, and the Third Department affirmed the award thereof to the wife, given the husband's Bankruptcy discharge of the mortgage debt, his failure to appear in the pending foreclosure action and his failure to comply with Supreme Court's directive to pay the carrying charges on the residence during the pendency of the action; the wife reaffirmed the mortgage debt and appeared in the foreclosure action with the goal of salvaging the home. With regard to counsel fees, the Appellate Division rejected the husband's claim that Supreme Court should not have awarded counsel fees to the wife without a hearing, inasmuch as the parties authorized the court to decide the issues on submission, and the husband did not request a hearing on counsel fees in his statement of proposed disposition.

COUNSEL FEES - AFTER TRIAL; EQUITABLE DISTRIBUTION – MARITAL PROPERTY PRESUMPTION & SEPARATE PROPERTY CREDIT

In Rosenberg v. Rosenberg, 145 AD3d 1015 (2d Dept. Dec. 28, 2016), the husband appealed from an August 2014 Supreme Court judgment, which determined equitable distribution, directed the husband to solely responsible for repaying a home equity line of credit, and directed him to pay the wife's counsel fees of $128,742. The parties were married in January 2003, have 2

children, and the wife commenced the divorce action in October 2009. The Second Department upheld Supreme Court's determination that a boat acquired during the marriage was marital property, given that the husband's testimony "that the funds used to acquire the boat were his separate property, unsupported by documentary evidence, was insufficient to overcome the marital presumption." Supreme Court awarded the jointly titled marital residence to the wife, which the parties purchased in 2003 with $118,000 of the wife's premarital separate funds, plus a mortgage. At the time of the trial, the home was worth $525,000 and was subject to encumbrances of $325,000. The Appellate Division upheld the $118,000 separate property credit to the wife, and ruled that Supreme Court should have awarded the husband half of the remaining $82,000 in equity, or $41,000. As to the home equity loan, the Second Department found that "Supreme Court improvidently exercised its discretion in directing that the defendant be solely responsible for the balance of a home equity line of credit on the marital residence," and directed that the parties be equally responsible therefor. With respect to counsel fees, the Court concluded: "In light of the overall financial circumstances of the parties and the circumstances of the case as a whole, we deem it appropriate to reduce the award of $128,741.86 to the sum of $80,000."

CUSTODY - ENCOURAGE NON-CUSTODIAL RELATIONSHIP & UNSUBSTANTIATED ABUSE ALLEGATIONS

In Karlsson v. Karlsson, 145 AD3d 639 (1st Dept. Dec. 29, 2016), the father appealed from a March 2015 Supreme Court order awarding sole legal and primary physical custody of the parties' children to the mother. On appeal, the First Department affirmed, finding that the mother "is more likely to support and encourage the children's relationship" with the father than he is to facilitate a relationship between the mother and the children, and noting the father's "history of making claims to the police, the Administration for Children's Services and hospital personnel, that were all found to be unsubstantiated."

CUSTODY – RELOCATION – DENIED

In DeFilippis v. DeFelippis, 2017 Westlaw 99149 (2d Dept. Jan. 11, 2017), the father appealed from a June 2016 Supreme Court order, which granted the mother's request to relocate with the parties' 2 children during the pendency of her 2014 divorce action, from Floral Park to East Hampton. The Second Department stayed the order in July 2016, pending appeal, and reversed, on the law. The Appellate Division held that the mother "did not establish by a preponderance of the evidence that the proposed relocation would serve the children's best interests" and found that her evidence that relocating would enhance her life and the children's lives economically, "was tenuous at best." The Second Department noted that the husband "presented evidence of his involvement in the children's daily lives, school, and extracurricular

activities" and that if the relocation was permitted, he "would no longer be able to see the children midweek or remain involved in their many activities." The Court concluded that the mother "did not establish by a preponderance of the evidence that her proposed relocation would enhance the children's lives emotionally or educationally."

CUSTODY - RELOCATION – DENIED (ROCKLAND TO WESTCHESTER)

In Lipari v. Lipari, 2017 Westlaw 189171 (2d Dept. Jan. 18, 2017), the mother appealed from a January 2016 Supreme Court order, which, after a hearing, granted the father's motion to enjoin her from relocating with the parties' 2 children 17 miles from the former marital residence in Valley Cottage, Rockland County, to Rye, Westchester County. On appeal, the Second Department affirmed. The parties' incorporated stipulation provided for joint legal custody, primary custody to the mother, and visitation to the father on alternating weekends from Friday after school until Sunday at 7:00 p.m., plus certain overnights each week and during certain school breaks and holidays. The mother had exclusive use and occupancy of the former marital residence, a four-bedroom house in Valley Cottage, Rockland County; the father rented a two-bedroom condominium unit in Valley Cottage, 5 minutes away. The father testified that: he picked up the children from school every day, even when he did not have scheduled visitation, and cared for them until the mother picked them up or while they spent the night at his home for overnight visitation; he coached many of the children's sports teams and attended their other extracurricular activities; he was "very close" with his children and involved in their daily lives since they were born; if the mother relocated to Rye, the amount of time he would be able to spend with the children "would be decreased tremendously"; and that he works at various locations in New Jersey, and would be unable to maintain the same level of involvement due to the increased commuting time to Rye. The mother testified that: she wished to move to Rye because it would reduce her commute to work as a teacher librarian for the Rye City School District; she believed that the Rye school district was "a lot better" than the Nyack school district; and that she could save money by moving to an apartment in Rye. The Appellate Division rejected the mother's argument that her proposed 17 mile move does not constitute a "relocation" that requires an analysis of the best interests of the child and the Tropea factors. The Second Department concluded: "the quality and quantity of the father's contact with the children during the week would be substantially impaired due to the demands of his work and the rush-hour commute to pick up and drop off the children in Rye"; and "the mother failed to demonstrate, by a preponderance of the evidence, that the children's lives would be enhanced economically, emotionally, or educationally by the move, such that the proposed relocation would be in the children's best interests."

EQUITABLE DISTRIBUTION - CARRYING CHARGE CREDIT REVERSED; SEPARATE PROPERTY TRANSMUTATION FOUND; WASTEFUL DISSIPATION

In Iacono v. Iacono, 145 AD3d 972 (2d Dept. Dec. 28, 2016), the wife appealed from a December 2013 Supreme Court judgment, which, after trial, directed equitable distribution of the parties' marital property. The parties were married in May 1987, have 2 children and the husband commenced the divorce action in June 2011. Supreme Court awarded the husband exclusive use and occupancy of the marital residence until the later of the date that the parties' youngest child graduates from high school or attains the age of 18 years, at which time the marital residence was to be sold. The net proceeds of the sale were to be divided equally between the parties, after crediting the husband for $105,000 for separate funds he claimed to have used to purchase the marital residence, and 50% of the mortgage, real estate tax, and homeowners' insurance premium payments he made since the commencement of the action. The husband claimed that he derived $105,000 from the sale of separate property, which he invested in the parties' first marital home. The first home was jointly titled and was sold in 2001; the sale proceeds were applied toward the purchase of the current marital home. The Second Department held that the husband "failed to establish entitlement to a separate property credit for the separate property funds he used in the purchase of the first marital home, as he offered no clear and convincing evidence to substantiate the specific amount claimed (citation omitted), or that the comingling was created solely for convenience without an intention of creating a marital beneficial interest (citations omitted)." The Appellate Division further held that the husband "is not entitled to a credit for 50% of the carrying charges on the marital residence, as the defendant is paying child support," because such a credit "would result in the wife making double shelter payments." The Second Department concluded that the wife should have been given a credit for 50% of the husband's withdrawals from a joint bank account and an IRA prior to or after the commencement of this action, and remitted to Supreme Court.

EQUITABLE DISTRIBUTION - CONVERTED TO PARTITION; SEPARATE PROPERTY

In Cohen v. Cohen, 2017 Westlaw 52833 (3d Dept. Jan. 5, 2017), the parties were married in 2007 and the wife commenced the action in 2009. Supreme Court converted the equitable distribution of the parties' pre-marital home into a claim for partition. The Third Department upheld Supreme Court's judgment, which awarded the home to the wife, with no monies due to the husband, given that his $18,403 in equity was less than his 50% share of associated expenses the wife paid from her separate account commencing in June 2009. The Appellate Division reversed the award to the wife of an ATV, finding that the same was a pre-marital gift by her to the husband and thus constitutes his separate property.

EQUITABLE DISTRIBUTION – DISTRIBUTIVE AWARD INTEREST; MAINTENANCE – DURATIONAL

In Ralis v. Ralis, 2017 Westlaw 95035 (2d Dept. Jan. 11, 2017), the wife appealed from a September 2014 Supreme Court judgment which, after trial of her March 2009 action, directed the husband to pay her a distributive award of $1,023,500, consisting of an immediate $180,000 lump sum, plus $5,000 per month commencing 3 years after judgment with 3% interest, and maintenance of $6,000 per month for 3 years commencing upon payment of the lump sum. The parties were married in May 1987 and had no children. The Second Department affirmed, holding that Supreme Court "balanced the illiquid nature of the plaintiff's assets, which are the primary source of his income, and which he would otherwise have to sell in order to satisfy the defendant's total award, against the defendant's interest in a lump sum payment by providing for a $180,000 payment within 45 days of the date of the judgment, with the balance secured by a mortgage, accruing interest, and paid in monthly installments lasting for the duration of the defendant's projected life expectancy." With regard to the 3 year delay in installment payments, the Appellate Division noted "the amount of the lump sum portion of the award equals the amount the defendant would have received in installments over that same period" and the maintenance award to be paid. The Second Department found that Supreme Court "providently exercised its discretion in setting interest at 3% rather than the statutory rate of 9%." The Court upheld the maintenance award, stating: "Here, considering the relevant factors, in particular the impact of the maintenance award on both parties when combined with the distributive award, the amount and duration of the maintenance award was a provident exercise of discretion."

EQUITABLE DISTRIBUTION - MARITAL PROPERTY – IN TRUST

In Markowitz v. Markowitz, 2017 Westlaw 189166 (2d Dept. Jan. 18, 2017), the husband appealed from a March 2014 Supreme Court judgment, which, among other things, awarded the wife an amount equal to the cash surrender value, as of her action's 2009 commencement date, of a Massachusetts Mutual Life Insurance policy. On appeal, the Second Department modified, on the law, by deleting the aforesaid provision. The Appellate Division held that the husband was correct that "Supreme Court erred in awarding the plaintiff the cash surrender value of the subject Massachusetts Mutual Life Insurance policy *** held by the 1995 Jeffrey S. Markowitz Irrevocable Trust. While marital assets placed in a trust may be subject to equitable distribution (citations omitted), the trust here is irrevocable, and neither party is a trustee with the power to transfer control of the trust assets. Accordingly, the trust assets are unavailable to either party. The defendant's contention that the trust has been implicitly revoked is without merit (see EPTL 7-1.9[a]). Accordingly, the policy should not have been included in the distributive award."

EVIDENCE - CHILD CARE EXPENSES

In Matter of Barmoha v. Eisayev, 2017 Westlaw 355960 (2d Dept. Jan. 25, 2017), the father appealed from an April 2015 Family Court order which directed him to pay a share of child care expenses. The Second Department affirmed, holding that "[t]he mother's testimony, as well as submission of proof of her payment of the monthly bill for the tuition for day care in the form of a letter from the child's day care provider, was sufficient evidence of the costs of child care expenses."

EVIDENCE - HOSPITAL RECORDS

In Matter of Johnson v. Johnson, 2017 Westlaw 355844 (2d Dept. Jan. 25, 2017), petitioner appealed from an October 2015 Family Court order which, after a hearing, dismissed his family offense petition against his brother. The Second Department affirmed, holding that Family Court "properly declined to admit into evidence hospital records that were not certified or authenticated," citing CPLR 4518.

FAMILY OFFENSE - HEARSAY CHILDREN'S STATEMENTS

In Matter of Dhanmatie G. v. Zamin B., 2017 Westlaw 82279 (1st Dept. Jan. 10, 2017), petitioner appealed from an October 2014 Family Court order which dismissed her family offense petition. The First Department affirmed, holding that her "allegations that respondent paternal uncle inappropriately touched one or more of the children were supported only by the inadmissible hearsay statements of the children." The Appellate Division stated that Family Court Act §1046(a)(vi), which allows such testimony, "is explicitly limited to child protective proceedings under articles 10 and 10-A, and has no application to family offense proceedings under article 8." The Court noted that use of the foregoing provision in custody proceedings "has been confined to situations in which the custody proceeding is founded upon abuse or neglect, rendering the issues 'inextricably interwoven'" and found that that there was no "additional admissible evidence to sufficiently corroborate the statements."

MAINTENANCE – WITHHELD GET AS FACTOR

In Masri v. Masri, 2017 Westlaw 160322, NY Law Journ. Jan. 18, 2017 at 1, col. 3 (Sup. Ct. Orange Co., Bartlett, J., Jan. 13, 2017), the parties were married in August 2002, separated in July 2007 and have been involved in divorce litigation (a 2009 judgment vacated in 2011 and a

discontinued November 2015 separation action) for most of the last decade. Both parties are 33 years old and there are two children, born in 2002 and 2004, the elder of whom is disabled and institutionalized at state expense. Supreme Court imputed income to the husband of $75,000 per year and found that his presumptive post-divorce maintenance obligation was $9,696 per year and awarded the same for 4 years (the advisory range being 2.1 to 4.2 years). The wife argued that the husband's withholding of a get should cause the Court, pursuant to DRL §236B(6)(o), to award $2,000 in monthly non-taxable spousal support to her until such time as the husband gives her a Get. The Court declined to do so, finding: "*** in the circumstances presented here, increasing the amount or the duration of Defendant's post-divorce spousal maintenance obligation pursuant to DRL §236B(6)(o) by reason of his refusal to give Plaintiff a Jewish religious divorce or 'Get' would violate the First and Fourteenth Amendments to the United States Constitution. There is no evidence that the Defendant has withheld a Get to extract concessions from Plaintiff in matrimonial litigation or for other wrongful purposes. *** To apply coercive financial pressure because of the perceived unfairness of Jewish religious divorce doctrines to induce Defendant to perform a religious act would plainly interfere with the free exercise of his (and her) religion and violate the First Amendment."

PROCEDURE - WITHDRAWAL AND DISMISSAL OF PETITION REVERSED

In Matter of Gabriel v. Morse, 145 AD3d 1401 (3d Dept. Dec. 29, 2016), the mother appealed from a January 2016 Family Court order which granted the father's motion to withdraw his petition for modification of a 2013 custody order pertaining to the parties' son born in 2008. The 2013 order provided for sole legal and primary physical custody to the mother, suspended the father's visitation and directed him to submit to a substance abuse evaluation. The father completed an in-patient rehabilitation program and then filed a petition for modification, seeking joint legal custody and scheduled visitation. The mother sought the father's treatment records, and when he failed to fully respond, the mother moved to dismiss the petition. The father then faxed a letter to Family Court and counsel, requesting that he be permitted to withdraw the petition. Family Court then dismissed the father's petition without prejudice and denied the mother's motion as moot. On appeal, the Third Department reversed, finding that the mother's counsel's letterhead stated that service by fax was not accepted, and further, that the father did not also serve mother's counsel by mail. The Appellate Division held that the father's letter must be treated as a motion for voluntary discontinuance, and given the lack of proper service, the court did not have jurisdiction to entertain the motion. The Third Department reversed and remitted for further proceedings.

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 cinclima@inclimalawfirm.com.