AAML NY CHAPTER BULLETIN

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MATRIMONIAL UPDATE

By Bruce J. Wagner
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AGREEMENTS - INTERPRETATION – RESIDENCE SALE

In Allard (Sheffer) v. Alllard, 2016 Westlaw 7129129 (3d Dept. Dec. 8, 2016), the former husband (husband) appealed from an August 2015 Supreme Court order, which denied his motion to enforce a 1989 separation agreement which was incorporated into a judgment of divorce. The agreement provided that the former wife (wife) was "entitled to sole and exclusive possession, use and ownership of the marital residence." The husband conveyed the residence to the wife and she refinanced the debt thereon in her name. The agreement also provided that "when and if the house is sold," the parties would equally share the proceeds. The wife placed additional mortgages on the residence between 1989 and 2007. In 2014, the husband moved for an order directing the immediate sale of the residence, or, in the alternative, an order directing the wife to pay off all of the mortgages on the residence. Supreme Court denied the husband's motion as moot. The Third Department affirmed, noting that Supreme Court correctly found that the husband was seeking an opinion with regard to a possible future event which has not occurred, and held that the husband's claim was not justiciable and was, in any event, time-barred under the 6 year statute of limitations provided by CPLR 213(2).

CHILD SUPPORT – CSSA OVER $143,000; COUNSEL FEES - DENIED; MAINTENANCE – DURATIONAL

In Macaluso v. Macaluso, 2016 Westlaw 7234697 (3d Dept. Dec. 15, 2016), the wife appealed from a June 2015 Supreme Court judgment which determined the issue of child support, counsel fees and maintenance. The parties were married in 2004, have 2 children born in 2007 and 2010, and separated in 2010. The husband provided all financial support until the wife commenced her action in 2014. Supreme Court directed temporary child support and maintenance and awarded $5,000 in temporary counsel fees to the wife. The parties settled equitable distribution and custody. Following trial, Supreme Court directed the husband to pay the wife $1,500 bi-weekly for maintenance through December 31, 2015, denied counsel fees and set child support at $1,333 bi-weekly until maintenance ends, to then increase to $1,646 bi-weekly. On appeal, the Third Department affirmed, upholding Supreme Court's finding that the husband's CSSA income was $156,215 and that the wife's CSSA income was $86,000, consisting of $36,000 in maintenance and $50,000 in imputed income. The combined CSSA income was $242,215 and the Appellate Division found "no abuse of discretion in *** application of the statutory child support percentage to the first $200,000 of combined parental income." As to maintenance, the Third Department noted that both parties were in their thirties and in good health at the time of trial, and that "even though both children were attending school or preschool at the time of trial, [the wife] had yet to make any effort to secure employment." Significantly, the wife has a doctorate in biology, and the Appellate Division found: "a vocational expert testified that she could secure local employment with an annual salary of $50,000 and could earn up to $180,000 a year with additional work experience." With regard to counsel fees, the Appellate Division affirmed the denial thereof, noting that the "temporary support payments *** allowed the wife to amass several thousand dollars in savings." Two Justices dissented in the wife's favor on the issue of counsel fees.

CHILD SUPPORT – IMPUTED INCOME

In Matter of Scheppy v. Kelly-Scheppy, 2016 Westlaw 7380749 (2d Dept. Dec. 21, 2016), the mother appealed from a December 2015 Family Court order which denied her objections to a September 2015 Support Magistrate order, rendered after a hearing and which directed her to pay $139 weekly in child support. The Second Department affirmed, holding that the Support Magistrate "properly imputed income to the mother based upon her prior and current income, and her savings account assets," and noting that her monthly expenses were more than 3 times greater than her stated monthly income, and "she did not submit any evidence to show that these monthly expenses were not being paid in a timely manner."

CHILD SUPPORT - SOCIAL SECURITY DISABILITY (SSD) BENEFITS

In Matter of Holeck v. Beyel, 2016 N.Y. App. Div. Lexis 8527 (4th Dept. Dec. 23, 2016), the father appealed from an April 2015 Family Court order, which denied his objections to a Support Magistrate order dismissing his petition for downward modification and directing him to change the representative payee for the children's SSD benefits from him to the mother. On appeal, the Fourth Department affirmed, noting that because the father failed to establish that he had used the children's SSD payments for their benefit, "the Support Magistrate did not err in directing that he pay to the mother the amount of those benefits that he received after the mother filed the petition seeking those payments for the benefit of the children." As to downward modification, the Appellate Division noted the father "requested that reduction after the mother became the payee for the children's SSD benefits, and the father contended that he received less income due to the change in payee." The Court concluded that a child's Social Security benefits "are not intended to displace the obligation of the parent to support his or her children."

CUSTODY - MODIFICATION – NO HEARING – REVERSED

In Matter of Pollock v. Wakefield, 2016 Westlaw 7234781 (3d Dept. Dec. 15, 2016), the mother appealed from an October 2015 Supreme Court order granting the father's application for modification of a May 2015 consent order, which provided for joint legal custody and shared placement of the parties' child born in 2009. In September 2015, the mother filed for sole legal and physical custody, "alleging that the father had become intoxicated and threatened to kill her and take the child." Supreme Court modified the May 2015 order, without a hearing, by appointing the father's girlfriend to transport the child and setting a schedule for Thanksgiving and Christmas, and otherwise continuing the May 2015 order. The Third Department reversed, on the law, and remitted for a hearing, holding that the mother "raised sufficient allegations against the father to warrant an evidentiary hearing" which "could support granting the relief sought."

CUSTODY - RELOCATION – DENIED (NY TO MO)

In Matter of Detwiler v. Detwiler, 2016 Westlaw 7224822 (2d Dept. Dec. 14, 2016), the mother appealed from a September 2015 Family Court order, which denied her petition to relocate to Missouri with the 3 children, and granted the father's petition to modify a January 2012 consent order, so as to grant him primary physical custody. The January 2012 order provided for joint legal custody, primary physical custody to the mother, and visitation to the father every weekday and on Sundays. On March 23, 2015, the father filed for modification to obtain custody

of 1 child, and 4 days later, the mother relocated to Missouri with the children, without prior notice to the father and without court permission. The Court directed the mother to return the children to New York in April 2015 and she complied with the order on May 1, 2015. The father amended his petition to seek custody of all 3 children. The Second Department affirmed, holding: "The mother's conduct in this case, in relocating with the children to Missouri, without discussing it with the children or the father, or seeking permission of the court, raises a strong probability that she is unfit to continue to act as the custodial parent. The mother also failed to show that the children's lives would be enhanced economically, emotionally, and educationally by the move." The Appellate Division noted that "[a]ny potential benefit in relocation did not justify the drastic reduction in the father's visitation (citation omitted) and did not justify uprooting the children who had always attended school in the same school district, where they were thriving academically and socially." The court appointed expert opined that relocation was not in the children's best interests.

CUSTODY - REVERSED ON APPEAL

In Matter of Michael B. (Lillian B.), 2016 Westlaw 6999555 (1st Dept. Dec. 1, 2016), the mother appealed from an August 2015 Family Court order which, following an 18 day hearing held between November 2013 and January 2015, awarded sole legal and primary physical custody of their daughter born in October 2007 to the father. On appeal, the First Department reversed, on the facts and in the exercise of discretion, by awarding sole legal and primary physical custody to the mother. The Appellate Division found the father was not present when the child was born and lived with the mother until she was about 3 years old. The father did not visit her at all for the first six months of her life and had limited contact with her thereafter. In November 2010, when the mother was pregnant with her youngest child, she had a psychiatric hospital stay and the father obtained an ex parte order of temporary custody which remained in place for nearly five years. The Court further found: "It is undisputed that, since the father was granted temporary custody, the paternal grandmother has acted as B.B.'s primary caretaker during the father's parenting time. The father has been only tangentially involved in B.B.'s day to day care, sometimes dropping her off at, or picking her up from, school, or taking her to doctor appointments. His primary involvement was in enrolling her in school and providing for her material needs. While the father has adequately provided for her financially, and the paternal grandmother capably ensured that B.B. was fed and clothed, their relationship with B.B. is not warm or affectionate." The First Department made its findings in great detail in a lengthy decision, which directed a specific schedule of visitation for the father, and noted, among other things, that the forensic evaluator found that the mother was strongly bonded to the child.

CUSTODY - VIOLATION – AFFIRMED, WITH SUSPENSION OF ALL CONTACT

In Matter of Gerber v. Gerber, 2016 Westlaw 6998912 (3d Dept. Dec. 1, 2016), the mother appealed from a September 2015 Family Court order, which found her in willful violation of an October 2014 order (which had suspended all contact between her and the parties' 3 children born between 1998 and 2002 for 6 months, with therapeutic visitation to then resume), and continued the no contact provision for an additional 6 months. The Third Department had affirmed Family Court's prior order in light of evidence that the mother was alienating the children from the father. Matter of Gerber v Gerber, 133 AD3d 1133, 1136-1139 (3d Dept. 2015). The father commenced this proceeding in December 2014, alleging that the mother violated the terms of that order by having continued contact with the children. The Appellate Division affirmed, holding that the father had proved his case by clear and convincing evidence, despite the opposition of the attorney for the children, and found: "The father testified that the tracking device placed on the oldest son's car indicated that the car was in front of the mother's house or in her neighborhood 29 times between November 2014 and January 2015, and those occasions coincided with dates that the oldest son was tardy for or absent from school. Further, the father testified that items from the mother's home, such as shirts, cell phones and toys, suddenly were in the boys' possession. Family Court discredited the mother's testimony that she did not see the children and was unaware that the children were at her house — except on three occasions when she immediately notified either the police or the father."

DISCLOSURE - NON-PARTY – GRANTED

In Kozel v. Kozel, 2016 Westlaw 7191530 (1st Dept. Dec. 13, 2016), a non-party attorney appealed from a February 2016 Supreme Court order which denied his motion for a protective order and to quash a subpoena by the former wife, a judgment creditor who sought information from him about the former husband. On appeal, the First Department affirmed, holding that the non-party "failed to establish conclusively that he lacks" such information, given that the non-party attorney handled the closing on a condominium unit originally purchased by an LLC whose sole member was a trust that a Florida court, in rendering the original judgment, concluded was controlled by the former husband and paid for with marital property. The Appellate Division rejected the non-party's argument that an attorney is subject to a different standard, and noted that Supreme Court instructed him to submit a privilege log and associated documents for an in camera examination. The Court concluded that the attorney was entitled to no more than the fees required by CPLR 5224(b).

DIVORCE - NO-FAULT OBVIATES FAULT GROUND

In Matter of Motta v. Motta, 2016 Westlaw 7234993 (1st Dept. Dec. 15, 2016), the wife appealed from an April 2016 Supreme Court IDV Part judgment of divorce in favor of the husband pursuant to DRL 170(7). The First Department affirmed, stating: "Contrary to defendant's contention, the court was not obligated to grant a judgment of divorce on the ground of cruel and inhuman treatment, and properly granted plaintiff a judgment of divorce on the ground of irreconcilable differences, pursuant to Domestic Relations Law §170(7), since his statement under oath that the marriage was irretrievably broken for a period of six months was sufficient to establish his cause of action as a matter of law."

ENFORCEMENT - AUTOMATIC ORDERS – CONTEMPT

In S.M.S. v. D.S., 2016 Westlaw 6908356 (Sup. Ct. Richmond Co., DiDomenico, J., Nov. 18, 2016), in a post-judgment proceeding, the defendant former husband was found to be in contempt of the automatic orders, based upon, among other proof, his admission that during the trial of the divorce action, he sold a marital property in Brooklyn, and used the proceeds, which he stated were $300,000, for his own benefit. The Court set the purge amount at $150,000.

EQUITABLE DISTRIBUTION - DEBT – HOME EQUITY LOAN

In Horn v. Horn, 2016 Westlaw 7109263 (2d Dept. Dec. 7, 2016), the parties were married in 1991 and have 2 children. The husband appealed from an August 2014 Supreme Court judgment which, among other things, directed him to pay two-thirds of parties' home equity line of credit debt, failed to award him maintenance, and directed him to pay 50% of the college costs for the parties' daughter after deduction of monies awarded by grants, aid, or student loans. On appeal, the Second Department affirmed, holding that "Supreme Court providently exercised its discretion in directing the defendant to pay two-thirds of the balance of a home equity line of credit (hereinafter the HELOC) or $198,667, and that the plaintiff was to be responsible for one-third of the balance of the HELOC or $99,330," given that "the evidence established that the HELOC debt was incurred for the dual purpose of improving the marital residence and paying bills as well as funding the defendant's separate business interest in which the plaintiff had no share." The Appellate Division concluded that the husband "failed to show that the HELOC debt as to the defendant's separate business interest should be shared equally." The Second Department found that it was proper for the court to impute income to the husband of $90,000 per year, and that factor, taken together with the distribution of marital property, led the Court to affirm Supreme Court's decision to not award maintenance to him. Finally, the Appellate Division upheld the equal sharing of college expenses, noting Supreme Court's finding, that the

husband's "account of his income and contention that he could not afford to contribute toward that child's college costs was incredible is supported by the record."

FAMILY OFFENSE - AGGRAVATED HARASSMENT 2D & HARASSMENT 2D FOUND

In Matter of Acevedo v. Acevedo, 2016 Westlaw 7224912 (2d Dept. Dec. 14, 2016), respondent, who is petitioner's adult son, appealed from a 2-year Family Court order of protection, based upon a finding that he had committed aggravated harassment in the second degree and harassment in the second degree against his mother. The Second Department affirmed, finding that from November 2014 to March 2015, the son repeatedly called the mother and demanded money from her, screamed at her, and admitted his mother "told him to stop calling her and to stop asking her for money, yet he persisted in doing both." The Appellate Division concluded: "This course of conduct, which continued despite his knowledge that the calls were unwanted, demonstrated his intent to harass and annoy and established that the calls were made for no legitimate purpose."

FAMILY OFFENSE - AGGRAVATED CIRCUMSTANCES REVERSED; SUMMARY JUDGMENT UPHELD

In Matter of Melissa H. v. Shameer S., 2016 Westlaw 7078950 (1st Dept. Dec. 6, 2016), the father appealed from an October 2015 Family Court order, which granted the mother's motion for summary judgment and found that the father committed harassment in the second degree and that aggravating circumstances existed, and issued a two-year order of protection. On appeal, the First Department modified, on the law, to strike the finding of aggravating circumstances, and otherwise affirmed. The Appellate Division held that the father's criminal conviction of harassment in the second degree in connection with a September 20, 2011 incident "serves as conclusive proof of the underlying facts" in the family offense proceeding. The First Department determined that Family Court's finding of aggravating circumstances based on the conviction of harassment in the second degree "is not supported by the sparse record in this summary judgment proceeding" and that the mother's contention that the father looked at the mother and the children while driving up next to them after the parties left the visitation agency, "is not sufficient to support a finding of aggravating circumstances."

FAMILY OFFENSE - DISORDERLY CONDUCT – FOUND

In Matter of Monique Elizabeth J. v. Orlandro D., 2016 Westlaw 7235142 (1st Dept. Dec. 15, 2016), the father appealed from a September 2015 Family Court order which, after a hearing, found that he committed disorderly conduct and issued an 18 month order of protection in favor

of the mother and her 2 children. On appeal, the First Department affirmed, finding that the mother proved by a preponderance of the evidence, that while the parties were in the courthouse, the father "attempted to take their child, who was securely strapped to the chest of petitioner's fiancé in a carrier, out of the carrier" and "pushed [the mother] and her four-year-old daughter," resulting in "an altercation, which court officers had to defuse."

FAMILY OFFENSE - DISORDERLY CONDUCT & HARASSMENT 2D – DISMISSED

In Matter of Thelma U. v. Miko U., 2016 Westlaw 7191613 (1st Dept. Dec. 13, 2016), petitioner appealed from a July 2014 Family Court order which, after a hearing, dismissed her family offense petition upon the ground of failure to prove disorderly conduct and harassment in the second degree. The First Department affirmed, holding that as to disorderly conduct, "none of the acts alleged occurred in public, were intended to cause a public inconvenience, annoyance or alarm, or recklessly created such a risk." With respect to harassment in the second degree, the Appellate Division determined that respondent's act of banging on the door because he was locked out "did not establish conduct that served no legitimate purpose," and that his use of foul language did not "rise to the level of harassment."

PROCEDURE - SERVICE – FACEBOOK – DENIED

In Qaza v. Alshalabi, 2016 Westlaw 7109698 (Sup. Ct. Kings Co., Sunshine, J., Dec. 5, 2016), the parties were married in June 2011 in New York, and the husband left the marital residence in September 2011, without advising the wife of his whereabouts. In October 2016, the wife commenced an action for divorce and sought substituted service by Facebook, alleging that: the husband was deported and living in Saudi Arabia; she had no contact information for him; he had no contacts in the US; and his New York driver's license was suspended in 2012. The Court noted the wife's contentions that Saudi Arabia is not a signatory to the Hague Convention on Service and that publication would cost in excess of $3,000. The Court denied the request for service via Facebook, given that the wife did not demonstrate that the husband continues to use the Facebook profile, nor did she show that she has communicated with him through the same at any particular time, while noting that the same has not been used since April 2014.

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.