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BRUCE J. WAGNER

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MATRIMONIAL UPDATE

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

CHILD SUPPORT – CSSA – IMPUTED INCOME

In Matter of Muok v. Muok, 138 AD3d 1458 (4th Dept. Apr. 29, 2016), the father appealed from a March 2015 Family Court order, which denied his objections to a Support Magistrate order. On appeal, the Fourth Department modified, on the facts and law, by granting the father's objections to the extent of imputing income to the mother of $20,000, in addition to her Social Security income, and remitted to Family Court. The parties have three children, one living with the father and two living with the mother. The Appellate Division agreed that Family Court "erred in determining that the Support Magistrate did not abuse her discretion in imputing annual income to the mother of $20,000, which included $13,164 that she received in Social Security income." The Court noted: "the mother was 65 years old and had not worked since 2007, when she closed a Montessori school that she operated. The record further establishes that the mother has a bachelor's degree and an MBA, and that she graduated from law school but did not pass the bar exam and was therefore not admitted to the practice of law. The mother testified that, prior to the hearing, she sought only jobs as an attorney, for which she is not qualified. Thus, the mother has not sought employment for which she is qualified since 2007 ***." The Fourth Department concluded: "The record is sufficient for us to determine that, based upon her education and experience, the mother has

the ability to earn income in the amount of $20,000 per year, exclusive of the Social Security income."

CHILD SUPPORT – CSSA OVER $136,000; EQUITABLE DISTRIBUTION – DEBT; MAINTENANCE – SOCIAL SECURITY AGE

In Gillman v. Gillman, 2016 Westlaw 2338413 (2d Dept. May 4, 2016), the wife appealed from a March 2014 Supreme Court judgment, which, upon a September 2013 decision, among other things: (a) awarded her only $836.75 per week in child support, (b) awarded her maintenance only until she reaches the age of 60, and (c) directed that the parties equally share the repayment of the $28,000 balance of a loan. On appeal, the Second Department modified, on the law, on the facts, and in the exercise of discretion, (a) by deleting the provision thereof awarding child support, (b) by deleting the provision thereof directing the defendant to pay maintenance until the plaintiff reaches the age of 60, and substituting therefor a provision directing the defendant to pay maintenance until the earliest of the plaintiff's eligibility for full Social Security benefits, her remarriage or cohabitation pursuant to Domestic Relations Law §248, or the death of either party, and otherwise affirmed and remitted to Supreme Court for a new child support determination. The parties were married in 1986 and have 3 children, including 19 year old twins, and a 14 year old in the agreed custody of the wife. The wife commenced the action for divorce in 2012. The husband (born 1959) was employed and the wife (born 1960) was the primary caregiver for the children and a homemaker, although in 2005 she started a home-decorating business out of the marital residence that generated an annual income of a few thousand dollars. The Appellate Division found that "Supreme Court failed to sufficiently articulate its reasons for capping the combined parental income at $176,000" and "failed to adequately articulate how these factors applied to the particular circumstances of this case and how it decided that $176,000, an amount less than the defendant's 2013 base salary of $181,000, was an appropriate limit on which to base his child support obligation." The Second Department found that Supreme Court did not consider that "the twins were not planning to return to college, were financially dependent upon their parents, and would be living at home full-time with the plaintiff." As to maintenance, the Appellate Division found that "Supreme Court improvidently exercised its discretion in determining that the maintenance award should terminate when the plaintiff reaches the age of 60" in that "it is unrealistic to believe that she will be able to achieve a 'level of financial independence which would eliminate' her need to rely on the defendant's support" and increased the duration as above stated. The Second Department upheld the loan sharing, finding that "Supreme Court providently exercised its discretion in directing that the parties share in the responsibility of repaying the $28,000 balance of a loan provided by the husband's mother," holding: "Financial liabilities 'incurred prior to the commencement of a divorce action constitute marital debt and should be equally shared by the

parties.' Here, the record established that the proceeds of the loan were used to improve the marital residence and, therefore, constituted marital debt."

COUNSEL FEES – FAMILY OFFENSE; BATTERER EDUCATION COSTS

In Matter of Savas v. Bruen, 2016 Westlaw 2338300 (2d Dept. May 4, 2016), respondent appealed from a December 2014 Supreme Court IDV Part order of protection, which, after a hearing, found that he committed harassment in the second degree and violated a temporary order of protection, and directed him to participate in a 52-week batterer's education program and pay the costs thereof, and to pay $7,500 in attorney's fees to the attorney for the petitioner in monthly installments of $312.50. On appeal, the Second Department affirmed, finding that "Supreme Court properly determined that the petitioner established, by a preponderance of the evidence, that [respondent] committed the family offense of harassment in the second degree by pushing the petitioner to the ground" and that "petitioner established, by clear and convincing evidence, that the appellant willfully failed to obey the temporary order of protection when he followed her on February 21, 2013. The Appellate Division held that "Supreme Court providently exercised its discretion in directing the appellant to participate in a batterer's education program and pay the costs thereof," citing FCA §§841 and 842[g] and in directing the him to pay $7,500 in attorney's fees to the attorney for the petitioner in monthly installments of $312.50, citing FCA §§841 and 842[f] and 846-a. Although appellant challenged the expense, the Second Department rejected this contention, concluding: "The petitioner had the right to counsel of her own choosing, and the fact that her mother paid to retain private counsel on her behalf is not a basis to disturb the award" and "the court sufficiently considered the appellant's indigent status by discounting the petitioner's request by 50% and giving the appellant two years to pay." [A related appeal, decided the same day, reversed a civil contempt finding for failure to attend the education program and to pay the counsel fees, and remitted for a hearing on financial ability to comply.]

CUSTODY AND VISITATION – GRANDPARENT

In Matter of Seddio v. Artura, 2016 Westlaw 2994128 (2d Dept. May 25, 2016), the father and mother separately appealed from an August 2014 Family Court order which, after a hearing, granted the paternal grandmother's January 2012 visitation petition pursuant to DRL §72. The Second Department affirmed, finding that the grandmother's testimony and the in camera examination of the children showed that the parents and the children lived with the grandmother for "at least three to four years and that there was regular contact between the children and the grandmother before a dispute between the grandmother and the father led to an estrangement in the family." The Appellate Division held that animosity alone "is insufficient

to deny visitation" and noted that the grandmother consented to a period of therapy with the children.

EQUITABLE DISTRIBUTION – SEPARATE PROPERTY – RESIDENCE – NOT FOUND

In Mistretta v. Mistretta, 138 AD3d 1075 (2d Dept. Apr. 27, 2016), the husband appealed from a January 2014 Supreme Court judgment, upon a November 2013 decision of the court after trial, which determined that certain premises are marital property subject to equitable distribution and directed the sale of those premises, with the parties to share equally in any net proceeds or deficiency from such sale. On appeal, the Second Department affirmed. The parties were married in 1991 and lived at the residence in question during the marriage. In 1996, the husband's mother deeded the residence to him and the wife commenced the divorce action in 2010. The husband claimed at trial that the residence was a gift from his mother and constituted separate property, but admitted that "for many years, he paid his mother $500 per month 'rent.'" The husband and his sister both acknowledged that rental income was paid to their mother pursuant to a written agreement between the husband and their mother, which was in the record. The Appellate Division held that the husband "failed to rebut the presumption that the subject premises, which he acquired during the marriage and prior to the commencement of this divorce action for consideration which was in fact paid during the marriage, were marital property" and that "Supreme Court providently exercised its discretion in directing the sale of the subject premises with the parties to share equally in any net proceeds or deficiency from such sale."

FAMILY OFFENSE - AGGRAVATED HARASSMENT SECOND – FOUND

In Matter of Whitney v. Judge, 138 AD3d 1381 (4th Dept. Apr. 29, 2016), respondent in a family offense proceeding appealed from a December 2013 Family Court order of protection, which directed him to stay away from petitioner for 2 years. On appeal, the Fourth Department affirmed as to one count of aggravated harassment in the second degree as defined in former Penal Law §240.30(2), two other offenses being dismissed on appeal. The Appellate Division found sufficient Petitioner's testimony that "after she had ended their relationship and asked respondent to cease communicating with her, respondent called her, sent her text messages, and left her voicemail messages in an excessive manner" and that "respondent threatened her and was verbally abusive during certain telephone calls."

FAMILY OFFENSE - DISORDERLY CONDUCT FOUND; STALKING NOT FOUND

In Matter of Tucker v. Miller, 138 AD3d 1383 (4th Dept. Apr. 29, 2016), respondent in a family offense proceeding appealed from a November 2013 Family Court order, which directed him to stay away from petitioner for 2 years. On appeal, the Fourth Department affirmed the order of protection, but vacated the finding in the underlying August 2013 order that respondent committed stalking in the fourth degree, as defined by Penal Law §120.45[3]. The Appellate Division rejected respondent's argument that Family Court "did not have subject matter jurisdiction because the parties were no longer in an intimate relationship," noting that "although their sexual relationship ended in the fall of 2012, the parties continued to live together on-and-off until the petition was filed in March 2013." The disorderly conduct finding was upheld, given Petitioner's testimony that respondent "screamed at her in a 'harassing' and obscene manner in her place of business on December 20, 2012, in the presence of customers and employees," which respondent admitted in part. As to stalking in the fourth degree, the Fourth Department concluded that "petitioner did not meet her burden of establishing by a preponderance of the evidence that respondent 'intentionally, and for no legitimate purpose, engage[d] in a course of conduct directed at a specific person, and kn[ew] or reasonably should [have known] that such conduct . . . [was] likely to cause such person to reasonably fear that his or her employment, business or career [was] threatened.'"

FAMILY OFFENSE – HARASSMENT SECOND – NOT FOUND

In Matter of Ronnie B. v. Charlene G., 138 AD3d 605 (1st Dept. Apr. 26, 2016), the mother appealed from an April 2015 Family Court order, which denied her motion to dismiss the father's family offense petition. On appeal, the First Department modified, on the law, to grant the motion as to the allegation that the mother telephoned and sent threatening text messages to the paternal grandmother, and otherwise affirmed. The Appellate Division held that Family Court "correctly denied respondent's motion to dismiss the petition to the extent it alleges that, on a specified date, respondent telephoned repeatedly, making threats of physical harm to petitioner and his family, since that allegation states a cause of action for harassment in the first or second degree" but found that "the allegation that respondent telephoned and sent threatening text messages to the paternal grandmother fails to state a cause of action for a family offense because those alleged actions were not directed at petitioner or the children."

FAMILY OFFENSE – HARASSMENT SECOND – NOT FOUND – FACEBOOK PHOTO

In Matter of Aly T. v. Francisco B., 2016 Westlaw 3006263 (1st Dept. May 26, 2016), the mother appealed from a July 2015 Family Court order, which, after a hearing, dismissed her petition

seeking an order of protection against the father. On appeal, the First Department affirmed, holding that the mother failed to establish any of the alleged family offenses, including harassment in the second degree. The Appellate Division found that although the mother's testimony and evidence as to the photograph posted on the father's Facebook page "meets the definition in common parlance of harassment, it does not sufficiently demonstrate *** harassment in the second degree."

FAMILY OFFENSE - INTIMATE RELATIONSHIP – ATTEMPTED ASSAULT & DISORDERLY CONDUCT

In Matter of Erica R. v. LaQueenia S., 2016 Westlaw 1737113 (1st Dept. May 3, 2016), respondent appealed from an August 2014 Family Court order which, upon finding that she committed attempted assault in the third degree and disorderly conduct, directed her to stay away from petitioner for 2 years. On appeal, the First Department affirmed, holding that Family Court had subject matter jurisdiction "based on the intimate, familial relationship between the parties," namely that Petitioner is the foster mother of respondent's child and the sister of the child's father, and the parties had "frequent communication and interaction over the years." The Appellate Division found that respondent had committed the mentioned family offenses based upon testimony that "respondent lunged at [petitioner] and threw a punch in her direction from less than a foot away during a supervised visitation with the child, and that respondent called and threatened petitioner the following day."

FAMILY OFFENSE - INTIMATE RELATIONSHIP - MENACING – FOUND

In Matter of Sonia S. v. Pedro Antonio S., 2016 Westlaw 2903949 (1st Dept. May, 19, 2016), respondent appealed from a June 2014 Family Court order, which, following a hearing, determined that he committed the family offense of menacing in the third degree. On appeal, the First Department affirmed. The Appellate Division noted that petitioner's allegations that respondent "forced her to have sex with him did not divest the Family Court of subject matter jurisdiction in the instant case, as the Family Court was authorized to consider whether the conduct in question amounted to any sexual offense enumerated in Family Court Act §812(1), although the Family Court found such allegations were not proven." The Court found that "the parties were involved in an 'intimate relationship' from about 1995 until 2011. The First Department determined that the elements of menacing in the third degree were satisfied by Petitioner's testimony that "while they were outside on a street, respondent stated that he was going to kill her, and gestured with his finger across his neck, as if to cut his head off."

ORDER OF PROTECTION – VIOLATION – REQUEST TO FOLLOW ON INSTAGRAM

In People v. Lemons, 2016 Westlaw 1735472 (Crim. Ct. N.Y. Co., Statsinger, J., May 2, 2016), a May 2015 order of protection directed defendant to have no contact with his ex-girlfriend. In September 2015, defendant used his screen name to request to follow the ex-girlfriend on Instagram. She recognized the screen name and contacted police. Criminal Court denied defendant's motion to dismiss the second degree criminal contempt charge as facially insufficient.

PENDENTE LITE – TEMPORARY MAINTENANCE GUIDELINES - DEVIATION

In Cooper v. Cooper, 51 Misc3d 1207(A) (Sup. Ct. Monroe Co., Dollinger, A.J. Apr. 4, 2016), Supreme Court began by framing the issue: "Sometimes, judges need Houdini-like powers, but as in this case, finding enough income to finance child support and temporary maintenance in a young family requires a magic beyond pulling a rabbit out of a hat. In this matter, the wife seeks an award of temporary maintenance from her husband of nine years. The couple have three young children who reside with their mother." Supreme Court found that the wife earned $12,000 annually for part-time work, and earned $7,800 in 2015, and decided to impute $12,000 in income to the wife. The husband's 2015 income was approximately $87,000, but the wife argued that 2015 was a reduced year, and Supreme Court determined that it would impute income of $95,000 to the husband, based on prior earnings. Supreme Court further noted that the parties' 2014 income tax return showed $41,742 in capital gains and the 2013 return shows $17,830 in capital gains. Supreme Court found that "the wife never mentions that capital gains income" and therefore declined to consider the additional income. The presumptive guidelines amount was $16,000 per year. Supreme Court stated: "However, before exploring the statutory factors that would justify a deviation from this amount, this court, recognizing the economic reality of the parties' combined income, engages in another exercise that demonstrates the practical consequences of these transfer payments on the lives of this couple. To achieve this practical goal, this court performs a simple 'net resources available' analysis to the husband and wife, just for illustration purposes." The Court analyzed the matter: "To calculate the husband's net available resources, this court reduces his 2015 imputed income of $95,000 by several calculations. First, he pays social security taxes of $7267, leaving $87,733 as his net income. He then pays $25,442 in child support pursuant to the Child Support Standards Act ("CSSA") as 29 percent of his post-FICA income. He has $62,299 left after these expenses. His income taxes are based on his $95,000 in total income, a standard exemption and two dependents which means he owes an estimated $14,968 in federal taxes and $5,890 in state taxes. http://www.tax-rates.org/income-tax-calculator/?action=preload. After subtracting these tax payments and payment of child support, the husband has an estimated $41,433 in available cash resources to finance other expenses - including the payment of temporary maintenance - and other costs."

As to the wife's income, the Court found: "Her $12,000 in income is reduced by $912 in FICA payments and she pays no income taxes to the federal Internal Revenue Service and perhaps $132 to the state. Her net income is $11,868. She receives $25,442 in child support payments, boosting her total available income to $37,310, while working part-time and earning only $12,000. Thus, under this scenario, the wife's net available income after receipt of just child support is approximately $37,310 is just $2,000 less than the net income available for her husband ($39,426) based on his actual income or $4,000 less based on his imputed income of $95,000. In addition, if, as the husband advocates, the wife were to work either more part-time hours or work full-time, then the wife's income might easily jump to $20,000 annually. She would then pay FICA and federal income taxes, but with a single dependent, she would qualify for the earned income tax credit and her tax obligations - including FICA - would be erased. Then, after receiving $25,442 in child support and keeping almost all of her salary, she would have $45,442 in available resources ($25,442 in child support plus a $20,000 income) or $4,000 more in available resources annually than her husband. These net available resource calculations do not include the much higher rate at which the husband will pay the pro rata share of additional child expenses or his contribution to health insurance costs. If those costs - health insurance, out-of-pocket unreimbursed medical expenses, and extracurricular costs - are added to the difference in the net resources, the gap in available resources grows even further. If those costs total $6000 annually and the husband pays 75 percent of those costs - which, as the more moneyed spouse the statute requires - then he would pay $4,500 and the wife would pay $1,500. His net available resources drop to less than $35,000 and hers would drop to less than $36,000. In addition, if there is a daycare cost, the parties' incomes will be further crimped, dropping them both to less than $33,000 annually. Importantly, all of these calculations include no temporary maintenance paid by the husband to his wife. When the temporary maintenance guideline amount based on the court's calculation - $16,000 - is figured into this equation or the wife's calculation of $21,276 in temporary maintenance is substituted, the disparity is overwhelming. While this court acknowledges that the tax treatment of the maintenance payments - tax deductible to the husband taxable to the wife - reduces the actual "cash flow" consequences in a $16,000 in temporary maintenance payment to approximately $11,000 (assuming a 30 percent tax treatment), nonetheless, the wife's available income rises, after taxes, to nearly $45,000 and the husband's available income, after taxes and paying the temporary maintenance, drops to less than $25,000, creating a nearly $20,000 gap in available resources in favor of what, at first blush, is the substantially lesser moneyed spouse." The Court then commented on the statute's underlying model: "This court acknowledges that the temporary maintenance guidelines, enshrined in statute, are not premised on the "available resources" model discussed above. But, nonetheless, in this court's judgment, the application of the guidelines must be cast in a realistic economic perspective to fully understand the impact of maintenance, paid from the husband to the wife, on the resources for both parents to support and enjoy their children. In this court's view, the consequence of any award of temporary maintenance is substantial reduction in the husband's available resources to less than parity

with his wife, even when she is earning only $12,000 annually. This consequence is unjust and inappropriate under the language of DRL §236B(5-a)(h)(1)." The Court then analyzed the deviation factors and concluded: "This court holds that payment of temporary maintenance pursuant to the guidelines would be inappropriate and unjust in this case. A payment of temporary maintenance would grossly skewer the income differentials between this couple, giving the wife perhaps more than double the available cash to pay expenses than the husband. Even payment of $500 per month or $6,000 annually would leave the husband with less than $30,000 in cash available and the wife would have more than $40,000. This court notes that the wife can easily argue that she needs additional resources because she has the children for more than half the time. But, that argument is rebutted, in part, by the concept of the Child Support Standards Act ("CSSA"), which compensates her, under statute, as the primary residential parent for her children." The Court ended its decision with a return to its opening theme: "Simply put, there is no rabbit at the bottom [of] this couple's hat to support the substantial transfer payment that an award of temporary maintenance, pursuant to the guidelines, would otherwise require in this matter."

PENDENTE LITE - TEMPORARY MAINTENANCE GUIDELINES - PRESUMPTIVE AMOUNT; COUNSEL FEES

In R.I. v. T.I, 51 Misc3d 1215(A) (Sup. Ct. Kings Co., Sunshine, J., Apr. 22, 2016), the parties were married in March 2014 and have 1 child born in October 2015. The husband filed the divorce action on December 23, 2015. The husband is a physician and the wife is a licensed physician's assistant who had worked recently only for the husband. The wife is now staying at home with the child. The husband earned $406,160.00 in 2015, less FICA of $9,284.38 and New York City taxes of $13,841.00, yielding CSSA and maintenance guidelines income of $383,034.62. The Court declined to impute any income to the wife. Supreme Court noted: "There were no factors enunciated in movant's papers or during oral argument to deviate above the $175,000.00 cap." The new temporary maintenance guidelines provided a presumptive amount, considering the payment of child support by the same payor, of $35,600 per year or $2,966.67 per month, which the court ordered. As to CSSA child support, the Court stated that the wife "has not provided any basis for the Court, under Cassano, at this juncture, to exceed the $143,000.00 cap." With regard to child support, Supreme Court determined: "Adjusting the plaintiff's income to take into account this Court's pendente lite maintenance award, the plaintiff's income for the purposes of child support is $347,434.62 ($383,034.62- $35,600.00 = $347,434.62). (See DRL §240(1-b)(5)(vii)(C). In order to determine whether this Court's pendente lite maintenance award is income to the defendant for the purposes of calculating child support, the Court looks to the commencement date of the action. On October 26, 2015, the Child Support Standards Act (DRL §240(1-b)(5)(iii)) was amended, effective January 26, 2016, to provide that in a calculation of child support in Family and Supreme Court, maintenance awards were to be considered income to the payee spouse for the calculation. In as much as that statute became effective on

January 26, 2016 and this action was commenced on December 23, 2015, it is not applicable to this action. As such, the Court must look to the controlling law at the time of commencement. Thus, the applicable law in the Second Judicial Department this Court must apply is that articulated by the Appellate Division, Second Department in Lee v. Lee (18 AD3d 508, 795 N.Y.S.2d 283 [2d Dept., 2005])." The Court concluded that the "pendente lite maintenance award made concurrently with the calculation of child support is not income to the wife for the purposes of calculating child support." The Court found the husband's CSSA income to be $383,034.62-$35,600.00 = $347,434.62. On the $143,000 cap ($143,000 x .17 = $24,310), the Court set the basic child support obligation at $24,310 per year or $2,025.83 per month, payable through SCU. As to counsel fees, the wife requested $10,000 and the Court noted that the husband's counsel had been paid $11,000, and therefore, found the $10,000 request to be reasonable, payable within 14 days.

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.