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MATRIMONIAL UPDATE

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AGREEMENTS - PENSION – INTERPRETATION

In Sanders v. Sanders, 2016 Westlaw 6270537 (3d Dept. Oct. 27, 2016), the former husband (husband) appealed from a January 2015 order which granted the former wife's (wife) motion to vacate a QDRO. On appeal, the Third Department affirmed. The parties' October 2006 stipulation, incorporated into a judgment of divorce, provided that the "the wife shall be entitled to her Majauskas share of the husband's pension through his union in a sum approximating $450 per month," starting November 1, 2006. The husband made those payments until November 2013. The wife sought a QDRO, and the husband opposed, upon the ground that, among other things, the pension arose from a disability and was his separate property. After Supreme Court approved the husband's QDRO, the wife sought reargument, which was granted, and the Court then vacated its prior order, finding that the stipulation unambiguously referred to the disability pension. The Appellate Division held that Supreme Court correctly determined the parties' clearly expressed intent, that the wife would share in the husband's disability pension, "is dispositive."

CSSA – CHILD CARE EXPENSES; COUNSEL FEES

In Matter of Anna Y. v. Alexander S., 142 AD3d 864 (1st Dept. Sept. 27, 2016), the mother appealed from

a March 2015 Family Court order which denied her motion for 90% of interim child care expenses and counsel fees. On appeal, the First Department reversed, on the law, by granting the motion for child care expenses at a rate of 78% (which was the father's contention as to pro rata share), subject to adjustment at trial, and $25,000 in counsel fees, based upon "leveling the playing field" and the father's "significantly greater" (unspecified) income and assets.

CSSA – SOCIAL SECURITY BENEFITS OF CHILDREN

In A.G. v. S.G., 52 Misc3d 1226(A) (Sup. Ct. Putnam Co., Marx, J., Sept. 15, 2016), the parties were married in May 2006, and had 2 children, born in 2006 and 2010. The wife commenced the divorce action in March 2015, was 37 years old and had CSSA income of $90,141 (after subtracting $10,200 per year in maintenance awarded to the husband). The husband was 65 years old, retired and had CSSA income of $30,240 (not including maintenance). The husband also receives $12,360 per year in Social Security Benefits for each of the children. The parties agreed to an equally shared physical custody arrangement. Supreme Court conducted a trial on child support and maintenance, among other issues. The Court noted pursuant to Graby v. Graby, 87 NY2d 605 (1996), that the Social Security income paid for children is not includable in the recipient parent's income, nor may it be used as a credit against the non-custodial parent's child support obligation. Since the wife had the higher income, she was deemed to be the non-custodial parent under the CSSA, and her presumptive CSSA obligation was $1,792 per month, net of a credit to her of $84.66 per month for the husband's 24.9% share of her $340 monthly cost for the children's health insurance. The court found the $1,792 per month amount to be unjust or inappropriate and reduced the award to $300 per month, based upon the parties' earnings, earning capacities (noting that the husband's efforts to find a job were "lackluster, at best"), the shared custody arrangement and the children's Social Security benefits.

COLLEGE EXPENSES– AGREEMENT INTERPRETATION; PRO RATA SHARES

In Friedman v. Friedman, 2016 Westlaw 5795556 (2d Dept. Oct. 5, 2016), the father appealed from a March 2014 Supreme Court order, which denied his motion to modify a prior stipulation so as to direct the mother to pay 100% of college expenses over and above custodial accounts, and granted the mother's cross motion which sought an order directing the father to pay 100% of such expenses. On appeal, the Second Department affirmed. The stipulation required the parties to jointly discuss the college selection, and with a child's input, agree on the same. Expenses over and above the custodial account were to be shared pro rata by the parties, based upon their respective incomes. Both parties were attorneys. The father last earned $443,593, and the mother had remarried in 2009 and remained unemployed. Supreme Court rejected the father's request to impute $100,000 in income to the mother and to impose a SUNY cap. The

Appellate Division held that Supreme Court properly directed the father to pay 100% of the college expenses beyond the custodial accounts, based upon the stipulation, which neither imposed a SUNY cap, nor addressed a party's non-employment.

COUNSEL & EXPERT FEES - DEFENSE OF RESCISSION COUNTERCLAIM

In Reiner v. Reiner, 2016 Westlaw 5928750 (2d Dept. Oct. 12, 2016), the parties were married in April 1988 and entered into a separation agreement in October 2004. In December 2005, the husband commenced a divorce action, seeking to incorporate the agreement, and the wife counterclaimed for rescission of the agreement based upon fraud and duress. Following a trial, Supreme Court granted a judgment of divorce in June 2014, which incorporated the agreement and dismissed the wife's counterclaims. By subsequent order granted in September 2014 on the husband's motion, Supreme Court awarded the husband counsel and expert fees in the sum of $189,293. On the wife's appeals from the judgment and the order, the Second Department affirmed, holding that the wife "failed to demonstrate that the burden of proof should have been shifted to the plaintiff to disprove fraud or overreaching (citations omitted), or to satisfy her burden of showing that the separation agreement was the product of fraud, duress, overreaching, or other inequitable conduct by the plaintiff." With regard to the issue of counsel and expert fees, given the agreement's provision for such an award for a successful defense of a rescission action, the Appellate Division held that the husband was entitled to the same.

COUNSEL FEES - FAMILY COURT – CHILD SUPPORT ENFORCEMENT & DEFENSE OF MODIFICATION

In Matter of Wiener v. Salamy, 142 AD3d 1179 (2d Dept. Sept. 28, 2016), the father appealed from October 2014, February 2015 and July 2015 Family Court orders which, respectively, dismissed his downward modification petition, granted the mother counsel fees of $13,045, and denied his objections to the first two orders. On appeal, the Second Department affirmed all 3 orders, holding that the father "failed to sustain his burden *** since the time of his last unsuccessful modification petition," and that the counsel fee award was appropriate pursuant to FCA 454(3) and 438(a), given the father's willful noncompliance and Family Court's finding that the downward modification petition was without merit.

CUSTODY - MODIFICATION – DENIAL OF ADDITIONAL TIME

In Matter of Machado v. Tanoury, 142 AD3d 1322 (4th Dept. Sept. 30, 2016), the father appealed from a May 2015 Family Court order, which granted the mother's motion to dismiss his petition to modify a prior consent order, so as to expand his visitation from 10 hours every two weeks

to one overnight visit every two weeks. On appeal, the Fourth Department reversed on the law, denied the mother's motion and reinstated the father's petition, concluding that "the father has adequately alleged a change in circumstances , *** namely, that respondent mother had, since the *** consent order, repeatedly reneged on her promises *** to allow the father to have overnight visitation with the child."

CUSTODY - DENIAL OF ADJOURNMENT REVERSED

In Zhu v. Cheng, 142 AD3d 1365 (4th Dept. Sept. 30, 2016), the mother appealed from a December 2014 Supreme Court judgment which, among other things, awarded custody of their child to the father. The mother's attorney had withdrawn on the morning of the trial and the mother requested an adjournment to obtain new counsel and the testimony of witnesses. On appeal, the Fourth Department reversed, on the law, and remitted for a new custody hearing, holding that Supreme Court abused its discretion, and finding that the mother's request "was not a delay tactic and did not result from her lack of diligence."

CUSTODY - MODIFICATION – DISMISSAL REVERSED; DOMESTIC VIOLENCE; CHILD'S WISHES

In Matter of Athena H.M. v. Samuel M., 2016 Westlaw 6106942 (1st Dept. Oct. 20, 2016), the mother appealed from a January 2016 Family Court order which, without a hearing, granted the father's motion to dismiss her amended petition for custody modification. On appeal, the First Department reversed, on the law and the facts, denied the father's motion, and remanded to Family Court. The parties had stipulated to joint legal custody of 2 children, with physical custody to the mother. About 6 years later, the mother relinquished the children to the father for mental health reasons, which led to a consent order granting sole custody to the father, with visitation "as agreed," in proceedings wherein the mother appeared by telephone and was unrepresented by counsel. The mother, still unrepresented a year later, sought enforcement of visitation, and after counsel was appointed for her, amended her petition to seek modification based upon, among other things, the expressed preference of the parties' then 13 year old son to live with her and his reluctance to stay with the father, and the father's alleged maltreatment of the son. The mother submitted evidence that she had sought treatment for her mental health issues, which she alleged related to a history of domestic violence. The Appellate Division held that: the foregoing constituted "sufficient evidence to warrant a plenary hearing to determine whether the totality of the circumstances warrants a modification of the custody order"; the child's wishes, "to be discerned from an interview, should be considered in making the determination"; and that Family Court erred by failing to consider "the sworn allegations of domestic abuse," citing Domestic Relations Law §240(1)," and by failing to meet with the child.

CUSTODY - MODIFICATION – DOMESTIC VIOLENCE - UNFOUNDED

In Werner v. Kenney, 142 AD3d 1351 (4th Dept. Sept, 30, 2016), the mother appealed from a December 2014 Supreme Court order which modified the parties' judgment of divorce, so as to award sole custody of the parties' child to the father. On appeal, the Fourth Department affirmed, holding that "the continued deterioration of the parties' relationship and their inability to coparent constitutes the requisite change in circumstances." The Appellate Division found that the record "supports the court's conclusions that the mother interfered with the father's relationship with the child and that her unfounded allegations of domestic violence, some of which were made in the presence of the child, render her unfit to be a custodial parent."

CUSTODY - MODIFICATION – SUMMARY JUDGMENT REVERSED

In Matter of Robert OO v. Sherrell PP, 2016 Westlaw 6106529 (3d Dept. Oct. 20, 2016), the father appealed from an October 2014 Family Court order, which granted the mother's motion for summary judgment and dismissed his modification petition. On appeal, the Third Department reversed, on the law, denied the mother's motion and remitted to Family Court. The parties have 4 children, born 2007, 2008 and 2009 (twins). A February 2013 consent order provided for joint legal custody, primary custody to the mother, and a schedule of time for the father. The father petitioned for modification in March 2014, seeking primary physical custody, alleging improper supervision and excessive corporal punishment. The mother moved to dismiss the petition, submitting an "unfounded" letter from the abuse and maltreatment registry and a caseworker letter which stated that there were no current safety concerns. The father opposed the motion. Family Court notified the parties that it was treating the mother's motion as a motion for summary judgment, and gave them time to submit additional proof. The Appellate Division held that Family Court erred in concluding that the motion had met her summary judgment burden, holding that the unfounded letter and the caseworker letter related to inquiries distinct from custody modification. The Third Department noted that the father's allegations included reports that the mother hits the children with her hand or a belt, and that the mother's 12 year old daughter from another relationship sometimes watches the parties' 4 children overnight while the mother is working, and, on one occasion, the 12 year old threw one of the children up in the air, causing a broken leg.

CUSTODY - PHYSICAL ALTERCATION; SCHOOL ATTENDANCE & PERFORMANCE

In Matter of Wilson v. Bryant, 2016 Westlaw 6089151 (2d Dept. Oct. 19, 2016), the father and the daughter appealed from a March 2015 Family Court order which, after a hearing, granted sole physical custody of the parties' older child, a son, to the father, and sole physical custody

of the parties' daughter to the mother. On appeal, the Second Department reversed, on the law, and granted the father sole custody of the daughter, noting that: the forensic evaluator's opinion favored custody to the father; the mother engaged in a physical altercation with the father's girlfriend in the presence of the children; the mother "failed to acknowledge or address the daughter's overall poor grades in school" and "provided no explanation for the daughter's continued periodic lateness" to school; the father demonstrated "a greater ability and willingness to both anticipate and provide for the daughter's social and intellectual needs"; and the court failed to appropriately weigh the issue of sibling separation.

CUSTODY - VISITATION – CHILD'S WISHES (12 Y/O)

In Matter of Melissa G. v. John W., 38 NYS3d 176 (1st Dept. Oct. 4, 2016), the mother appealed from a December 2014 Family Court order which awarded her unsupervised visitation upon specified conditions. On appeal, the First Department affirmed, holding that "Family Court properly considered the testimony of the then 12 year-old child, who testified both in camera several times and in open court, as well as that of the mother, and concluded that the child would prefer to remain in New York with her father, with unsupervised visitation with her mother in Florida. The court was entitled to give great weight to the wishes of this child, who has demonstrated insight and maturity throughout these proceedings."

ENFORCEMENT - STIPULATION – HOME EQUITY LOAN WAS CURRENT

In DiSanto-Grossman v. Grossman, 2016 Westlaw 5928884 (2d Dept. Oct. 12, 2016), the wife commenced a divorce action in July 2010. A July 2011 temporary required the husband to pay the mortgage and home equity loan on the marital residence, among other things. The parties entered into a stipulation in March 2013, which: transferred the marital residence to the wife; contained the husband's representation that the mortgage and home equity loan were currently paid; and provided that the wife would assume both liabilities after April 2013. Unbeknownst to the wife, beginning in November 2012 and continuing thereafter, the husband withdrew a total of $16,470 from the home equity loan and used the same to pay the mortgage and home equity loan. Following the wife's motion, Supreme Court rendered an order in June 2013 which directed the husband to repay that same sum and granted the wife judgment therefor. On appeal, the Second Department affirmed, noting that the husband did not deny that he withdrew the foregoing funds after the commencement of the action, used the same to satisfy his obligations under the temporary order, and found that "he was solely responsible for those funds."

EQUITABLE DISTRIBUTION - TRANSFER IN CONTEMPLATION OF MATRIMONIAL ACTION

In S.E. v. M.E., 52 Misc3d 1224(A) (Sup. Ct. Kings Co., Thomas, J., Sept. 6, 2016), the parties were married in January 1992 and the wife commenced a divorce action on August 4, 2009. The husband was served with the Summons on August 18, 2009. A jury awarded a verdict in favor of the wife on her cruelty grounds. As of the date of the commencement of the action, the husband had about $144,000 in ConEd stock, which the Court found he transferred to each of his two children of a prior marriage on August 18, 2009, to the extent of $57,000 each. The husband contended that this transfer was pursuant to a verbal understanding he had with the wife, to compensate his children for $60,000 in gifts made by the parties in 2006 to the wife's daughter from a prior marriage. The Court noted that there was no DRL 236(B)(3) agreement to confirm this arrangement, and, further, declined "to look back three to four years prior to the divorce action to make any finding regarding how the parties chose to spend their money." The Court credited the wife for 50% of the ConEd stock, as a transfer in contemplation of a divorce action, based upon testimony that: on July 24, 2009, the husband told the wife that "he wanted to divorce her because he could not change her"; on July 26, 2009, the wife called the husband to tell him that she had left him and would be filing for divorce; on August 10, 2009, the husband hired a private investigator to follow the wife; the husband received a letter dated August 11, 2009 from the wife's attorney, attaching an affidavit of Defendant in an action for divorce; the husband retained an attorney on August 12, 2009; and on August 12, 2009, the husband made a phone call regarding the transfer of the ConEd stock. The referee did not find credible the husband's testimony that he initiated the ConEd stock transfer on August 6, 2016.

FAMILY OFFENSE - ATTEMPTED ASSAULT 3D; HARASSMENT 2D

In Matter of Rhina MM v. Sandy MM, 38 NYS3d 416 (1st Dept. Oct. 4, 2016), respondent, petitioner's sister, appealed from a February 2016 Family Court order which, after a hearing, issued a two year order of protection. On appeal, the First Department affirmed, holding that a preponderance of the evidence established the offenses of attempted assault in the third degree and harassment in the second degree, based upon eye witness testimony that respondent had threatened petitioner with a knife in 2010, and referred to an email from respondent where she admitted that she threw keys at petitioner.

FAMILY OFFENSE - WILLFUL VIOLATION OF ORDER OF PROTECTION

In Matter of Kessiah A., 2016 Westlaw 5935088 (1st Dept. Oct. 13, 2016), respondent appealed from a December 2014 order which, after a hearing, found that he willfully violated a June 2014 2-year order of protection, which prohibited him from having written communications with a

child, and committed him to jail for a 6 month term. On appeal, the First Department affirmed, holding that the evidence demonstrated beyond a reasonable doubt that respondent violated the order by sending the child 2 letters in June 2014, which were intercepted by ACS before the child could read them. The Appellate Division rejected respondent's claim that the order was not served upon him, finding that the June 2014 transcript shows that he consented to the issuance thereof with his counsel present, and that Family Court ensured that he understood the order's terms.

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.