AAML NY CHAPTER BULLETIN

EDITOR:
BRUCE J. WAGNER

Volume 2 No.: 10
October 2016
REVISED EDITION

MATRIMONIAL UPDATE

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

COUNSEL FEES; DEBT – COLLEGE LOAN; MAINTENANCE & LIFE INSURANCE

In Osman v. Osman, 2016 Westlaw 4769339 (2d Dept. Sept. 14, 2016), the wife appealed from a March 2014 Supreme Court judgment which, among other things: granted her maintenance of $2,000 per month for 6 years; directed the husband to maintain life insurance for maintenance arrears, only; directed her to pay 20% of a $173,279 college loan in the husband's name; and denied her request for counsel fees. On appeal, the Second Department modified, on the facts and in the exercise of discretion, by: increasing maintenance to $2,500 per month for 8 years; directing the husband to maintain life insurance for all past due and future maintenance, with annual reductions; and deleting the provision regarding the college loan. The parties were married in 1980 and the Court noted that the wife "was primarily a stay-at-home mother after the birth of the parties' daughter." With regard to maintenance, the Appellate Division considered the 27 year length of the marriage, the parties' ages and lifestyle during the marriage, the wife's limited employment history, and the parties' financial circumstances (all of which were unspecified), and held that "Supreme Court improvidently exercised its discretion." The life insurance obligation was modified as per statute. DRL 236(B)(8)(a). As to the college loan, the Second

Department found: "[t]o the extent that the debt was incurred during the marriage, the plaintiff was the sole wage-earner when those obligations were incurred"; and "any obligations incurred by him after the commencement of the action were voluntarily incurred for the support of the children, which, under these circumstances, are not recoverable by him." With respect to counsel fees, the denial was affirmed, upon the ground that the wife's application "was not supported with necessary documentation."

CUSTODY – STANDING – NO ADOPTION OR MARRIAGE

In Matter of Frank G. (Anonymous) v. Renee P.F. (Anonymous), 2016 Westlaw 4646017 (2d Dept. Sept. 6, 2016), Frank G. appealed by permission from an August 2015 Family Court order which, after a hearing, denied his motion to dismiss Joseph P.'s petition for custody of fraternal twin children (born February 2010) for lack of standing, and determined that Joseph P. has standing to seek custody and/or visitation. On appeal, the Second Department affirmed. Joseph and Frank were domestic partners who lived together in New York State from 2009 through February 2014. Joseph's sister, Renee P.-F., signed a surrogacy contract, in which she agreed to undergo in vitro fertilization by Frank, and to surrender her parental rights in order for Joseph to adopt the child or children, such that the two men would be the parents and that she would remain a part of the children's lives. Joseph did not adopt the children, and Renee frequently saw the children until the men separated in early 2014. In May 2014, Frank refused access to Joseph and Renee. Frank moved with the children to Florida in December 2014, without informing Joseph or Renee and without court permission. Renee petitioned for custody and immediate access and Joseph sought the same relief. Citing Matter of Brooke S.B. v Elizabeth A. C.C., 2016 Westlaw 4507780 (August 30, 2016), the Appellate Division held that "Joseph sufficiently demonstrated by clear and convincing evidence that he and Frank entered into a pre-conception agreement to conceive the children and to raise them together as their parents," and had standing. The Second Department remitted to Family Court for a full hearing on Joseph's petition. A separate appeal, decided the same day (2016 Westlaw 4645460), remitted Frank's petition for relocation to Florida for a hearing.

ENFORCEMENT - LIFE INSURANCE – FAILURE TO MAINTAIN

The Appellate Division upheld Supreme Court's order in Mayer v. Mayer, et al. (Sup. Ct. Orange Co., Onofry, A.J., April 7, 2014), affirmed 142 AD3d 691 (2d Dept. Aug. 31, 2016). An October 2000 judgment of divorce required the husband to pay child support and college and professional educational expenses for two children, and to maintain $1,000,000 of term life insurance for their benefit, with the wife to be named as trustee, until his support obligation is

fully satisfied. The husband obtained such a policy in June 2002, but the policy lapsed in October 2005 and was converted into 2 new policies totaling $300,000: a $200,000 policy owned by the husband and a $100,000 policy owned by the former wife. The husband was found in contempt in May 2006 for failure to maintain the life insurance and comply with other obligations, and was found to be in child support arrears in the sum of $74,107. At that time, the husband had over $750,000 in other life insurance available, and was directed to either fulfill his life insurance obligation with a new policy, or change the beneficiaries to name the 2 subject children as sole beneficiaries. In December 2010, the husband changed the beneficiaries of the $200,000 policy to, among other things, 5% each for the two subject children, giving them $10,000 each, while naming his second wife and 4 other children of prior and current marriages, as to the balance. The husband died in March 2011, and complex litigation then ensued, which included the insurance companies, who had been put on notice of the judgment's terms. Supreme Court decided various motions and ordered that the two adult children of the previous marriage be joined as party defendants, and found that the wife was entitled to a constructive trust on all proceeds paid out from life insurance upon the husband's death, subject to ratable apportionment, pending a determination as to the exact amount owed to the wife for any support obligations. Supreme Court found that the wife's equitable interest in the insurance proceeds is superior to those of the designated beneficiaries. On appeal, the Second Department held that "Supreme Court correctly interpreted Domestic Relations Law §236(B)(8)(a) in determining that the amount of the insurance proceeds subject to the constructive trust should be the amount of the father's child support and educational expense obligations had he lived. The court properly rejected the plaintiff's contention that the proceeds subject to the trust should equal the face amount of the life insurance policy required under the judgment of divorce, $1,000,000, minus the life insurance proceeds" her two children had received. The Appellate Division concluded: "Additionally, the court did not err in determining that the proceeds of the $100,000 NYLIAC policy, reduced by the premiums the plaintiff paid on that policy, should be taken into account ratably in determining the amount of the constructive trust. The purpose of the $100,000 NYLIAC policy was to ensure that the father's death would not cause economic injury to Alanna and Matthew in the form of the loss of their support and payment of their educational expenses."

MAINTENANCE – NON-DURATIONAL; JUDICIAL ESTOPPEL; SEQUESTRATION

In Canzona v. Canzona, 2016 Westlaw 5107999 (2d Dept. Sept. 21, 2016), the husband appealed from an October 2013 judgment of divorce, which awarded the wife non-durational maintenance of $2,500 per month and rejected the husband's judicial estoppel argument, and a November 2013 order, which granted the wife's motion pursuant to DRL 243 for sequestration of certain funds as security for maintenance. On appeal, the Second Department affirmed the

judgment, holding that the maintenance award was a provident exercise of discretion. The husband argued that the wife's prior bankruptcy petitions, which alleged that she was not then entitled to alimony or maintenance, estopped her from seeking maintenance in the divorce action. The Appellate Division found that "as the parties were still married at the time the bankruptcy petitions were filed, and the defendant was not required to list any possible future rights to maintenance payments in the bankruptcy petitions, which were filed years before the judgment of divorce," Supreme Court properly determined that the wife was not judicially estopped from seeking maintenance. The Second Department affirmed the order granting sequestration of "certain funds" (not specified) as a proper exercise of discretion.

PRIVACY OF MEDICAL TREATMENT AND NOTICE OF EX PARTE APPLICATION

In B.T. v. E.T., 2016 Westlaw 4680918 (Sup. Ct. Richmond Co., DiDomenico, J., Sept. 2, 2016), in an action commenced in March 2016, the wife moved by Order to Show Cause on September 2, 2016 to enjoin the husband from being present in the delivery room when she gives birth to the parties' child. The husband opposed that relief and claimed that wife's counsel failed to give proper notice of the application as required by 22 NYCRR 202.7(f), contending that 24 hours' notice was required. Supreme Court rejected this argument, finding that "the notice by facsimile transmission provided by Plaintiff's lawyer to Defendant's counsel was sufficient" under the rule. As to the merits, Supreme Court noted that the wife "has a legal right to determine the course of her medical treatment and the right to the utmost privacy in the receipt of medical care," including "the sole decision to consent to non-medical spectators, if any, who might seek access to her medical information or more intrusively, to be physically present during the rendering of medical care," citing, among other authorities, 42 USC §1320d et seq. The Court found that this issue appears to be "a matter of first impression in New York," but that a New Jersey court decided that a husband does not have a right to compel his presence in a delivery room over a wife's objection. Plotnick v. DeLuccia, 85 A.3d 1039 (N.J. Super. Ch. 2013).

TEMPORARY CHILD SUPPORT – DENIED

In W.B. v. R.R.B., NY Law Journal August 26, 2016 (Sup. Ct. Suffolk Co., Quinn, J., August 9, 2016), the parties were married in December 2000 and have 2 children born in September 2001 and February 2003. The husband is a teacher who earned $124,733 in 2015 and an additional $27,471 from a small construction company he owned. The wife is also a teacher and earned $121,629 in 2015, plus substantial rental income from her real estate holdings, and, as Supreme Court found, "has amassed substantial assets through inheritances from her wealthy family." The parties separated in December 2013, at which time the husband moved into the parties'

second home, while the wife remained in the former marital residence. The parties agreed that the wife would pay the taxes and utilities on the marital residence, the children's daily expenses, her car payment, and a home equity loan, and that the husband would pay the expenses on the second home, including a home equity loan, health insurance, homeowner's insurance on both homes, landscaping and maintenance for the marital residence, and the wife's auto insurance through April 2016. The husband alleged that he contributes to the children's expenses when asked by the wife and that he pays all of their expenses when they are with him. The wife sought temporary child support 1 year after the action was commenced. Supreme Court denied the wife's motion, finding: "There is nothing to suggest, however, in defendant's submissions that the needs of the children are not being met." The Court further found: "defendant earns substantial income above her salary as a teacher. The children's physical health is good, and the plaintiff's health coverage covers essentially all costs for the child's psychologist and medication for the younger child's anxiety disorder. The children's standard of living remains consistent, and it appears that all the children's needs, financially and emotionally are being provided for by the parties."

TEMPORARY CHILD SUPPORT, MAINTENANCE & COUNSEL FEES

In Michael V. v. Eva S., 52 Misc3d 1221(A) (Sup. Ct. Kings Co. Aug. 22, 2016, Sunshine, J.), the parties were married in June 2008 and have 2 children, ages 7 and 1. The husband commenced the divorce action in August 31, 2015. The husband, a commercial pilot, had 2015 CSSA income of $184,102 and the wife, an executive director for a non-profit, had 2015 CSSA income of $69,763. The parties separated in July 2015 when the husband left the marital residence, and he then began to voluntarily pay $3,800 monthly in unallocated support, plus 50% of the cost of the older child's extracurricular and after-school activities from September 2015 until December 2015. The Court found that the presumptive temporary maintenance guidelines amount of $2,468.60 per month was not unjust or inappropriate, and awarded the same. With regard to child support and CSSA income above the $143,000 cap, Supreme Court found: "The defendant has not established a record detailing specific expenses or a lifestyle basis sufficient for the Court, ***, under Cassano, ***, to exceed the $143,000.00 statutory cap (citation omitted). In fact, defendant's primary argument has been that the children's lifestyle was constrained by plaintiff's unwillingness to contribute financially in keeping with his income during the marriage." The Court awarded $2,043.32 monthly in CSSA child support based upon the first $143,000 of combined parental income. As to counsel fees, the wife had paid over $66,000 and owed over $25,000, while the husband had paid over $39,000. The Court noted that the husband had contributed to his 401(k) pendente lite, while the wife's net worth had decreased, and awarded $25,000 in counsel fees to the wife in accordance with the statutory presumption, payable within 45 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.