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MATRIMONIAL UPDATE

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COURT OF APPEALS NOTE

Concluding "the year of custody" in the Court of Appeals, the Court has decided the two cases for which they granted leave to appeal on September 1, 2015 [see September 2015 AAML NY Chapter Bulletin], specifically, Matter of Estrellita A. v. Jennifer L.D., 123 AD3d 1023 (2d Dept. Dec. 24, 2014) and Matter of Brooke S.B. v. Elizabeth A. C.C., 129 AD3d 1578 (4th Dept. June 19, 2015). Overruling their 1991 decision in Matter of Alison D., the Court framed the issue and holding:

These two cases call upon us to assess the continued vitality of the rule promulgated in Matter of Alison D. v Virginia M. (77 NY2d 651 [1991]) -- namely that, in an unmarried couple, a partner without a biological or adoptive relation to a child is not that child's "parent" for purposes of standing to seek custody or visitation under Domestic Relations Law §70(a), notwithstanding their "established relationship with the child" (77 NY2d at 655). Petitioners in these cases, who similarly lack any biological or adoptive connection to the subject children, argue that they should have standing to seek custody and visitation pursuant to Domestic Relations Law §70(a). We agree that, in light of more recently delineated legal principles, the definition of "parent" established by this Court 25 years ago in Alison D. has become unworkable when applied to increasingly varied familial relationships. Accordingly, today, we

overrule Alison D. and hold that where a partner shows by clear and convincing evidence that the parties agreed to conceive a child and to raise the child together, the non-biological, non-adoptive partner has standing to seek visitation and custody under Domestic Relations Law §70.

Congratulations are due to our
Fellow Eric Wrubel
who argued for the child in Matter of Brooke S.B.

AGREEMENT–POST-NUPTIAL–INVALID; EQUITABLE DISTRIBUTION–BUSINESS PROPORTIONS & SEPARATE PROPERTY CREDIT; MAINTENANCE–DURATIONAL

In Maddaloni v. Maddaloni, 2016 Westlaw 4443707 (2d Dept. August 24, 2016), the parties were married in January 1988, at which time the husband owned several cars, a house, and a jewelry business, and he had a contract to buy a shopping center. The parties had 2 children, emancipated at the time of trial, and the wife commenced the divorce action in March 2011. On an appeal of a May 2014 Supreme Court judgment, the Second Department affirmed the trial court's finding that the maintenance provision of an August 1988 postnuptial agreement, which conferred $50,000 upon the wife in full satisfaction, was unconscionable at the time of entry of final judgment. The Appellate Division further upheld Supreme Court's determination that a 2011 amendment to the postnuptial agreement was also invalid, due to lack of consideration and the "unethical overreaching of the [husband] and his counsel, when the [husband] delivered the 2011 amendment directly to the plaintiff rather than her counsel" and the "vast disparity in the parties' income and net worth." The Second Department noted that the husband's jewelry business "underwent tremendous growth while the plaintiff worked there, and the parties lived what can easily be described as a lavish lifestyle," including ownership of "numerous high-end automobiles" and taking international vacations, with regular travel to the Bahamas on the husband's yacht. The Appellate Division affirmed the $500,000 award to the wife, representing 25% of the appreciation in value of the jewelry business, and the 10 year durational maintenance award (amount unspecified), based upon, among other things, a proper imputation of income to the husband of at least $600,000 per year. The Second Department rejected the husband's claim for a separate property credit for contributions to the marital residence, vacant land and 2 luxury cars, upon the ground that "the evidence at trial clearly demonstrated that, with respect to these items, the defendant's separate property had been commingled with marital property" and, further, the vacant land and one of the cars was funded by a home equity line of credit against the marital residence.

CHILD SUPPORT - CSSA – OPT-OUT INVALID

In Young v. Young, 2016 Westlaw 4371558 (2d Dept. Aug. 17, 2016), the father appealed from an August 2014 Supreme Court order, which denied so much of his pre-judgment motion as sought to set aside a March 2013 stipulation of settlement in the wife's 2009 divorce action. On appeal, the Second Department modified, on the law, by setting aside the child support provision of the stipulation and remitting for a new determination of CSSA child support and college expenses for the parties' youngest child. The Appellate Division found that the stipulation did not comply with the CSSA, in that it did not contain a calculation of basic child support, or a recital that such calculation would result in the presumptively correct amount of child support, contrary to DRL §240(1-b)(h), and further, made "no distinction between the defendant's obligation to pay basic child support and his obligation to pay other support for the child not required by statute, such as the child's college tuition and other expenses incurred by the child after his 21st birthday."

COUNSEL FEES; EQUITABLE DISTRIBUTION: SEPARATE PROPERTY - BUSINESS DEVELOPED BEFORE MARRIAGE; TRANSMUTATION OF MARITAL RESIDENCE & ORIGINATION CREDIT

In Dabo v. Sibblies, 2016 Westlaw 4385274 (1st Dept. August 18, 2016), the husband appealed from a September 2015 Supreme Court judgment which, among other things: found that the wife's business interests were her premarital separate property and denied him a share thereof; limited his share of the transmuted marital residence to $37,500; and awarded the same sum to the wife as counsel fees. On appeal, the First Department affirmed. The Appellate Division noted that "it was clear from the testimony of both parties that the wife had established [two businesses] prior to the parties' marriage, and that she was already heavily involved in the development of a real estate project" in 2007, the year prior to the parties' marriage, even though the wife acquired the leasehold interest in the project after the marriage. The Court noted that "the husband's sole direct contribution to the [real estate project] was limited to his participation in a single conference call regarding a stop work order" and "the husband made no showing to satisfy his burden of demonstrating the baseline value of the business and the extent of its appreciation." The First Department rejected the husband's apparent attempt to "value" the LLC comprising the real estate project "based solely upon a capital account distribution reported on a K-1 form," which the Court deemed "insufficient." As to the marital residence, the Appellate Division found that Supreme Court correctly determined that the same was transmuted to marital property when placed in joint names, and that the husband's share was properly limited to 50% of $75,000, which was the difference between the stipulated $1.6 million dollar value as of the time of transfer and the stipulated $1.675 million dollar value at a date closer to trial. The Court concluded that the $37,500 counsel fee award payable by the husband was proper, considering "the financial circumstances of the parties, the relative merits

of the positions taken at trial, and any dilatory tactics undertaken by the parties during the litigation." The First Department also upheld the imposition of $7,500 in sanctions for the husband's filing of a frivolous motion.

CUSTODY – MODIFICATION: CHILD'S WISHES (12 Y/O); FORENSIC DENIED; SIBLING SEPARATION

In Cook v. Cook, 2016 Westlaw 4199298 (2d Dept. Aug. 10, 2016), the parties had 2 children, a son (born May 2002) and a daughter (born July 2005). The parties' May 2012 agreement, incorporated into a September 2012 divorce judgment, provided for joint legal custody, primary custody to the mother and visitation to the father. The father's April 2015 Family Court petition and the mother's June 2015 Supreme Court motion, both seeking sole custody, were consolidated before Supreme Court for a hearing. Supreme Court denied the mother's pre-hearing motion for a forensic evaluation, and rendered an order in August 2015, granting residential custody of the son to the father, and residential custody of the daughter to the mother. Both parties appealed. On appeal, the Second Department held that Supreme Court "providently exercised its discretion" in denying the mother's motion for a forensic evaluator, "as the court possessed sufficient information to render an informed decision regarding custody consistent with the subject children's best interests." The Appellate Division determined that "the father demonstrated a sufficient change in circumstances to warrant modification *** so as to award him residential custody of [the parties' son]," given that the son's "relationship with the mother has deteriorated since the prior custody arrangement was agreed to (citations omitted) and that the father exhibits a greater sensitivity to his emotional and psychological needs, particularly with respect to the environment in [his] new school." The Court noted that "the attorney for the children advocated for residential custody to be awarded to the father, since [the parties' son], who was 12 years old when the father's petition was filed, communicated a preference to reside with him." While affirming custody of the son to the father, the Second Department disagreed with "Supreme Court's determination that the evidence did not demonstrate a sufficient change in circumstances warranting modification *** so as to award the father residential custody of the parties' [daughter]," given the law in favor of not separating siblings "unless there is an overwhelming need to do so." The Appellate Division found: "It is undisputed that [the children] have a close relationship, and, based upon the recommendations of the children's therapist that they should not be separated, the position of the attorney for the children that they should remain with the same custodial parent, and evidence that the father demonstrated more of an ability and willingness to assure meaningful contact between the children and the mother, and to foster a healthier relationship between the children and the mother, than the mother would have fostered between the children and the father, the court should have awarded residential custody of [the parties' daughter] to the father."

EQUITABLE DISTRIBUTION – SEPARATE PROPERTY CREDIT; WASTEFUL DISSIPATION

In Shkreli v. Shkreli, 2016 Westlaw 4198586 (2d Dept. Aug. 10, 2016), the husband appealed from a September 2014 Supreme Court judgment, which, following trial and a June 2014 decision, determined the marital residence to be marital property, except for a separate property credit to him of only $50,000 and directed its sale, and awarded the wife a credit for his wasteful dissipation of marital assets. On appeal, the Second Department modified, only to the extent of apportioning the marital residence sale proceeds 60% to the husband. The parties were married in June 1984 and lived in a house owned by the husband and his brother. In 1996, the husband bought vacant land with a mortgage of $55,000 and about $30,000 cash. He then took out a $165,000 mortgage to satisfy the initial mortgage and to fund construction of a new house. In 1997, the house owned by the husband and his brother was sold, and he testified that his share of the proceeds went toward the parties' new house. The husband commenced the divorce action in May 2012, but prior thereto, in early 2012, he liquidated a retirement account and obtained a $250,000 mortgage on the marital residence. He used $100,000 thereof to repay his sister-in-law for a loan used to pay the previous mortgage on the marital residence. Supreme Court: (a) directed the marital residence to be sold and that any remaining proceeds, after payment of costs associated with the sale and a $50,000 separate property credit to the husband, be divided between the parties, with the husband to pay off any remaining debt thereon out of his share; and (b) awarded the wife a credit for the husband's wasteful dissipation of marital assets. The Appellate Division held that the husband "failed to establish the value of his separate property contribution to the purchase of the marital residence" and "presented no evidence as to how much money he contributed to the purchase of the house he co-owned with his brother prior to the marriage or the value of his interest in the house when he acquired it." The Court further determined that the husband "presented no evidence as to whether the money [to buy the vacant land] was separate or marital property," but that Supreme Court "took into account that there was evidence that some unknown amount of the plaintiff's separate property was used to purchase and construct the marital residence by awarding the plaintiff a greater percentage share of the proceeds of the sale of the marital residence." The Appellate Division modified the judgment "to conform with the court's decision after trial regarding the equitable distribution of the remaining sale proceeds of the marital residence, with 60% awarded to the plaintiff and 40% to the defendant." The Second Department concluded that "Supreme Court properly found that the plaintiff wastefully dissipated certain marital assets and awarded the defendant a credit *** (citations omitted). Other than the $100,000 payment to his sister-in-law and the payment of certain dental expenses for himself and the parties' daughter, the plaintiff presented no evidence as to what he did with the remaining proceeds from the $250,000 mortgage he obtained just prior to the commencement of the action and the money from the liquidated retirement account. Further, he failed to provide any credible

explanation for the source of funds, in excess of $125,000, that he deposited in a separate bank account in his name in February 2012, with subsequent unexplained cash withdrawals."

MAINTENANCE – DURATIONAL –INCREASED–INCOME IMPUTED FROM EXPENSES

In Fenech v. Fenech, 141 AD3d 683 (2d Dept. July 27, 2016), the wife appealed from a December 2014 Supreme Court judgment, which, among other things, awarded her maintenance of $500 per month for a period of 42 months. On appeal, the Second Department modified, on the law and in the exercise of discretion, by increasing maintenance to $1,500 per month for 54 months. The Appellate Division upheld Supreme Court's imputation of $20,800 in annual income to the wife, based upon her prior earnings history, but found that the Court erred in calculating the husband's annual income at $55,000, given that his statement of net worth listed $99,588 in yearly expenses, and he was unable to explain how the same were paid.

PENDENTE LITE – TEMPORARY MAINTENANCE - MODIFICATION

In Anonymous v. Anonymous, 36 NYS3d 28 (1st Dept. August 4, 2016), the husband appealed from an April 2015 Supreme Court order, which granted the wife's motion to modify an October 2011 stipulated preliminary conference order ($250 per week in temporary maintenance, plus household and child-related expenses), by directing him to pay $7,500 per month in temporary maintenance. On appeal, the First Department affirmed, holding that the preliminary conference order was invalid, given its failure to specify the reasons for deviation from the guidelines and the presumptive award. The Appellate Division found that Supreme Court properly determined the husband's income to be $300,000 per year.

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.