

NYSBA FAMILY LAW SECTION, Matrimonial Update, March 2017

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Agreements - Prenuptial; Temporary Relief Granted

In *Kashman v. Kashman*, 2017 Westlaw 690969 (2d Dept. Feb. 22, 2017), the Appellate Division reversed so much of Supreme Court's March 2017 order as denied the husband's cross-motion for summary judgment, seeking a determination that the parties' 1995 prenuptial agreement waived equitable distribution, maintenance and counsel fees, and denied so much of the wife's motion as sought temporary maintenance and limited her temporary child support award for 3 children to \$3,000 per month. The Second Department found that the husband met his burden of showing that the prenuptial agreement was not the product of fraud or duress, and remitted the matter for a determination of temporary maintenance, which was not waived by the prenuptial agreement, and for a redetermination of child support, to include an explanation for the award and for not applying the CSSA, if the Court chooses not to do so.

Child Support - Modification - 2010 Amendments - 15% Change

In *Matter of Brink v. Brink*, 2017 Westlaw 460637 (4th Dept. Feb. 3, 2017), the father appealed from an April 2015 Family Court order, which denied his objections to a Support Magistrate order rendered following a hearing, dismissing his 2014 petition

to modify a 2013 order directing him to pay child support of \$407.36 bi-weekly for 2 children born in 2001 and 2004. The father alleged that he made significantly less money in 2013 than he did in 2012. On appeal, the Fourth Department reversed, on the law, reinstated the father's petition and remitted to Family Court, holding that the father's 18% decrease in income met the modification threshold of FCA 451(b)(3)(ii), where, as here, the Support Magistrate had declined to consider the father's 2013 income when rendering the last order, and had, instead, limited the findings to 2012 and prior income.

Counsel Fees - After Trial; Equitable Distribution - Business; Maintenance - Durational

In Repetti v. Repetti, 2017 Westlaw 690604 (2d Dept. Feb. 22, 2017), both parties appealed from an August 2014 Supreme Court judgment, which awarded the wife \$1,350 per week in maintenance upon the sale of the marital residence through September 2022, 30% of the value of the husband's interest in his accounting firm, and \$72,500 in counsel fees. The parties were married in 1984 and have 4 children, all emancipated except for one child who was age 16 at the time of trial. The wife was primarily a homemaker and the Appellate Division upheld the imputation of \$30,000 in annual income to her. The Second Department increased the maintenance award's duration to the wife's age 67 or full Social Security age, upheld the 30% award

of the value of the husband's interest in his accounting firm, and decreased the wife's counsel fee award to \$45,000.

Counsel Fees - After Trial; Equitable Distribution - Enhanced Earnings; Maintenance - Durational

In Yao v. Kao-Yao, 2017 Westlaw 706150 (1st Dept. Feb. 23, 2017), the First Department affirmed so much of a March 2015 Supreme Court judgment, upon an October 2013 decision after trial, which awarded the wife 10% of the husband's \$3,440,000 in enhanced earnings as a physician (anesthesiologist, projected to an age 67 retirement), maintenance of \$5,000 per month, retroactive to June 1, 2009 and for 1 year following entry of judgment, and \$200,000 in counsel fees. The parties were married in May 2000 and have 2 children born in August 2002 and November 2004. The husband commenced the divorce action in October 2007, and had completed medical school, one year of residency, a one year internship, and 2 of the 3 parts of the US Medical Licensing Exam, all prior to the marriage, having passed the 3rd part in February 2001, 9 months after the marriage. The husband became an employee of a private practice group in July 2003 and was not yet board certified in anesthesiology at the time of commencement of the action or at the time of trial. The wife completed a bachelor's degree in May 2007 and had worked at various office jobs, sporadically, at \$15 per hour or less and as a Mandarin language tutor for \$30 per hour. The husband's

most recent earnings mentioned in the Appellate Division's decision were \$611,829 for 2010.

Custody - Modification - Domestic Violence

In Matter of Belcher v. Morgado, 2017 Westlaw 459055 (4th Dept. Feb. 3, 2017), the mother appealed from a July 2015 Family Court order which, after a hearing, modified a prior order and awarded custody of their child to the father. On appeal, the Fourth Department affirmed, noting that the mother admitted at the hearing that she was arrested for assault in the second degree and spent about 2 weeks in jail following an incident with her former boyfriend which occurred while the child was asleep in her home. The Appellate Division held that the award of custody to the father was in the child's best interests "in view of the domestic violence at the mother's home."

Custody - Modification - Domestic Violence

In Matter of Chess v. Lichtman, 2017 Westlaw 424625 (2d Dept. Feb. 8, 2017), the mother appealed from an October 2015 Family Court order which, without a hearing, granted the father's motion to dismiss her February 2014 petition seeking to modify a March 2012 incorporated custody stipulation pertaining to 4 children now between ages 10 and 16, so as to grant her sole custody. In September 2013, upon the mother's motion, Family Court suspended the father's visitation, pending investigation of allegations he had sexually abused the oldest

child, then 13 years old. DSS commenced an Article 10 proceeding in January 2014. The mother's February 2014 petition alleged as changed circumstances the parties' deteriorating parental relationship, the pending Article 10 proceeding, and a DSS indicated report against the father. Family Court held the mother's modification petition in abeyance, pending resolution of the Article 10 proceeding. The Article 10 petition was disposed of with a 6 month ACOD, over the AFC's objection, in September 2014, which became final in March 2015, leading to an April 2015 order of unsupervised visitation with the 3 younger children and the father's May 2015 motion to dismiss the mother's petition. On appeal, the Second Department reversed, on the law, and remitted the mother's petition for a hearing before a different Family Court Judge. The Appellate Division held that the mother had alleged a sufficient change in circumstances to warrant a hearing on her petition.

Custody - UCCJEA - NY Jurisdiction and Duty to Confer

In *Matter of Rusiecki v. Marshall*, 2017 Westlaw 460412 (4th Dept. Feb. 3, 2017), the mother appealed from an August 2015 Family Court order, which granted the father's motion to dismiss her March 2015 petition seeking to modify a June 2011 Florida order permitting the father to relocate to New York with the child, but which "retained jurisdiction over the matter." The father relocated to New York in June 2011 and the mother did the

same in August 2011. The Fourth Department reversed, on the law, and remitted, holding that Family Court erred in concluding that it did not have jurisdiction due to the Florida Court's reservation of jurisdiction, given that both parties no longer reside in the originating state and that New York was the home state as of the time of the mother's petition, citing DRL 76-b(2) and 76(1)(a). The Appellate Division further noted that due to a subsequent Florida proceeding commenced by the father, Family Court had a duty to confer with the Florida Court and failed to do so, as required by DRL 76-e.

Divorce - Foreign - Dismissal of NY Action Reversed

In Fouad v. Magdy, 2017 Westlaw 485798 (1st Dept. Feb. 7, 2017), the wife appealed from an August 2016 Supreme Court judgment which granted the husband's cross motion to dismiss her complaint. The parties were married in Egypt in 2006, and then lived in Dubai until August 2012 when they moved to Massachusetts. In July 2014, the parties and their 2 children moved to New York City, and remained there together until their July 2015 separation, whereupon the wife and 2 children relocated to her parents' home in Egypt, and the husband remained in New York. The wife commenced her New York divorce action on October 2, 2015, and the husband obtained a bill of divorce (revocable for 90 days, but not certified pursuant to CPLR 4542[a]) from an Egyptian court dated October 27, 2015.

The husband revoked his Egyptian divorce on December 5, 2015, and alleged that he commenced a second action in Egypt in February 2016. The First Department reversed, on the law, the facts and in the exercise of discretion, holding that New York's first in time rule favored the wife's action, commenced 8 days before the husband's action. The Appellate Division rejected the husband's forum non conveniens argument, given that the parties lived in the US for the last 3 years of their 9-year marriage and that New York was the last marital domicile, with home state jurisdiction over custody within 6 months of the commencement of the wife's New York action.

Enforcement - Willful Violation - Incarceration

In Matter of Provost v. Provost, 2017 Westlaw 703031 (3d Dept. Feb. 23, 2017), the father appealed from a February 2016 Family Court order which, following a sanctions hearing at which no testimony was taken, sentenced him to 90 days in jail for willful violation of a 2007 child support order directing him to pay the statutory minimum of \$25 per month. A Support Magistrate set arrears at the statutory maximum of \$500 and recommended 6 months' incarceration. At the sanctions hearing, counsel for both parties informed Family Court that the father had paid the full amount of arrears, plus 2 months. The Third Department stayed Family Court's order pending appeal, and modified, on the law, by reversing so much thereof as committed the father to

jail. The Appellate Division held that since the father cured his default prior to sentencing, "Family Court abused its discretion by issuing the order of commitment."

Equitable Distribution - Separate Property - Appreciation & Commingling

In *Brown v. Brown*, 2017 Westlaw 601289 (2d Dept. Feb. 15, 2017), the husband appealed from a June 2014 Supreme Court judgment, rendered upon a January 2013 decision after trial, which, among other things, awarded the wife 20% of the appreciation in value of certain of his separate property, and a portion of a personal injury award made to the husband (a member of NYCFD) from the September 11th Victim Compensation Fund (VCF). On appeal, the Second Department affirmed, noting that the VCF award proceeds were deposited into a joint checking account along with the husband's paychecks, and that the husband purchased a home for investment purposes in February 2005 with VCF award proceeds. The Appellate Division held that "by depositing the proceeds of the award into the parties' joint account, the defendant's separate property lost its character of separateness and a presumption arose that each party was entitled to a share of the funds, which was not rebutted." As to the appreciation issue, the Second Department determined that the wife's "direct and indirect contributions ***, as the nontitled spouse, contributed to the appreciation in the value

of the defendant's separate properties."

Pendente Lite - Temporary Maintenance Guidelines - Deviation & Counsel Fees

In Turret v. Turret, 2017 Westlaw 483818 (1st Dept. Feb. 7, 2017), the husband appealed from a February 2016 Supreme Court order, which, in the wife's 2014 action, granted her tax-free temporary maintenance of \$11,565 per month and \$175,000 in temporary counsel fees. The First Department affirmed, holding that Supreme Court's upward deviation was appropriate, based upon the then existing DRL 236(B)(5-a)(h)(1) factors of substantial differences in the incomes of the parties and the marital standard of living. The Appellate Division upheld the counsel fee award based upon Supreme Court's determination that the husband "was in a better position to bear the cost of her legal fees."