NYSBA FAMILY LAW SECTION, Matrimonial Update, August 2017

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Court Rule Changes

CLE – Diversity, Inclusion and Elimination of Bias

New 22 NYCRR 1500.2 (g) has been added, **effective January 1, 2018** and establishes a new category of CLE credit. "Diversity, Inclusion and Elimination of Bias" courses, programs and activities must relate to the practice of law and may include, among other things, implicit and explicit bias, equal access to justice, serving a diverse population, diversity and inclusion initiatives in the legal profession, and sensitivity to cultural and other differences when interacting with members of the public, judges, jurors, litigants, attorneys and court personnel. 22 NYCRR 1500.22(a) has been amended, **effective July 1, 2018** to require that each attorney's minimum 24 CLE credit hours in each biennial reporting cycle shall include 1 credit hour in diversity, inclusion and elimination of bias, such that attorneys due to re-register **on or after July 1, 2018** must meet this requirement.

Divorce Judgments

New 22 NYCRR §202.50(b)(3) has been added, **effective August 1, 2017**, and requires all judgments of divorce to include language substantially in accordance with 3 decretal paragraphs

set forth in the rule with regard to: (i) incorporation of an agreement, to survive, or not, with a directive to the parties to comply therewith; (ii) concurrent Family Court jurisdiction for enforcement and modification; and (iii) a mandate that post-judgment enforcement and modification applications in Supreme Court be brought in the county where one of the parties resides, or if there are minor children, in the county where one of the parties or the child or children reside, except for good cause shown on an application to Supreme Court.

Page Limits – Motion Papers

New 22 NYCRR §202.16-b has been added, **effective July 1, 2017,** pertaining to pendente lite motions, and provides: (i) for preferential calendar treatment for emergency applications, with sanctions for misusing the emergency designation; (ii) where practicable, all relief should be sought in one motion; (iii) that papers shall be one-sided, with one inch margins on 8½ by 11 inch paper, with all exhibits tabbed, using Times New Roman font 12 point, with sufficient quality ink to allow for reading and proper scanning of documents; (iv) supporting and opposition affidavits/affirmations are limited to 20 pages, expert affidavits are limited to 8 pages, and reply affidavits/affirmations are limited to 10 pages, and no sur-replies are allowed without court permission; (v) other than statements of net worth, retainer agreements, maintenance

guidelines and CSSA worksheets, billing statements and affidavits/affirmations relating to counsel fees, all of which may include attachments, all exhibits to motions/cross-motions/orders to show cause, opposition papers and replies must be no greater than 3 inches thick unless prior court permission is granted, and must contain exhibit tabs; (vi) counsel and pro se litigants may certify in good faith the need to exceed the foregoing limitations, which reasons the court may reject; and (vii) local part and district rules may be to the contrary or in addition to these rules.

Agreements - Interpretation – Spousal Health Insurance

In Matter of Crawley v. Crawley, 2017 Westlaw 2855831 (2d Dept. July 5, 2017), the parties were married in February 1997 and entered into a February 2005 written agreement incorporated into a judgment of divorce. The agreement provided that the former husband "shall assist the [former wife] in procuring COBRA coverage under existing medical policies to cover the [former wife]." In April 2016, the former wife brought an enforcement petition seeking to hold the former husband in willful violation of the judgment and sought $17,996, representing the sum she had paid since the divorce for COBRA coverage. Both the Support Magistrate and Family Court determined that the agreement did not mandate the former husband to pay the premiums. The Second Department agreed and affirmed.

Attorney and Client - Fees – Greater than Requested from Adverse Party

In Hyman & Gilbert v. Withers, 151 AD3d 945 (2d Dept. June 21, 2017), the law firm appealed from a March 2015 Supreme Court judgment which dismissed its complaint seeking legal fees, based on its representation of the client in her efforts to enforce the maintenance and child support provisions of her separation agreement and judgment of divorce, and to oppose her former husband's petition for downward modification of his maintenance and child support obligations. There were two post-judgment retainer agreements which were specific to certain enforcement proceedings and which excluded appeals. The firm obtained 2 money judgments for the client. The former husband then moved in the Supreme Court to terminate maintenance and for downward modification of child support. The law firm sought attorney's fees of $10,000 for defending that motion. Supreme Court denied the former husband's motion, and awarded the client $10,000 in attorney's fees, payable directly to the law firm. The law firm then sought counsel fees for the Family Court proceedings of $41,044.06, and the client received an award in that amount. The law firm then commenced the present action against the client for $80,317.52 arising from work it performed in the Family Court and the Supreme Court, and for appellate work. Supreme Court found that: (1) the law firm could not obtain

additional fees for its work in the Family Court, because the Family Court had already awarded it attorney's fees for the sum it requested; (2) the law firm was not entitled to recover additional attorney's fees for its work in the Supreme Court; and (3) the law firm was not entitled to attorney's fees for its appellate work, because it never entered into a retainer agreement with its client for such work. The Second Department affirmed, holding: “An attorney is not precluded from seeking fees charged pursuant to a retainer agreement that are greater than the amount granted to the client by the court in the action where the circumstances warrant, such as where the fees awarded by the court are less than the amount demanded. (Citation omitted).” The Court concluded that where, as here, the law firm “obtained awards of the amounts demanded in both the Family Court and Supreme Court matters and *** [is] *** not entitled to additional fees.” Nor could the law firm recover for appellate work since there was no written retainer agreement therefor, as required by 22 NYCRR 1400.3.

Child Support - CSSA – Extracurricular Activities; Imputed Income; Private School Tuition; Unjust or Inappropriate – Extraordinary Visitation Expenses

In Matter of Decillis v. Decillis, 2017 Westlaw 2855824 (2d Dept. July 5, 2017), the mother appealed from a February 2016 Family Court order which, after a hearing on the mother’s June

2015 petition: (1) directed the father to pay only $404 in biweekly child support for the parties' child born in 2003, based on income that was imputed to the mother, and a biweekly $168 visitation expense credit to the father, against what would have been a $572 biweekly obligation; and (2) denied so much of her petition seeking to direct the father to contribute to the costs of private school tuition and expenses and extracurricular activities. The Second Department modified, on the law, the facts, and in the exercise of discretion: (1) by reducing the credit to the father to $33 biweekly; and (2) increasing child support to $539 biweekly. The Appellate Division held that the Support Magistrate "properly imputed income [$43,000] to the mother based upon her prior income, her choice to engage in only part-time employment, and her current living arrangement, in which she did not pay rent or related housing expenses." As to the visitation expense credit, the Second Department noted that the expenses included $67 for travel expenses, and the remainder was for the cost of meals and entertainment during visitation, as to which the Appellate Division found: "the record does not support the conclusion that the father's presumptive pro rata share was 'unjust or inappropriate' so as to warrant a credit" for the latter; however, the Court concluded that "the record supports the award of a credit in the sum of $33 for [travel] expenses," which, when subtracted from the presumptive $572

biweekly award, resulted in an adjusted CSSA award of $539 bi-weekly. The Second Department determined that the Support Magistrate properly declined to award private school tuition and expenses, given that: “the child attended public school while living in Suffolk County, and the parties never agreed to share in the costs of private school”; and there is “no specific testimony in the record as to any particular scholastic needs of the child that would justify such an award.” The Court concluded that “the Support Magistrate did not err in denying that branch of the mother's petition which sought to direct the father to contribute to the cost of extracurricular activities.”

Child Support - Constructive Emancipation

In Matter of Dejesus v. Dejesus, 2017 Westlaw 2961391 (2d Dept. July 12, 2017), the child [age unspecified] appealed from a July 2016 Family Court order, which denied her objections to an April 2016 Support Magistrate order finding her to be constructively emancipated. The Second Department affirmed, noting the father’s testimony that the daughter “voluntarily left [the father’s] home, against the father’s will, after they had an altercation” and that she could return home “if she agreed to certain conditions,” which the Appellate Division found to be reasonable. The Court concluded that “the father met his burden of establishing that the petitioner voluntarily

abandoned his home to avoid his parental discipline and control, thereby forfeiting her right to support."

Child Support - Modification – 2010 Amendments - Changed Circumstances

In *Provenzano v. Provenzano*, 151 AD3d 1800 (4th Dept. June 16, 2017), the parties' 2013 divorce judgment incorporated a child support agreement which opted out of the CSSA and required the father to pay $900 per month with an equal sharing of all of the children's other expenses. In November 2014, Supreme Court granted the mother's motion for an increase in the father's child support obligation to comport with the CSSA. The Fourth Department modified, on the law, holding that Supreme Court "erred in increasing the father's child support obligation," given that "the mother failed to demonstrate a substantial change in circumstances warranting an upward modification of child support." The Appellate Division noted that the mother's affidavit "stated only that the father failed to pay his share of the expenses for the children's extracurricular activities. She admitted during her hearing testimony, however, that the children's basic needs are being met. Inasmuch as the mother's remedy for the father's failure to pay his share of the expenses is to seek enforcement of the agreement, the court erred in increasing the father's child support obligation as a substitute for that relief."

Counsel Fees – After Trial; Equitable Distribution – Debt; Maintenance – Durational

In Minervini v. Minervini, 2017 Westlaw 3045586 (2d Dept. July 19, 2017), the husband appealed from a July 2015 Supreme Court judgment, rendered following an April 2015 decision issued upon the parties' agreed stipulation of facts in lieu of a trial, which, among other things, awarded the wife maintenance of $1,740 per month for 32 months, directed him to pay 72% of marital credit card debt, and granted $5,000 in counsel fees to the wife. The parties were married in October 2005 and the wife commenced the divorce action in July 2013. The parties' incomes were unspecified, except for a finding that the husband's income was "nearly three times that of" the wife. The Second Department held that Supreme Court "providently exercised its discretion in allocating the parties' credit card debt in proportion to their respective incomes." The Appellate Division also upheld the maintenance award, the duration of which was stipulated, based upon "the disparity in the parties' incomes." The Court concluded that the counsel fee award was proper, given the disparity between the parties' incomes "and the fact that the [husband's] legal fees were paid by his union."

Custody - Relocation (Nassau to Orange)

In Matter of Turvin v. D'Agostino, 2017 Westlaw 2961209 (2d Dept. July 12, 2017), the mother appealed from June 2016 orders

which denied her petition to relocate from Nassau County to Middletown (Orange County) and granted the father's modification petition for custody of the parties' then 15 year old child. The Second Department reversed, on the facts and in the exercise of discretion, granted the mother's petition, denied the father's petition and remitted to Family Court to establish visitation for the father. The Appellate Division found that "the mother has been the child's primary caretaker for all but less than one year of the child's life, the child was 15 years old at the time of the hearing, the child has established a primary emotional attachment to the mother and expressed that she wished to relocate with the mother and the mother's three young children, and that the mother's and child's life may be enhanced economically by the move to Middletown."

Custody - Visitation – Denied – Plot to Murder Father

In Matter of Michael Evan W. v. Pamela Lyn B., 2017 Westlaw 2870613 (1st Dept. July 6, 2017), the mother appealed from a December 2015 Family Court order which, after a hearing, issued an order of protection against the mother and denied her supervised visitation with the child. The First Department affirmed, noting: "The father presented substantial evidence at the hearing that the mother masterminded a plot to murder him in order to gain control of the father's $1,500,000 life insurance policy, for which she was named the irrevocable trustee.

Surveillance photos revealed the mother and her cousin buying a sledgehammer at Home Depot the day before the cousin attacked the husband with the same sledgehammer. The father also presented phone records showing that the mother and her cousin were in communication on the day of the attack, and a hand-drawn map found with the cousin at his arrest, which depicted points of entry and egress in the father's building, was determined to be written in the mother's handwriting. In addition, the knife recovered from the scene came from the mother's apartment. Beyond the evidence related to the attack on the father, testimony demonstrated that the mother sought to alienate the child from the father, falsely claiming that the father was trying to put her in jail, and pressing the child for personal details about the father's life, which also supported the denial of visitation (citation omitted). Moreover, the mother invoked her Fifth Amendment right not to testify, and did not call any other witnesses, depriving the Family Court of any basis to grant her visitation."

Enforcement - Maintenance – Money Judgment – CPLR 5241 Inapplicable

In Granat v. Granat, 2017 Westlaw 2961453 (2d Dept. July 12, 2017), the former wife appealed from a January 2016 Supreme Court order, which denied her motion made in 2015 pursuant to CPLR 5241 to direct an income execution against the

former husband's social security benefits, in order to collect maintenance arrears under a 1998 money judgment issued to enforce an obligation under the August 1992 judgment of divorce. Supreme Court denied the motion upon its finding that the social security benefits were exempt from execution pursuant to CPLR 5205. The Second Department affirmed, holding that CPLR 5205 was inapposite, and ruling that CPLR 5241 applies only to support obligations, and is not available to enforce a money judgment.

Equitable Distribution - Marital Residence Sale Denied; Tax Consequences; Maintenance - Durational

In Galanopoulos v. Galanopoulos, 2017 Westlaw 3161100 (2d Dept. July 26, 2017), the husband appealed from a January 2015 Supreme Court judgment, which, upon a November 2014 decision after trial, awarded durational maintenance to the wife, failed to direct the sale of the marital residence and distributed marital property. The Second Department affirmed. The parties were married in May 1990 and had two emancipated children. The wife was the primary caregiver for the children and a homemaker, while the husband owned a restaurant in Manhattan. The wife commenced the action for divorce in 2012. Supreme Court awarded the marital residence to the wife, with a $315,000 credit to the husband for his equity therein, and the wife received a distributive award of $514,564 for other marital property. Supreme Court declined to consider the husband's potential

capital gains tax liabilities upon a future sale of a property in New Jersey. The Court awarded maintenance to the wife for approximately 9 years in total: $5,000 per month from December 1, 2014 to November 1, 2017; $4,000 per month until November 1, 2020; and $3,000 per month until October 31, 2023. The Appellate Division affirmed the maintenance award as a provident exercise of discretion, and held that the trial court properly declined to direct a sale of the marital residence, given that the husband received his share of the equity. With regard to the capital gains tax issue, the Second Department found: "There was no evidence of an impending sale of that property, and it would be inequitable to saddle the plaintiff with any capital gains tax liability that the defendant might incur upon a sale of the property at some point in the future." The Court noted that "where, as here, a party fails to offer any competent evidence concerning tax liabilities, the court is not required to consider the tax consequences of its award."

Equitable Distribution - Separate Property – Credit; Transmutation

In Smith v. Smith, 2017 Westlaw 2870228 (3d Dept. Jul 6, 2017), the wife appealed from an August 2015 Supreme Court judgment, which, after trial of the wife's June 2014 divorce action, directed equitable distribution. The parties were married in August 1992 and have no children together. A farm at

which the parties lived was purchased by the husband 9 years prior to marriage for $55,000, was subject to debt of $24,700 as of the date of marriage, and was deeded to the parties as tenants by the entirety 2 years after the marriage. Supreme Court, among other things, granted the wife a $25,000 distributive award payable over 10 years and denied her request for maintenance. On appeal, the Third Department modified on the law, by increasing the wife's distributive award. The Court noted that the parties agreed that the farm was transmuted into marital property and had a date of trial value of $235,000, and was unencumbered. The Appellate Division held that Supreme Court "incorrectly utilized a separate property appreciation analysis and shifted the burden to the wife to prove that her own efforts actively increased the value of the property." The Third Department further found that the husband "met his burden of proof, albeit without precision, in establishing his entitlement to a credit against the value of the farm residence." When the parties were married, the husband owed $24,700 on the farm." There was no date of marriage appraisal, but the Appellate Division found that it was not likely that "the value of the property decreased over the 11-year period that the husband owned the property prior to deeding it to himself and the wife. Taking into account that part of the parcel was transferred to the husband's then-girlfriend and that there was some amount of

principal left on the mortgage, there is sufficient evidence in the record to warrant a $35,000 credit in favor of the husband." The Appellate Division further found that "there are equitable distribution factors that mitigate against an equal distribution of the remaining equity in the farm. In particular, the husband deposited any income from the farm into his separate bank account and paid the taxes and other carrying charges associated with the real property from this same account. The wife also vacated the marital residence for lengthy periods of time during which the husband was required to solely maintain the residence. The wife testified that, since January 2007, she spent the winters in Florida; the first year she went for three months, the second year for two months, and, since then, she has gone for five to six months at a time. The husband worked the farm daily for 30 years, and the wife conceded that the farm constituted his whole life. Based on these factors, we award the wife 40% of the remaining equity, after the separate property credit, in the sum of $80,000, minus any monies already paid to the wife on the original award of $25,000, with the amount due to be paid no later than one year from the date of this decision."

Pendente Lite - Modification – Denied – No SNW

In Lawlor v. McAuliffe, 2017 Westlaw 2945318 (1st Dept. July 11, 2017), the mother appealed from an April 2015 Supreme Court

order which denied her application for a downward modification of child support. Supreme Court had issued a temporary order in March 2015, increasing the mother's obligation based her upon testimony and 2014 W2, which showed a substantial increase since the preceding order, which had provided for only nominal child support due to her unemployment. The First Department affirmed, noting that the mother had moved for downward modification of the March 2015 order, but failed to submit a Statement of Net Worth, as required by rule [22 NYCRR 202.16(k)(2)] and did not provide any other evidence demonstrating that the amount of support ordered was inappropriate.

Pendente Lite - Temporary Maintenance Guidelines (Former)

In Daza v. Leclerc, 54 NYS3d 858 (1st Dept. July 6, 2017), the husband appealed from a January 2017 Supreme Court order, which, in the wife's March 2015 divorce action, granted his motion for temporary relief only to the extent of awarding him temporary maintenance of $10,100 per month, child support of $1,405.62 per month, and directing the wife to bear 70% of the child's add-on expenses. The First Department affirmed, holding that: the husband "failed to show either that the motion court failed properly to apply the formulas or to consider the factors set forth in the version of Domestic Relations Law §236(B)(5-a) applicable to this case, ***; the husband failed to show that there are exigent circumstances warranting reversal of the

temporary maintenance award (citation omitted); and while the husband argued that the maintenance award was “insufficient *** to meet his reasonable living expenses at a level consistent with the parties' pre-separation standard of living, *** he offered no documentation of those expenses, did not identify any expenses that he had not been, or would not be, able to pay, and offered no rebuttal to plaintiff's claim that some of his expenses appear to have been inflated for litigation purposes.” With regard to temporary child support, the Court upheld the award, given that the husband “failed to identify any child-related expense that he had not been, or would not be, able to pay as a result of the award.” As to add-on expenses, the First Department concluded that the husband “failed to identify any expenses that he had not been, or would not be, able to pay.”

Temporary Maintenance Guidelines (Former) – Deviation; Child Support; Counsel Fees

In Caputo v. Caputo, 2017 Westlaw 3045850 (2d Dept. July 19, 2017), the wife appealed from a September 2016 Supreme Court order which, in her April 2015 divorce action, granted her motion for temporary relief only to the extent of awarding her $150 per month in temporary maintenance, $1,000 per month in temporary child support and $2,500 in counsel fees. The parties were married in October 1997 and have four children. The wife sought temporary maintenance of $3,613.71 per month, temporary

child support of $2,613.89 per month, and $5,000 in counsel fees. Supreme Court found that the presumptive CSSA and temporary maintenance guidelines awards “would be inappropriate in light of the fact that the plaintiff had continued to maintain the marital residence, the parties' vehicles, and insurance, and make all payments relating to the children's healthcare” and deviated therefrom. The Second Department affirmed, noting: "The formula to determine temporary spousal maintenance that is outlined in Domestic Relations Law §236(B)(5-a)(c) is intended to cover all of a payee spouse's basic living expenses, including housing costs, the costs of food and clothing, and other usual expenses" (citations omitted). Here, much of the defendant's basic living expenses that would be included in the presumptive award of temporary maintenance were already being paid by the plaintiff.” The Appellate Division found that the wife “failed to demonstrate that the pendente lite maintenance award has left her unable to meet her financial obligations,” and upheld the child support and counsel fee determinations as being within Supreme Court’s discretion.