NYSBA FAMILY LAW SECTION, Matrimonial Update, February 2019

By Bruce J. Wagner
McNamee Lochner P.C., Albany

Agreements – Interpretation–Pension & DRO; Procedure – Appeal-Time

In Econopouly v. Econopouly, 167 AD3d 1378 (3d Dept. Dec. 27, 2018), the former husband (husband) appealed from an April 2017 Supreme Court order which, upon the motion of the former wife (wife), directed entry of a "QDRO" (actually a COAP) against his federal pension benefits pursuant to a 1992 divorce judgment and stipulation. In May 2017, the wife's counsel mailed the COAP (presumably to OPM in Washington, D.C.) and the husband's counsel was copied on the letter and the order. There was no affidavit or proof of the May 2017 mailing of the order to the husband's counsel. The husband's counsel entered the order in August 2017, served notice of entry upon the wife's counsel and appealed therefrom on the same day. The Third Department held that the husband's August 2017 appeal was timely, and given that no appeal as of right lies from a QDRO, treated the husband's notice of appeal as a motion for leave to appeal and granted the same. The Appellate Division rejected the husband's interpretation of the stipulation (which appeared to be that the wife's entitlement was limited to his salary level as of the time of the stipulation), and concluded that the wife's COAP, which provided for a 50% distribution of the

marital portion of his pension pursuant to the Majauskas formula, was proper, and affirmed.

Counsel Fees - Enforcement & Modification of Child Support

In Matter of Edelson v. Warren, 2019 Westlaw 149513 (1st Dept. Jan. 10, 2019), the mother appealed from an October 2017 Family Court order, which denied her objections to a Support Magistrate counsel fee award against her in the father's child support enforcement proceeding, in which she also sought downward modification of her child support obligation. The First Department affirmed, rejecting the mother's argument that the Magistrate erroneously included fees incurred in the modification portion of the proceeding. The Appellate Division noted that the Support Magistrate "deemed the modification and willfulness issues 'interrelated,' and the parties acknowledge that, upon the conclusion of the modification proceedings, they agreed that the evidence and testimony would be adopted for purposes of the violation proceedings." The Court further cited the Magistrate's findings that the mother engaged in "commingling of personal and business expenses, and her failure, in the Support Magistrate's view, to seek employment opportunities diligently after the demise of her business" and that "the proceedings were protracted because of respondent's [the mother's] efforts to reduce her child support obligation."

Counsel Fees - Enforcement of Child Support

In Matter of Mensch v. Mensch, 2019 Westlaw 138442 (2d Dept. Jan. 9, 2019), the mother appealed from a May 2018 Family Court order, which denied her objections to an April 2018 Support Magistrate order denying her motion for counsel fees. The Second Department reversed, on the facts and in the exercise of discretion, granted the mother's objections and her motion for counsel fees, and remitted to Family Court to determine the amount of fees. The mother filed an enforcement petition in December 2017, alleging that the father failed to pay $1,635 in child support from April 2017 through August 2017, which sum the father paid, shortly after the petition was filed. The Appellate Division held that the denial of counsel fees "was an improvident exercise of discretion," given that the father paid the alleged arrears "only after the mother was forced to expend attorneys' fees to commence an enforcement proceeding" and that the father should not have engaged "in self-help by withholding child support payments that he ultimately did not dispute were due and owing."

Custody - Facilitate Non-Custodial Parent; Needs of Child; Relocations; Stability

In Matter of Jarvis L. v. Jasmine L., 88 NYS3d 888 (1st Dept. Jan. 3, 2019), the mother appealed from a June 2017 Family Court order, which granted sole legal custody of the child to

the father. The First Department affirmed, noting that "the child thrives in the stable environment of petitioner's home and that petitioner is better equipped than respondent mother to address the child's educational, emotional, and material needs. For the first seven years of the child's life, while respondent was the child's primary caretaker, she had a difficult time providing a stable home environment for him, as evidenced by a series of relocations. Moreover, the child missed a substantial number of days from school, repeated the first grade, displayed behavioral problems, and changed school districts three times. During the year that he was in petitioner's care, the child thrived academically, participated in extracurricular activities, and exhibited improved behavior." The Appellate Division found that the father "was more willing than respondent to facilitate the noncustodial parent's relationship with the child" and concluded that Family Court "gave proper weight to the child's expressed preference to reside with petitioner."

Custody - Modification – to Father

In Matter of Xavier C. v. Armetha K., 2019 Westlaw 123484 (1st Dept. Jan. 8, 2019), the mother appealed from a February 2018 Family Court order which, after a hearing, modified a prior order by granting the father primary physical custody and final decision-making authority. The First Department affirmed, finding that the hearing testimony established that the father

“had a place for the child in his home, and had a plan for addressing his medical, psychological, dental, and educational needs.” The Appellate Division determined that “the mother discouraged the relationship between the father and the child by misleading the child as to the identity of his biological father and by failing to produce the child for at least three visits” and “also refused to comply with a prior court order granting the father joint legal custody by refusing to provide him with information about the child's education, medical issues and appointments absent further explicit court directive to do so, and by refusing to involve the father in joint decision making with respect to the child.” The Court noted in conclusion that “the child had numerous absences and was late to school on many occasions, and was not promoted to first grade, while in the mother's care” and “she did not address the child's dental health until it became an emergency and he needed to have four teeth extracted.”

Custody - Relocation – Granted (VA)

In Matter of Tanya B. v. Tyree C., 2019 Westlaw 80619 (3d Dept. Jan. 3, 2019), the father appealed from an August 2017 Family Court order which, after a hearing, granted the mother’s February 2017 petition for permission to relocate from Broome County to Virginia (a 6-hour drive) with the parties’ then 7 year old child. A June 2013 order provided for sole custody to

the mother and the father had supervised visitation as agreed. The Third Department affirmed, finding that the mother "had been unemployed for two years," was "unsuccessful in her efforts to obtain employment," and her only income was $1,000 per month in SSD benefits. The mother had a written offer of employment and housing in Virginia and planned to reside near a close friend who has grandchildren of comparable ages to the child. The Court found that the mother had recently married and the two planned to relocate to Virginia together. The mother testified that the combined income of she and her spouse would allow them to meet all living expenses. The Appellate Division further noted that "the father's relationship with the child was almost nonexistent, as evidenced by the fact that he had only seen the seven-year-old child once or twice during the preceding four years."

Disclosure – Devices and Email, Social Media Accounts

In Vasquez-Santos v. Mathew, 2019 Westlaw 302266 (1st Dept. Jan. 24, 2019), defendant appealed from a June 2018 Supreme Court order, which denied her motion to compel access by a third-party data mining company to plaintiff's devices, email accounts, and social media accounts, to obtain photographs and other evidence of plaintiff engaging in physical activities. The First Department reversed, on the law and the facts and granted defendant's motion, to the extent that access to plaintiff's

accounts and devices limited to “only those items posted or sent after the accident” and to “those items discussing or showing” plaintiff “engaging in basketball or other similar physical activities.” The Appellate Division held: “Private social media information can be discoverable to the extent it ‘contradicts or conflicts with [a] plaintiff's alleged restrictions, disabilities, and losses, and other claims.’” Here, Plaintiff was at one time was a semi-professional basketball player, and claims that “he has become disabled as the result of the automobile accident at issue, such that he can no longer play basketball.”

Equitable Distribution - Enhanced Earnings (MBA – 0%); Separate Obligation & Student Loan Debt

In Lynch v. Lynch, 2019 Westlaw 138524 (2d Dept. Jan. 9, 2019), the wife appealed from a December 2015 Supreme Court judgment, which, upon an April 2015 decision made in the wife’s October 2011 divorce action, upon written submissions in lieu of a trial: (1) declined to make any equitable distribution award to her for an MBA received by the husband during the marriage; (2) directed that the parties be equally responsible for certain amounts the husband borrowed from the parties’ home equity line of credit; and (3) granted the husband a credit for one-half of student loans paid for his MBA. The Second Department modified, on the law, on the facts, and in the exercise of discretion, by

deleting the credit to the husband for one-half of the student loans paid for his MBA. The parties were married on December 26, 1993. It was a second marriage for both parties and there were no children of their marriage. The husband lost his job as a JP Morgan Vice President in late 2001, where he earned a high of $233,562 in 1996. He started his MBA program in September 2002 and earned his degree in May 2004. With regard to relative contributions, the Court found: “His classes were held on Saturdays and he studied and prepared papers without assistance from the plaintiff. His tuition and books were paid by student loans and by credit card. The plaintiff, however, provided the defendant with funds for personal and living expenses, paid joint expenses such as the home mortgage and car insurance, provided medical insurance through her employment, maintained the marital residence, and helped care for the children and the family pets.” Defendant became re-employed with JP Morgan Chase in February 2003 and earned over $186,000 in 2005 including part-time teaching, before taking a Senior Vice President job at Citigroup in 2006. At Citigroup, the husband earned highs of $260,847 in 2012 and $250,000 in 2013, before being laid off in July 2013. The wife’s expert valued the MBA enhanced earnings at $185,463, plus an additional $21,362 based on the husband’s part-time teaching position. The wife contended that she was entitled to 35% of the $206,000 total of the enhancements. The

Second Department found that the husband “did not acquire his MBA degree until May 2004. Between 1996 and 2000, the defendant's actual earnings exceeded the ‘base line’ earnings [$197,540] attributed to him. Thus, we agree with the Supreme Court's conclusion that the statistical data used by the plaintiff's expert to establish the defendant's ‘base line’ earnings significantly understated the defendant's pre-MBA degree earnings capacity. Given that the defendant earned $233,562 while employed by J.P. Morgan in 1996, we cannot accept the premise of the plaintiff's expert that his income of $240,723 per year while employed by Citigroup in 2011 reflects a substantial, measurable enhancement of his lifetime earning capacity attributable to his acquisition of an MBA degree in 2004. We see no error in the court's conclusion that obtaining the MBA degree merely allowed the defendant to secure employment at a substantially similar level of compensation to what he had earned in the past.” The Court concluded that (a) the husband’s part-time teaching position “did not reflect an enhancement to his lifetime earning capacity by virtue of his acquisition of the MBA degree”; and (b) “even if the defendant were to be viewed as having enhanced his lifetime income by reason of his acquisition of an MBA degree, the plaintiff failed to establish that she made substantial contributions towards his achievement of that degree.” While the wife established that the husband

"may have borrowed the sum of $30,000 from the HELOC to make a scheduled lump sum payment to his prior wife," the Court concluded: "This is not the sort of expenditure made during the marriage that may be second-guessed by the courts in a later divorce action (*see Mahoney-Buntzman v Buntzman*, 12 NY3d 415, 421-422)." As to the student loan debt, the Second Department held that since the wife "was not granted a distributive award based on the value of the MBA degree, and given the court's determination not to obligate the plaintiff to pay any portion of the balance of these loans herself, the provision giving the defendant an equitable distribution credit for one-half of the amount he paid to satisfy these loans should be deleted."

Equitable Distribution - Proportions – Long Marriage (50%); Separate Property – Commingling

In Eschemuller v. Eschemuller, 167 AD3d 983 (2d Dept. Dec. 26, 2018), the husband appealed from a January 2016 Supreme Court judgment which, upon a May 2015 decision after trial, directed equitable distribution. The parties were both born on 1947, married in August 1969 and have two emancipated children. The husband earned his MBA and engineer's license during the marriage, and the wife has a master's degree and license in teaching and worked as a teacher. The parties separated in May 2007 and the wife commenced the action in June 2007. The Second Department affirmed the judgment, finding that "although the

defendant [husband] was the more substantial wage earner throughout the marriage, the plaintiff [wife] made both economic and noneconomic contributions to the marriage which allowed the parties to amass a substantial marital estate," and holding that Supreme Court "providently divided the parties' marital assets, in effect, equally." As to the issue of separate property commingling, the Appellate Division held that the husband "failed to establish that, over the years, certain personal injury awards retained their separate character" and that he "failed to present sufficient evidence to support his claim of a set off for personal injury awards."

Family Offense - Harassment 2d

In Matter of Mullings v. Mullings, 2019 Westlaw 209010 (2d Dept. Jan. 16, 2019), respondent appealed from a March 2018 Family Court order, which found that he committed harassment in the second degree and granted a 2-year stay away order of protection. The Second Department affirmed, holding that "credible evidence established that the [respondent] threatened to shoot the petitioner and to kick the petitioner's son in the liver, and that the [respondent] previously had angrily and intentionally broken the petitioner's computer.

In Matter of Reyes v. Reyes, 2019 Westlaw 209002 (2d Dept. Jan. 16, 2019), the grandson appealed from a March 2018 Family Court order which, after a hearing, found that he committed

harassment in the second degree against his 86-year-old grandmother and issued a 2-year stay away order of protection. The Second Department affirmed, holding that “a fair preponderance of the evidence” demonstrated that the grandson, “with the intent to harass, annoy, or alarm the petitioner, engaged in a course of conduct consisting of following the petitioner around her apartment, cursing at the petitioner, and staying in her apartment until all hours of the night, despite her numerous requests that he leave, which alarmed and frightened the petitioner and served no legitimate purpose.”

Family Offense - Harassment 2d, Menacing 2d

In Matter of Putnam v. Jenney, 2019 Westlaw 80614 (3d Dept. Jan. 3, 2019), Respondent, Petitioner’s brother-in-law, appealed from an October 2017 Family Court order which, after a hearing on Petitioner’s August 2017 family offense petition, found that he had committed harassment 2d and menacing 2d and issued a two-year order of protection. The Third Department affirmed, noting that Family Court’s “determinations regarding the credibility of witnesses are entitled to great weight on appeal.” Petitioner, who lived with his girlfriend, Marie Wing, respondent, and respondent’s wife, Kylea Jenney (Petitioner’s sister), alleged that respondent "pulled a knife out on [him]" during an argument and that such behavior was "dangerous or threatening." The Appellate Division found that the testimony that respondent

“threatened petitioner with a knife established by a preponderance of the evidence that respondent committed the family offense[s] of menacing in the second degree [intentionally places or attempts to place another person in reasonable fear of physical injury, serious physical injury or death by displaying a deadly weapon [or] dangerous instrument, Penal Law §120.14] and harassment in the second degree [with intent to harass, annoy or alarm another person[,] [h]e or she . . . subjects such person to physical contact, or attempts or threatens to do the same, Penal Law §240.26(1)].” The Court noted that intent “may be inferred from the surrounding circumstances.” Ms. Wing testified that respondent and Kylea Jenney (Jenney) were arguing and, when petitioner "stuck up for" Jenney, his sibling, respondent “asked Jenney to get his knife, Jenney complied and, while holding the knife in his hand, respondent told petitioner, ‘go back in your bedroom before I stab you.’” Both Wing, who was pregnant at the time, and petitioner testified that they moved out of the apartment because they were fearful of respondent and his threatening behavior.

Family Offense - Violation – Incarceration; Self-Incrimination Privilege

In Matter of DeSiena v. DeSiena, 167 AD3d 1006 (2d Dept. Dec. 26, 2018), the husband appealed from a January 2018 Family

Court order which, after a hearing, found that he twice violated an April 2017 stay-away temporary order of protection, granted a permanent order of protection, and directed that he be incarcerated for a period of six months for each violation. The Second Department affirmed. The April 2017 order directed the husband to refrain from any communication with the wife and to stay at least 500 feet away from the wife, her home, and her place of employment. The husband invoked his Fifth Amendment privilege against self-incrimination in response to some of the questions posed by the wife's attorney. A nonparty witness observed the husband, the day after he was served with April 2017 order of protection, posting a flyer which contained disparaging remarks about the wife, 15 feet away from the wife's place of employment. The husband also sent a letter to the wife, in which he stated that he had a "special offer" for her, but that she would need to telephone him to hear the details. Family Court determined, beyond a reasonable doubt, that the husband willfully violated the temporary order of protection by: (1) failing to stay at least 500 feet away from the wife's place of employment; and (2) failing to refrain from communication with the wife. The Appellate Division held that “beyond a reasonable doubt, [the husband] *** willfully violated the temporary order of protection on two separate occasions by failing to stay at least 500 feet away from the wife's place of employment and by

failing to refrain from communication with the wife. The Second Department further held that Family Court "was not entitled to draw a negative inference from the invocation of his Fifth Amendment privilege against self-incrimination, as the proceeding was criminal and not civil in nature." The Court concluded: "Since the record demonstrates that the court did not draw a negative inference based on the husband's assertion of his Fifth Amendment privilege, the husband's contention that the court violated his Fifth Amendment right against self-incrimination is without merit."

Pendente Lite - Counsel Fees

In Skokos v. Skokos, 2019 Westlaw 138353 (2d Dept. Jan. 9, 2019), the husband appealed from a May 2016 Supreme Court order, which, in his August 2015 divorce action, granted the wife's cross motion for temporary counsel fees to the extent of $15,000. The parties were married in November 2015 and have 1 child. The Second Department affirmed, finding that the wife is the nonmonied spouse and "the evidence *** revealed a significant disparity in the financial circumstances of the parties, as the plaintiff owns and derives his income from a successful construction business, and the defendant, who has not been employed outside the home since the beginning of the marriage, has relatively few financial resources."

LEGISLATIVE & COURT RULE ITEMS

Family Offense – Coercion 3rd added

Family Court Act §§812(1) and 821(1)(a) were **amended, effective November 1, 2018**, to add coercion in the third degree to the list of enumerated family offenses. A9505D/S07505C, Laws of 2018, Ch. 55, Part NN.

Family Offense – Firearms

Family Court Act §842-a was **amended, effective June 11, 2018**, to add "rifles and shotguns" to the provisions of law regarding weapons surrender and firearms license suspension and revocation, to conform to federal law. A10272/S08121, Laws of 2018, Ch. 60.

Judicial Notice – Internet Mapping

CPLR Rule 4511 is **amended, effective December 28, 2018,** by adding a new subdivision (c) on this topic. (See September 2018 AAML NY Chapter Bulletin, page 5).

Statement of Client's Rights and Responsibilities

22 NYCRR §1400.2 is **amended, effective February 15, 2019**, to prescribe a revised Statement of Client's Rights and Responsibilities.