NYSBA FAMILY LAW SECTION, Matrimonial Update, March 2019

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Attorney & Client - Disqualification – Associate Changed Firms

In Janczewski v. Janczewski, 2019 Westlaw 576849 (2d Dept. Feb. 13, 2019), the husband appealed from a February 2018 Supreme Court order, which granted the wife's motion to disqualify his attorneys. The Second Department affirmed, noting that from July 2016 to February 2017, an associate worked on the wife's case and then commenced employment at the law firm representing the husband, "giving rise to an irrebuttable presumption of disqualification," which was warranted "based on the appearance of impropriety."

Attorney & Client - Disqualification – Initial Consultation

In Graziano v. Andzel-Graziano, 2019 Westlaw 758554 (3d Dept. Feb. 21, 2019), the husband appealed from a May 2018 Supreme Court order which denied his motion to disqualify the wife's counsel. The husband's March 2015 divorce action was settled by a March 2017 stipulation incorporated into an October 2017 judgment. In February 2018, the husband sought a money judgment, counsel fees and disqualification of the wife's newly retained attorney. The husband had a consultation with the wife's attorney in 2011, 4 years prior to the commencement of his divorce action. The Third Department stated: "The sole issue

to be determined *** is whether the husband *** [demonstrated] *** that the issues discussed between him and the wife's counsel in 2011 are substantially related to said counsel's present representation of the wife in the instant dispute. We conclude that they are not." The Appellate Division therefore affirmed, finding that the wife's counsel "stated that he has no recollection of this [2011] legal consultation, he took no notes of the meeting and he did not obtain or review any financial documentation from the husband." The Court concluded: "*** the husband concedes that the subject postjudgment litigation *** is not, standing alone, sufficient to establish a substantial relationship between the husband's initial consultation with the wife's counsel and the present litigation, but instead argues that the inclusion of a request for counsel fees in relation to the present motion necessarily brings up for review his financial circumstances and, therefore, creates the requisite substantial relationship. We disagree."

Child Support - CSSA – Imputed Income; Equitable Distribution – Debt; Proportions (50%)

In Mack v. Mack, 2019 Westlaw 758593 (3d Dept. Feb. 21, 2019), the husband appealed from an October 2017 Supreme Court judgment, which distributed marital property and debt and imputed $200,000 in income to him for support purposes. The Third Department affirmed. The parties were married in 2002 and

have 2 children born in 2002 and 2004. Supreme Court directed the husband to pay maintenance of $2,485.68 monthly until 2022 and child support of $2,238.50 monthly. The Appellate Division agreed that Supreme Court correctly found that a debt owed by the husband's premarital company (PTI) to a foreign corporation was not his personal obligation and "just as the assets of PTI are separate property, the debts of that corporation should not be considered part of the marital estate." The Third Department rejected the husband's claim that Supreme Court "erroneously considered a $200,000 debt owed by PTI to the husband as a marital asset subject to equitable distribution" and noted that his "argument that the corporation may not be able to repay the loan is belied by a $50,000 payment made during the pendency of this action." With respect to the husband's challenge to equal distribution of marital property, the Appellate Division held that considering "particularly, the almost 15-year duration of the marriage and the wife's contributions to the household as a homemaker and in caring for the parties' children, while forgoing her own career, the court did not abuse its discretion in awarding the wife 50% of the marital property." As to the issue of imputed income, the Court noted the husband's testimony that "as an electrical engineer, he earned $115,000 in 1995 and was earning $125,000 by 2000, when he left his job and formed PTI. Recent tax returns showed that PTI ran in the negative and

the husband had no income." The Third Department held that Supreme Court properly imputed $200,000 in income to the husband, despite his claim that he had no regular paycheck and no earnings, "based on the parties' standard of living, the reality of the husband's business and accounting practices, and testimony that the husband paid personal expenses from corporate accounts."

Child Support - CSSA – Imputed Income – Inheritance; Private School Expenses

In Matter of Weissbach v. Weissbach, 2019 Westlaw 454189 (2d Dept. Feb. 6, 2019), the mother appealed from an April 2018 Family Court order which, after a hearing on the mother's January 2017 petition: (1) directed the father to pay $25 per week in child support for 3 children and (2) denied an award of private school expenses. The Second Department modified, on the law, on the facts, and in the exercise of discretion, by: (1) awarding $546.16 per week in child support and (2) directing the father to pay 78% of the children's private school expenses. Family Court imputed an additional $20,800 per year to the father, above the income of $8,354 per year he claimed from his auto parts business, less $639.08 for social security and medicare taxes, finding CSSA income of $28,514.92. Family Court also imputed $27,040 to the mother based on her testimony that she had worked as a medical assistant at $13 per hour. While the

father’s CSSA obligation would have been $158.01 per week, Family Court found that such sum “would be unjust and inappropriate,” because he was already voluntarily paying most of the household expenses for the children and the mother, and reduced the obligation to $25 per week. The Appellate Division found that Family Court should have imputed an additional $70,000 per year to the father, finding that “since 2009, the father had been contributing an additional $70,000 per year toward household expenses from sums that he had inherited.” The Second Department determined that the parties' combined parental income was $125,554.92 per year and the father's pro rata share of the basic child support obligation was 78%, or $546.16 per week. The Court held that “the father's voluntary contributions to household expenses do not furnish a basis to depart from the Child Support Standards Act calculation (*see* Family Ct Act §413[1][f]). Such voluntary payments constitute, at most, an unenforceable promise to pay.” As to private school expenses, given that “the credible evidence established that the children were enrolled in private school with the father's approval, and that the father could support himself and contribute to the children's private school tuition and expenses” Family Court should have directed the father to pay 78% thereof.

Child Support – College Denied - Imputed Income; Counsel Fees – After Trial; Equitable Distribution – Credit for Dissipated

Funds – Proportions (50%)

In Morille-Hinds v. Hinds, 2019 Westlaw 693232 (2d Dept. Feb. 20, 2019), the wife appealed from an April 2016 Supreme Court amended judgment, rendered upon a January 2014 decision after trial and an April 2015 order, which, among other things: (1) directed her to pay the husband $23,122.25 for counsel fees; (2) distributed 50% of the marital property to him; (3) failed to equitably distribute $3,500 allegedly dissipated by the husband; (4) awarded child support based upon his actual income without imputation of additional income; and (5) declined to direct the husband to pay college expenses for the parties' child. The Second Department modified, on the law, on the facts, and in the exercise of discretion, by awarding the wife a credit of $1,750 for her 50% share of marital funds spent by the husband, and otherwise affirmed. The parties were married in August 1993 and had one child born in 1995. The wife commenced the action in September 2007 and Supreme Court rendered a judgment in June 2010 following trial. The husband appealed from so much of the June 2010 judgment which "awarded him only 15% of the value of the parties' real property, the plaintiff's retirement accounts, and certain bank accounts, and imputed an annual income to him in the sum of $80,000 for the purpose of his child support obligation." 87 AD3d 526 (2d Dept. 2011). The Appellate Division reversed and remitted equitable distribution

and child support. The wife is a microbiologist and the monied spouse and the husband is a handyman/contractor. Both parties were 54 years old at the time of the retrial. The Second Department noted that the parties “acquired significant assets during the marriage, including multifamily homes, a home and vacant parcels in St. Lucia, and substantial retirement assets. Most assets were held in the plaintiff's name. The plaintiff earned significant income as compared to the defendant's earnings, which were minimal.” On this appeal, the wife contends that she was “entitled to a larger percentage of marital assets as a result of her outsized marital efforts in comparison to the defendant, whom she considered ‘lazy,’ inasmuch as she was the primary wage earner and also claimed to be the primary caretaker for the parties' child,” despite the Appellate Division’s finding in the prior appeal that the husband “made significant contributions to the value of the parties’ real property." 87 AD3d at 527. The Second Department opined on the prior appeal that the husband’s “contribution to the care of the parties’ child should have been considered.” 87 AD3d at 528. The Appellate Division affirmed the equal distribution of marital property, agreeing with Supreme Court's determination “that each of the parties made significant contributions to the acquisition of the marital assets during this 14-year marriage” and that the husband “also contributed substantially by searching for and

finding investment properties that increased significantly in value due to his utilization of his contracting/construction skills in renovating and remodeling the properties" and "participated in the care of the parties' child." On the issue of dissipation, the Second Department agreed with the wife that "Supreme Court should have awarded her 50% of the $3,500 balance that was in the Kraft Foods federal credit union savings account prior to commencement of the action, which sums were spent by the defendant." With respect to imputed income, the Appellate Division rejected the wife's argument that "despite reporting almost nonexistent income of the defendant on joint returns over the years, the defendant should pay child support based upon an $80,000 yearly income," citing its decision upon the prior appeal, which found that "the Supreme Court's determination that the defendant could earn $80,000 annually lacks support in the record." 87 AD3d at 528. On the present appeal, the Second Department found that the husband's "highest reported annual income during the marriage was $18,570" and agreed with Supreme Court's finding that "there was no evidence that the defendant's earning potential was greater than what was earned during the marriage." As to college expenses, the Appellate Division agreed with Supreme Court's determination declining to direct the husband to pay a share thereof, given that the wife "failed to provide any documentary proof of the cost of the college the

child had been accepted to and was planning to attend." The Court upheld the counsel fee award, "considering the disparity in the parties' incomes, as well as the fact that the plaintiff failed to produce documents, and that she maintained unreasonable positions regarding the issues of equitable distribution and child support despite the guidance offered by this Court upon its remittal of the issues."

Child Support - Modification – Imputed Income; No Jurisdiction Over Tax Refund

In Matter of Bashir v. Brunner, 2019 Westlaw 408769 (4th Dept. Feb. 1, 2019), the mother appealed from a November 2017 Family Court order denying her objections to a Support Magistrate order, which, after a hearing, reduced the father's child support obligation. The Appellate Division held that Family Court properly denied the mother's objection to that part of the order "finding that the mother lived rent-free," given that the Magistrate "did not credit the mother's testimony that she paid rent when she was able to do so." As to imputed income, the Fourth Department held that the Magistrate properly determined that the mother's testimony, stating "she was forced to leave her employment so that she could care for the children, whose child care costs she could no longer afford due to the father's temporary failure to pay child support," was not credible. The Appellate Division did find that Family Court

erred in denying her objection to that portion of the Magistrate's order which, “in effect, distributed half of the parties’ tax refund to the father by reducing his child support obligation by that amount.” The Court concluded: "[T]he father's entitlement to claim the child[ren] as [] dependent[s] for income tax purposes is not an element of support set forth in Family Court Act article 4, and thus the court lacks jurisdiction" to distribute the parties' tax refund. The Fourth Department remitted to Family Court to recalculate the father’s child support obligation without regard to the income tax refund.

Counsel Fees – After Trial; Maintenance – Durational

In Romeo v. Muenzler-Romeo, 2019 Westlaw 575623 (2d Dept. Feb. 13, 2019), the husband appealed from an August 2017 Supreme Court judgment, upon a March 2017 decision after trial of the wife’s April 2014 action, which awarded the wife maintenance of $1,900 per month for 8 years and counsel fees of $26,000. The Second Department affirmed. The parties were married in August 1995, at which time the husband was retired from NYPD and working part-time, while the wife worked as a substitute teacher. The Appellate Division upheld the maintenance award based upon Supreme Court’s consideration of the standard of living, property distribution, duration of the marriage, the parties’ health and future earning capacity, and the wife’s

ability to become self-supporting. As to counsel fees, the Second Department affirmed, based upon the disparity between the parties' incomes, the relative merits of the parties' positions, and the husband's conduct "that delayed the proceedings."

Counsel Fees – Reversed–Debt & No Monied Spouse; Equitable Distribution – Debt (Student Loans) & Wasteful Dissipation; Income Tax - Dependency Exemptions – Conditions

In Haggerty v. Haggerty, 2019 Westlaw 408799 (4th Dept. Feb. 1, 2019), the wife appealed from a June 2017 Supreme Court judgment which, among other things, directed her to pay counsel fees of $14,000 to the husband. The Fourth Department modified in the exercise of discretion and on the law, by vacating the counsel fees award, and otherwise affirmed. The Appellate Division rejected the wife's argument that she should have been given a credit for marital assets allegedly dissipated by the husband, finding that he "established that he used those particular assets to pay for marital expenses." The Fourth Department rejected the wife's contention that Supreme Court erred in directing that her ability to claim one of the parties' two children as a dependency exemption was upon the condition that she remain "current with her child support obligation for a full calendar year," noting her "prior failure to pay child support." With respect to the parties' combined student loan debt, the Appellate Division recognized that there "may be

circumstances where equity requires a credit to one spouse for marital property used to pay off the separate debt of one spouse" and concluded that Supreme Court "did not abuse or improvidently exercise its discretion in directing that each party be responsible for his or her student loan debt." The Fourth Department agreed with the wife that the $14,000 counsel fee award to the husband should be vacated, finding that "where neither party is a 'less monied spouse' (Domestic Relations Law §237[a]), and plaintiff [the wife] has significantly more student loan debt than defendant, we conclude in the exercise of our discretion that the award should be vacated and that each party should be responsible for his or her own attorneys' fees."

Custody – Alcohol Abuse; Evidence - Hearsay – Statements of Children

In Antonella GG. v. Andrew GG., 2019 Westlaw 758601 (3d Dept. Feb. 21, 2019), the mother appealed from an April 2017 Supreme Court order which, after a hearing, granted the father sole legal and physical custody of 2 children born in 2002 and 2003, with significant unsupervised visitation to the mother. The Third Department affirmed, noting from the testimony "that the mother has an alcohol abuse problem that worsened in the years before the parties' split" and that witnesses "depicted the mother as an angry, incoherent drunk who physically and verbally abused the father, accosted responding police officers

and engaged in other inappropriate behavior that the children were not insulated from in any way." With respect to legal custody, the Appellate Division found that "the parties have severe communication difficulties that preclude a joint custodial arrangement." The Court concluded: "The father sought to introduce out-of-court statements of the children regarding the mother's misuse of alcohol, which constituted proof of neglect, and the statements were sufficiently corroborated so as to warrant their admission," citing FCA §1046[a][iii][vi].

Custody - Modification – Sole Custody; Supervised Visitation; Travel to Japan

In Matter of Kayo I. v. Eddie W., 2019 Westlaw 611499 (1st Dept. Feb. 14, 2019), the father appealed from an October 2016 Family Court order which, after a hearing, modified the parties' 2010 stipulation by awarding the mother sole legal custody, ordering supervised visitation, and permitting the mother to travel to Japan with the child without his consent. The First Department affirmed, holding that the award of sole custody was proper, given that joint legal custody is no longer viable, considering the father's "use of physical discipline *** in violation of court orders, and the child's resulting reluctance to be alone with his father." The Court rejected the father's claim that the mother "interfered in his relationship with the child," finding that the mother "was acting on the child's

behalf.” The Appellate Division held that Supreme Court “properly ordered that respondent's visitation be supervised.” The First Department concluded: “The court providently exercised its discretion in permitting petitioner, the custodial parent, to travel to Japan with the child for one month each year, upon 6 weeks notice to the father but without obtaining respondent's prior consent.”

Custody - Modification – Therapeutic Visits; Wishes of Child (14 y/o)

In Matter of Granzow v. Granzow, 168 AD3d 1049 (2d Dept. Jan. 30, 2019), the mother appealed from an October 2017 Family Court order, which, after a hearing, dismissed her October 2016 petition to modify a June 2016 consent order, so as to direct therapeutic visitation with the parties’ then 14 year old child, as provided by said order. The June 2016 order provided for joint legal custody and sole physical custody to the father, and provided that “there shall be therapeutic visitation between [the mother] and the minor child as agreed upon by the parties, giving due consideration to the recommendations of the child's therapist and [the mother's] therapist, and consent for such visitation shall not be unreasonably withheld.” The order further provided that “in the event such therapeutic visitation does not take place by September 1st, 2016, this shall be deemed a change in circumstances for [the mother] to file a petition

for modification.” The Second Department affirmed, noting: “the child's therapist unequivocally testified that, in her opinion, the child would not benefit from therapeutic visitation with the mother at this time, and the child was clear and consistent in expressing his opposition to any form of parental access with the mother (citation omitted). To the extent that the court relied upon the in camera interview of the then 14-year-old child, it was entitled to place great weight on his expressed wishes.”

Custody - UCCJEA – Inconvenient Forum

In Matter of Veen v. Golovanoff, 2019 Westlaw 576085 (2d Dept. Feb. 13, 2019), the father appealed from a February 2018 Family Court order, which dismissed the father’s enforcement petition based upon lack of jurisdiction. The Second Department affirmed. The parties are divorced and a November 2010 order provided for physical custody to the mother and access to the father. The mother moved to California with the children, with the father’s permission, in August 2011. In September 2013, the mother and children moved to Washington state. The father filed his petition in July 2017 and the mother filed a modification petition in Washington in November 2017. The two courts conferred and Family Court relinquished jurisdiction upon the ground of inconvenient forum, citing DRL 76-a(1)(a), 76-f(1) and (2). The Appellate Division upheld Supreme Court’s

determination, based upon the children's absence from New York since August 2011 and the mother's willingness to pay the father's travel expenses to Washington for a parental evaluation.

Custody - UCCJEA – Temporary Emergency Jurisdiction

In Matter of Alger v. Jacobs, 2019 Westlaw 408968 (4th Dept. Feb. 1, 2019), the father appealed from a July 2016 Family Court order, which among other things, directed him to stay away from petitioner and the then 11-month old child and which awarded her sole custody of the child. The father argued on appeal that Family Court erred in denying his motion to dismiss the petitions for lack of subject matter jurisdiction. The Fourth Department affirmed, noting that DRL 76-c(1) provides that New York courts have "temporary emergency jurisdiction if the child is present in this state and . . . it is necessary in an emergency to protect the child, a sibling or parent of the child." The child was present in New York when the mother filed the petitions. Therefore, Family Court had to determine if it was "necessary in an emergency to protect the child, a sibling or parent of the child." The Appellate Division agreed that "the allegations in the petitions were sufficient to establish the requisite emergency, i.e., they allege acts of physical violence perpetrated by the father against the mother, resulting in her hospitalization in an intensive care unit for several days." The

father was incarcerated in Florida and the mother relocated to New York to be with family, who could help her with the child, and to be safe in the event the father was released.

Custody - Visitation – Supervised

In Matter of William F.G. v. Lisa M.B., 2019 Westlaw 409049 (4th Dept. Feb. 1, 2019), the mother and the attorney for the child appealed from a June 2017 Family Court order which granted the father's petition to modify a prior stipulated order and directed that the father's wife may supervise his visits with the subject children, at locations designated by him, including his own home. The Fourth Department reversed on the law and dismissed the petition. The father was convicted of sexually abusing the parties' then-four-year-old daughter, and the prior order: granted sole legal and physical custody of the children to the mother; required the father's visitation to be supervised by either his therapist, who specializes in sexual abuse, or the maternal grandmother of the children; and specified that visitation was to occur at a location mutually agreed upon by the father and the grandmother. The Appellate Division agreed with the mother that Family Court "erred in drawing a negative inference against her based on her failure to testify at the hearing." The Fourth Department found that a negative inference was not warranted, in that the mother "had no relevant testimony to offer inasmuch as she had no personal knowledge of the

allegations in the modification petition, i.e., the father's completion of sex offender treatment, his compliance with the terms of his probation, his visits with the children, and his marriage to his new wife." The Appellate Division concluded: "The father's employment, his lack of a criminal history other than the sexual abuse of his child, his completion of sex offender treatment, his lack of a history with Child Protective Services, and his lack of a mental health diagnosis do not constitute a change in circumstances because those circumstances existed at the time of the parties' stipulation." The Court noted that "the maternal grandmother has a long history of successfully facilitating positive interaction between the children and the father while providing meaningful protection to the children" since 2013. The Appellate Division cited the testimony of the father's wife, which "demonstrates that she did not know the details of the sexual abuse committed by the father against his daughter."

Equitable Distribution - Debt; Proportions; Separate Property Credit

In Westreich v. Westreich, 2019 Westlaw 692975 (2d Dept. Feb. 20, 2019), the husband appealed from a March 2017 Supreme Court judgment, rendered upon an August 2016 decision after trial and a January 2017 order granting the wife counsel fees of $425,000, which: (1) allocated certain marital debt 75% to him

and only 25% to the wife; (2) denied him a $2,565,934 separate property credit for the marital residence; (3) awarded the wife 75% of the sale proceeds from certain antiques, furnishings, and artwork and awarded her 100% of her jewelry; and (4) awarded the wife counsel fees of $425,000. The Second Department modified, on the law, on the facts, and in the exercise of discretion, by: (1) directing that the outstanding debt owed to a Trust shall be paid 50% by each party; and (2) awarding the husband a $2,565,934 separate property credit, and otherwise affirming the judgment. The parties were married in May 2001 and have 2 children born in 2002 and 2003. The wife commenced the divorce action in May 2013. A July 2015 agreement resolved custody issues (joint legal, equal sharing) and provided that the wife would be deemed the primary residential parent for CSSA purposes. The remaining issues were tried commencing in January 2016. The Second Department noted the parties' "substantial wealth" and that: the husband was awarded a multimillion dollar condominium in Sea Island, Georgia; the wife was awarded a multimillion dollar vacation property in Southampton; the marital residence in Old Westbury, which is to be sold, is worth between $7.6 and $10.5 million; the husband has a business interest (Monday Properties) found to be worth over $7.5 million, of which the wife was awarded a 25% share; and the husband has an interest in a portfolio of office buildings in

Rosslyn, Virginia, determined to be worth almost $14.5 million, of which nearly $9.7 million was determined to be marital property and of which the wife was awarded a 25% interest. The wife asserted on appeal that the net value of her equitable distribution award is $17,336,371, taking into account both the assets and the debts allocated to her. The husband argued on appeal that responsibility for the debt owed to the Trust should have been allocated equally between the parties, based upon Supreme Court's finding that the same was used for his purchase of real estate holdings, and that such holdings generated income for the parties during the marriage. The Appellate Division agreed, holding that there was "no dispute as to the legitimacy of the debt and that both parties benefitted therefrom" and that there was "no reason why responsibility for the amount of debt left unpaid should be allocated differently from the responsibility for [a prior] partial payment *** made on that same debt." The Court concluded: "Given the substantial nature of the assets received by both parties, the Supreme Court's unchallenged and explicit finding that the debt to the Trust was marital debt from which both parties benefitted, and the court's determination that the defendant's payment of a portion of the Trust debt from marital funds during the pendency of the action was not inappropriate, we conclude that the responsibility for the remaining debt owed to the Trust should be apportioned

equally between the parties.” With respect to the allocation to him of 75% of certain other debt attributable to a real estate investment and only 25% to the wife, the Appellate Division held that since Supreme Court “allocated the value of Monday Properties 75% to the defendant and 25% to the plaintiff, we see no reason to disturb the court's allocation of this investment debt in the same proportion, particularly given the absence of any finding by the court that the plaintiff derived any particular or special benefit from the subject property.” With respect to the husband’s claim for a separate property credit of $2,565,934 for the marital residence, although Supreme Court allocated the sale proceeds 60% to him and 40% to the wife, based on his contribution of separate property to the purchase, renovation, and furnishing of the residence, the Appellate Division held that given that there was no evidence that refuted his contention that the source of funds transferred into a joint account a few days before the closing was the husband’s separate property, and further, that “there was no evidence that the funds used to provide the cash component of the purchase price of the marital residence did, or even could have, come from any marital property source, *** the conclusion is inescapable that the $2,565,934 came from the defendant's premarital assets, and he should have received a credit therefor.” With respect to the husband’s argument that Supreme Court should not have awarded

the wife 75% of the proceeds from the sale of the furnishings, antiques, and art in the marital residence, and 100% of her own jewelry, the Second Department upheld this determination, given that the wife "used her knowledge and expertise in acquiring the personalty in the marital residence, while the defendant was uninvolved. Further, the parties gave each other jewelry during the marriage, and it was appropriate for each party to retain his and her jewelry." The Appellate Division did not address the counsel fee issue directly, except to state that the husband's "remaining contentions are without merit."

Equitable Distribution - Proportions - Medical Practice (30%); Trust Not Distributed

In Oppenheim v. Oppenheim, 168 AD3d 1085 (2d Dept. Jan. 30, 2019), the wife appealed from an April 2016 Supreme Court judgment, rendered upon a January 2016 decision after the trial of an April 2014 action, which failed to distribute the value of a family trust created in 2012, failed to award her maintenance, and awarded her only a 30% share of the husband's interest in a medical practice. The Second Department affirmed. The parties were married in 1992 and have 3 children, all emancipated. The husband is a neurosurgeon, and the wife is licensed as a Certified Financial Analyst, but has not been employed since the first child was born. Supreme Court found that the wife failed to prove that the husband acted inequitably in the creation of

the family trust or that his intent was to defraud her for his own benefit, and determined that the family trust was created prior to any indication of marital discord. Supreme Court awarded the wife a 30% share of the husband's interest in the medical practice, based upon her indirect contributions, and declined to award her maintenance, given "the parties' distributive shares of the substantial marital estate." The Appellate Division noted that the wife "has never challenged the validity of the family trust and has not sought to set it aside" and held that Supreme Court "providently exercised its discretion in declining to award equitable distribution of the value of the family trust" because the wife did not prove that the husband "acted inequitably in regard to the formation of the family trust." With regard to the medical practice, the Second Department held that Supreme Court "providently exercised its discretion in determining that the defendant, based on indirect contributions, was entitled to a 30% share" of the husband's interest in the medical practice. The Court concluded: "Upon consideration of the relative financial positions and circumstances of the plaintiff and the defendant, and all other relevant factors, the Supreme Court providently exercised its discretion in declining to award the defendant maintenance."

Family Offense – Extension of Order of Protection

In Matter of Lashlee v. Lashlee, 91 NYS3d 711 (2d Dept.

Feb. 6, 2019), the father appealed from an April 2018 Family Court order, which, after a hearing and a finding of good cause, extended a June 2015 order of protection for 5 years. The Second Department affirmed. The June 2015 order directed the father to stay away from and refrain from communicating with the mother, except in emergencies involving the parties' two children. The mother testified that: the father may have followed her and the children when they travelled to South Carolina, as he sent the children postcards from states along the route to South Carolina; the father sent the police to her home the day before Thanksgiving to retrieve mail, even though he had not lived at the home for four years; he requested copies of the mother's employment personnel file in connection with a support proceeding, allegedly with the intent of having the mother fired from her job; and he had sent upsetting emails to his former attorney which led to the attorney's request to be relieved as the father's counsel. The Appellate Division noted that "Family Court found credible evidence that while the mother and the father have had no direct contact since the issuance of the order of protection, the father continued to interfere with the mother's peaceful existence and well-being through other means."

Family Offense – Harassment 2d, Menacing 3d – Found

In Matter of Shirley D.-A. v. Gregory D.-A., 168 AD3d 635 (1st Dept. Jan. 31, 2019), respondent appealed from a November

2017 Family Court order which, after a hearing, found that he committed harassment in the second degree and menacing in the third degree, granted a one-year order of protection, and excluded him from petitioner's home effective January 15, 2018. The First Department affirmed, holding that petitioner proved "by a fair preponderance of the evidence that respondent, her son, committed the [stated] family offenses." The Appellate Division noted the mother's testimony that: "she moved out of her apartment and into her daughter's apartment in part due to fear of living with respondent who was living in her apartment"; "on November 15, 2017, when she returned to her apartment, respondent made numerous threatening statements and gestures toward her while following her from room to room." The Court concluded that "these actions and statements indicate that respondent was intending to harass, annoy or alarm petitioner, and that he intended to place her in fear of physical injury."

Maintenance - Durational – Age 66; Imputed Income

In Brendle v. Roberts-Brendle, 2019 Westlaw 576710 (2d Dept. Feb. 13, 2019), the husband appealed from a February 2016 Supreme Court judgment, upon a December 2015 decision after trial, which imputed a $150,000 per year income to him and awarded the wife maintenance of $2,500 per month for 10 years and $1,250 per month to her age 66. The Second Department affirmed. The parties were married in 1996 and have 2 children.

The Court upheld the imputed income finding, based upon the husband's "past earnings and demonstrated earning capacity," which included a business operated by the parties and a restaurant he opened after the commencement of the action. The parties stipulated that the wife would receive $50,000 for her interest in the marital business. The Appellate Division upheld the maintenance award based upon the length of the marriage, the wife's age and limited earning capacity, the marital standard of living and the stipulated distribution of the business.

Pendente Lite - Counsel Fees – Custody

In Matter of Balber v. Zealand, 2019 Westlaw 611368 (1st Dept. Feb. 14, 2019), the father appealed from June 2017 and April 2018 Supreme Court orders which, respectively, awarded the mother interim counsel fees in the sums of $35,000 and $85,000, pursuant to DRL 237(b), based upon her total requests of $225,000. The First Department affirmed, rejecting the father's argument that DRL 237(b) does not authorize counsel fee awards in custody disputes between unmarried parents, given its plain language: "upon any application *** by petition and order to show cause concerning custody, visitation or maintenance of a child, the court may direct a *** parent to pay counsel fees *** directly to the attorney of the other *** parent ***."