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Child Support - College – Credit Against Child Support Denied; SUNY Cap Calculations

In Matter of Wheeler v. Wheeler, 174 AD3d 1507 (4th Dept. July 31, 2019), both parties appealed from a July 2018 Family Court order which granted in part and denied in part the father's objections to a Support Magistrate order. On a prior appeal, the Fourth Department held that Family Court erred by finding that the father's obligation to contribute to his daughter's college expenses was not triggered, because the mother violated the parties' separation agreement by failing to consult with him regarding the selection process. 162 AD3d 1517 (4th Dept. 2018). On the present appeal, the Appellate Division held that contrary to the father's contention, the parties' agreement does not provide that the agreed-upon SUNY Cap should be calculated by reducing the amount of such cap by the daughter's financial aid, grants, loans and scholarships, as this interpretation "would render the parental contribution illusory, inasmuch as the amount of financial aid that the daughter received at the private university exceeds 'the cost of SUNY Geneseo' established at the hearing." The Fourth Department held that the parties are obligated to contribute on a pro rata

basis to the daughter's "net college expenses, i.e., the defined out-of-pocket expenses less financial aid, unless that amount exceeds the cost of SUNY Geneseo, in which case the parties' pro rata contributions would be calculated from the amount of the cap." The Appellate Division agreed with the mother that Family Court erred by reducing the father's contribution, "inasmuch as the Support Magistrate properly concluded that the daughter's net college expenses were less than 'the cost of SUNY Geneseo' and properly calculated the amount of the father's obligation." The Fourth Department concluded that while Family Court "erred in determining that [the father] failed to preserve his further contention that he is entitled to a credit against his child support obligation for his contribution to the daughter's room and board expenses while she is away at college (*see* Family Ct Act §439[e]), we nonetheless conclude that his contention lacks merit. 'A credit against child support for college expenses is not mandatory but depends upon the facts and circumstances in the particular case, taking into account the needs of the custodial parent to maintain a household and provide certain necessaries' (*Matter of DelSignore v DelSignore*, 133 AD3d 1207, 1208 [4th Dept 2015] [internal quotation marks omitted]). Here, it cannot be said that the father was entitled to a credit for the daughter's room and board expenses inasmuch as the record establishes that the mother must maintain a household for the

daughter during school breaks (citations omitted)."

Child Support - CSSA – Add-ons Pro Rata; Imputed Income; Life Insurance; Equitable Distribution - Credits for Carrying Charges, Mortgage Principal & Withdrawals; Equal Distribution Upheld; Exclusive Occupancy of Marital Residence; Maintenance – Durational

In Strohli v. Strohli, 174 AD3d 938 (2d Dept. July 31, 2019), both parties appealed from December 2015 Supreme Court judgment, rendered upon an April 2015 decision after 12 days of trial. The parties were married in 1992 and have 5 children born between 1995 and 2010. The husband commenced the action in July 2013, and his primary source of income was from real estate investment, building renovations and construction. The wife was the primary caretaker for the children and assisted the husband with his business. She testified that she had been offered a job paying $15 per hour. Supreme Court imputed income to the husband of $86,064 and imputed $31,200 to the wife. The Second Department upheld both imputations based upon the husband's "self-reported expenses listed in his net worth statement, along with the parties' standard of living over the course of the marriage" and as to the wife, her high school diploma, employment prior to trial in retail sales and the aforesaid job offer at $15 per hour. The Appellate Division affirmed the maintenance award of $1,000 per month for 6 years as a provident

exercise of discretion. The Second Department modified on the following issues: (a) Supreme Court directed the husband to pay 79% of camp expenses, which the Appellate Division altered to the extent of adding the qualifying terms "reasonable ***, required as and for child care in order for the defendant to be employed" and by directing that the wife pay 21% thereof; (b) as to health insurance and expenses for the children, while upholding the directive that the husband provide the same, the Appellate Division directed that the parties share both the premiums therefor and unreimbursed medical costs in the same 79%/21% proportions; (c) while upholding the directive that the husband pay 79% of private school tuition, due to the children's attendance at private yeshivas, the Second Department modified to direct that the wife pay 21% thereof; (d) the Appellate Division directed the husband to purchase life insurance in an amount sufficient to secure the payment of his maintenance and child support obligations; (e) while upholding the equal distribution of marital property, based upon its finding that "both parties contributed to this marriage of 21 years," the Second Department modified Supreme Court's directive that the parties share expenses pending the sale of certain investment properties 60%/40% and provided that each party shall receive a 50% credit from the sale proceeds of each property for certain enumerated expenses paid by him or her; (f) while affirming the

award to the wife of exclusive use and occupancy of the marital residence until the youngest child is 18, the Appellate Division noted that this should not preclude an earlier sale upon the wife's consent; (g) by directing that the wife receive a 50% credit against the proceeds of the sale of the marital residence for payments she made to reduce the principal balance of the mortgage, as well as for payments she makes or made to reduce the principal balance of the home equity line of credit, from the date of the judgment of divorce to the date of closing of the sale thereof; and (h) by directing that the husband receive a credit of $19,400 for his 50% share of marital funds the wife withdrew from the parties' checking account between 2 months before ($20,000) and 1 week before ($18,800) the commencement of the action for divorce, upon the ground that the wife "failed to substantiate that these funds were used for marital expenses."

Child Support - UIFSA – No NY Jurisdiction

In Matter of Nicholas A. v. Jessica T., 2019 Westlaw 3407172, NY Law Journ. Aug. 6, 2019 at 21, col. 1 (Fam. Ct. Chemung Co., Tarantelli, J., July 22, 2019), the father objected to a July 2019 Support Magistrate Order which, without a hearing and upon the ground of lack of jurisdiction to modify, dismissed the father's June 2019 petition to suspend his child support obligation (alleging parental alienation) under a June 2012 German court order for a daughter born in 2011. At the time of

divorce, both parties resided in Germany, where the mother, a German citizen, continues to reside. The father is a US citizen and returned to the US. In June 2016, the German order was registered for enforcement in Chemung County, where, ultimately, a September 2018 order established the father's arrears thereunder at over $3,600. As to the present proceeding, Family Court noted that New York's 2015 adoption of a new version of UIFSA incorporates the Hague Convention on International Recovery of Child Support, of which Germany is a member. FCA 580-615 allows New York courts to modify foreign child support orders under certain circumstances, except as provided in FCA 580-711(a), which does not allow such a modification of a Convention child support order "if the oblige remains a resident of the foreign country where the support order was issued," unless (1) the oblige consents to NY jurisdiction, either expressly or by defending on the merits without objecting to jurisdiction, or (2) the foreign court lacks or refuses to exercise its modification jurisdiction. Family Court found that the mother did not submit to modification jurisdiction in New York by reason of her prior defense of the father's contest to the June 2016 registration of the German order for enforcement, and Germany had not declined jurisdiction. The Court noted that a parental alienation defense "is specifically not available in the context of a UIFSA proceeding," citing FCA 580-305(d).

Counsel Fees – After Trial-Denied; Equitable Distribution - Proportions-Equal; Partnership; Sale of Property; Wasteful Dissipation Not Found

In Barrett v. Barrett, 2019 Westlaw 3955243 (4th Dept. Aug. 22, 2019), both parties appealed from an April 2018 Supreme Court judgment which, among other things, directed equitable distribution and denied counsel fees to the wife. The Fourth Department affirmed the denial of counsel fees, holding that although the wife was the "less monied spouse ***, she will receive a significant monetary award as a result of the equitable distribution." The Court rejected the wife's contention that a property in Skaneateles not be sold, given that she "is not a custodial parent [and] the parties' future financial circumstances warrant the sale of the property." The Appellate Division further rejected the wife's claim of wasteful dissipation of marital assets, finding that "the record establishes that the parties' net worth began to decline due to [the husband's] partial retirement, the conduct of the parties' children, and the global financial crisis – all while the parties maintained the lavish lifestyle to which they were accustomed." The Fourth Department modified Supreme Court's direction that the husband's 1/3 interest in a partnership be sold (given the requirement that all other members must approve such a transfer and that the "unprofitable nature" thereof

"suggests that liquidation of that asset is highly unlikely") and substituted a directive that the wife be awarded a one-half remainder interest in another property, subject to the husband's life estate. The Court otherwise affirmed the "approximately even split" of the parties' remaining assets in light of their 35-year marriage.

Counsel Fees - Hearing Needed; Enforcement – Medical Expenses; Maintenance – Modification – Extreme Hardship Not Proved

In O'Neill v. O'Neill, 174 AD3d 1526 (4th Dept. July 31, 2019), the husband appealed from a March 2018 judgment, which awarded $165,000 in counsel fees to the wife and from an order denying, without a hearing, his cross motion for a downward modification of maintenance, and the wife cross appealed from an order denying her motion for a judgment for unpaid medical expenses. The parties had a prenuptial agreement signed before their 1984 marriage, which was incorporated into their 1993 judgment of divorce. At the time of the agreement, the husband had over $12 million in assets. The Fourth Department reversed the judgment for counsel fees and remitted to Supreme Court for a hearing, which the husband requested. The Appellate Division reversed so much of the order denying the wife's request for medical expenses, which were required by the parties' agreement and which the wife had itemized, and awarded her a judgment for $5,412.01, plus 9% interest. The Fourth Department upheld

Supreme Court's denial of the husband's motion to modify maintenance, finding that he "failed to disclose the value of his then-current assets and thus failed to make the requisite showing of extreme financial hardship."

Counsel Fees - Support Proceeding

In Matter of Sanchez v. Reyes, 174 AD3d 907 (2d Dept. July 31, 2019), the attorney for the mother appealed from a September 2018 Family Court order, which denied his objections to a June 2018 Support Magistrate order, granting him only $25,000 in counsel fees, following a hearing on child support and entry of a March 2018 order in favor of the mother, and granted the father's objections by vacating the aforesaid counsel fee award. The mother thereafter discharged the attorney. The Second Department modified, on the facts and in the exercise of discretion, by reinstating the counsel fee award to the extent of $15,000, holding that Family Court "improvidently exercised its discretion in determining that [the mother's attorney] was not entitled to any award of counsel fees from the father."

Custody - Hague Convention–Return to Habitual Residence; Risk of Harm Exception

In Saada v. Golan, 2019 Westlaw 3242029, NY Law Journ. July 31, 2019 at 21, col. 1 (2d Cir. July 19, 2019), the mother appealed from a March 2019 District Court order, which, after a 9-day hearing, directed her to return the parties' child to

Italy, where he was born in June 2016, following her retention of the child at a domestic violence shelter in New York after her July 2018 trip for her brother's wedding. The District Court found that the parties' "relationship was violent and contentious almost from the beginning" and that the father "physically, psychologically, emotionally and verbally abused" the mother. The Second Circuit upheld the District Court's habitual residence determination, finding that Italy is the country where the child has "usually or customarily" lived. However, the Second Circuit found that the undertakings imposed by the District Court to ameliorate the "grave risk of harm" it found to be present if the child were to return to Italy, were not sufficient. In particular, the Second Circuit found that "[t]he District Court's factual findings provide ample reason to doubt that [the father] will comply with" his promises to stay away from the mother after she returns to Italy and to only visit the child with her consent. The Second Circuit remanded for further proceedings so that the District Court can "consider whether there exist alternative ameliorative measures that are either enforceable by the District Court or supported by other sufficient guarantees of performance."

Custody – Modification-AFC Substituted Judgment; Sexual Abuse; Supervised Visitation-Delegation Reversed

In Matter of Edmonds v. Lewis, 2019 Westlaw 3955058 (4th

Dept. Aug. 22, 2019), the mother appealed from a July 2017 Family Court order which, after a hearing, modified a stipulated October 2015 order (joint custody, primary to father, visitation to mother) pertaining to their child born in 2012, by granting sole custody to the father with supervised visitation to the mother, with the duration and frequency to be determined by either the parties or the supervising agency. The mother's visitation was suspended in May 2016 "following the child's disclosure of sexual abuse by the mother's boyfriend." The mother then agreed to keep the boyfriend away from the child and was granted supervised visitation, which was temporarily suspended in December 2016. The Fourth Department modified, on the law, by remitting to Family Court to establish a supervised visitation schedule, holding that the delegation thereof was improper. The Appellate Division upheld the AFC's substituted judgment for the then 5-year-old child, based upon the child's lack of "capacity for knowing, voluntary and considered judgment," while noting that the mother did not preserve this argument for appellate review "because she made no motion to remove the AFC." The Fourth Department affirmed the award of sole custody to the father, finding: "The mother's refusal to believe the child's disclosure of sexual abuse and her continued commitment to the alleged abuser rendered her unfit to have custody of the child." The Court noted that the father's home

environment is superior "inasmuch as the mother resides in a one-bedroom apartment with the alleged abuser." Finally, the Appellate Division upheld the directive for supervised visitation because "the mother repeatedly put the child at risk by violating court orders (citation omitted) and by permitting the alleged abuser to have access to the child."

Custody - Visitation–Overnights Eliminated

In Matter of Gilroy v. Backus, 174 AD3d 1458 (4th Dept. July 31, 2019), the father appealed from an April 2017 Family Court order which, after a joint hearing and in camera interviews with his children by two different mothers, modified prior visitation orders so as to eliminate his overnight visitation with both children. The Fourth Department affirmed, holding that the elimination of overnight visitation was in the children's best interests, noting that the record established that "the children were anxious and fearful of spending nights with the father because of his inattention to them, lack of suitable accommodations for them, and frequent arguments with his girlfriend."

Enforcement – Automatic Orders; Equitable Distribution - Separate Property–Not Proved; Stock–Tax Consequences Not Proved; Maintenance - Durational

In Mage v. Mage, 174 AD3d 884 (2d Dept. July 31, 2019), the husband appealed from a January 2016 judgment, rendered upon a

February 2015 decision after trial of the wife's 2012 action. The parties were married in 1991 and have 3 children. The Second Department upheld Supreme Court's determination holding the husband in contempt for violating the automatic orders, finding that he knowingly transferred, sold or converted marital funds (shares of UPS stock), which resulted in prejudice to the wife. The Appellate Division disagreed with Supreme Court's determination that the proceeds of sale of certain property in Greene County purchased during the marriage were the wife's separate property, given that the testimony of the wife and her father "was insufficient to rebut the presumption that the property, *** was marital property" and modified the judgment accordingly. With respect to the proceeds from shares of UPS common stock the husband sold following the commencement of the action, the Second Department upheld Supreme Court's award of 50% thereof to the wife, as well as its determination to not allocate the income tax consequences, "because the defendant failed to present any evidence from which the court could have determined the tax liability." The Appellate Division upheld the maintenance award to the wife of $2,500 per month for 5 years, noting that the wife "had been out of the workforce since the parties' first child was born in 1995, that she stayed at home to be the primary caregiver for the parties' children, that when she did return to work she would be paid at the low end of the

pay scale, and that she would have to purchase her own health insurance as a result of the divorce."