NEW YORK STATE BAR ASSOCIATION
FAMILY LAW SECTION
CONTINUING LEGAL EDUCATION

SUMMER 2019 MEETING
Saratoga Hilton
Saratoga Springs, NY
July 13, 2019, 11:10 a.m. – 12:00 noon

"Matrimonial Update"

OUTLINE

(September 10, 2018 – April 25, 2019)

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TABLE OF CONTENTS

PAGE

I. AGREEMENTS 1

A. Enforcement – Statute of Limitations 1

B. Interpretation – Emancipation 2

C. Interpretation – Pension & DRO 2

D. Residence Sale – Court Imposed Terms Reversed 5

E. Set Aside Denied 5

F. Set Aside – Duress and Unconscionability - Summary Judgment Denied 6

G. Set Aside – Duress, Coercion, Fraud & Unconscionability – Summary Judgment Denied in Part; Ratification not Found 7

H. Set Aside – Unconscionability – Disclosure and Hearing Ordered 10

II. ATTORNEY & CLIENT 12

A. Disqualification- Associate Changed Firms 12

B. Disqualification – Contact with Children 12

C. Disqualification – Initial Consultation 13

III. CHILD SUPPORT 14

A. Aunt & Uncle v. Father; Life Insurance Reduced 14

B. CSSA – Cap $300,000; Imputed Income 15

C. CSSA – COLA Vacated; $143,000 Cap Imposed 17

D. CSSA – Imputed Income 21

E. CSSA – Imputed Income – Fiancé Support 22

F. CSSA – Imputed Income – Inheritance; Private School Expenses 23

G. Enforcement – Medical Evidence in Defense Inadequate;
Modification – Denied – SSD Not Determinative 23

H. Modification – Imputed Income; No Jurisdiction Over Tax Refund 24

I. Modification – Income Decrease Caused by Relocation Nearer to Child 25

J. Modification Medical Evidence Inadequate; Public Assistance Arrears Cap
Denied 26

K. Modification – 2010 Amendments – Changed Circumstances 26

L. Modification – 2010 Amendments – Denial Vacated................................. 27

IV. COUNSEL & EXPERT FEES 29

A. After Stipulation 29

B. After Trial 30

C. After Trial – Reduced 40

D. After Trial – Reversed – Debt, No Monied Spouse 43

E. Enforcement and Modification of Child Support – Granted 44

F. Enforcement of Child Support - Granted 45

G. Sanctions – iPad Access Not Disclosed 45

H. Submission Inadequate 46

V. CUSTODY AND VISITATION 47

A. Alcohol Abuse 47

B. Domestic Violence; Interference with Parental Relationship 48

C. Facilitate Non-Custodial Parent; Needs of Child; Relocations; Stability 48

D. Father – Interference – Absconding with Child 49

E. Modification – Education; Hygiene; Rejection of Therapy; School Suspensions 49

F. Modification - Sole Custody; Supervised Visitation; Travel to Japan 50

G. Modification – Summary Judgment - Mental Health, Neglect 50

H. Modification – Therapeutic Visits; Wishes of Child (14 y/o) 51

I. Modification – to Father 52

J. Modification – Without Hearing, Reversed 52

K. Refusal to Allow GAL to Meet Father's Girlfriend; Zones of Decision Making Rejected 54

L. Relocation - Granted (FL) – Initial Custody Determination 55

M. Relocation - Granted (VA) 55

N. Relocation – Radius Clause Not Determinative 56

O. School Change – Denied 56

P. Sole – Domestic Violence, Relocation (CA) Permitted 57

Q. Summary Judgment Suspending Visits – Reversed 58

R. Third Party – Grandparent v. Great Grandparent 59

S. Third Party – Grandparent - Denied.. 59

T. Third Party – Maternal Aunt – Alcohol Abuse; Supervised Visitation to Father 61

U. Third Party – Standing – Equitable Estoppel 62

V. UCCJEA – Another Proceeding Pending 62

W. UCCJEA – Home State...63

X. UCCJEA – Inconvenient Forum 66

Y. UCCJEA – Temporary Emergency Jurisdiction 66

Z. Visitation – Supervised 67

AA. Visitation – Transportation Responsibility 68

VI. DISCLOSURE 72

A. Devices and Email, Social Media Accounts 72

B. NonParty – Reasons Needed 72

VII. ENFORCEMENT 74

A. Contempt – Health Insurance; Counsel Fees 74

B. Incarceration Upheld 75

C. Money Judgment – Credit for Payments Made 75

D. Receiver Appointed 77

VIII. EQUITABLE DISTRIBUTION 78

A. Debt – Credit for Funds Dissipated; Proportions (50%) 78

B. Debt - Proportions (50%) 80

C. Debt – Proportions; Separate Property Credit 83

D. Debt – Student Loans (Each Own); Wasteful Dissipation Not Found 86

E. Debt – Student Loan 87

F. Debt - Unequal; Pension – No Survivor Benefit 88

G. Enhanced Earnings (MBA – 0%); Separate Obligations & Student Loan Debt ..91

H. Marital Property Presumption 94

I. Proportions – Bank Accounts – Credit for Use of Marital Funds; Marital Residence Sale Directed 95

J. Proportions – Business (10% & 40%); Valuation Date DOC 98

K. Proportions – Business (50%); Enhanced Earning Capacity (25%) Separate Property – Commingled, Restored 99

L. Proportions – Long Marriage (50%); Separate Property – Commingling 99

M. Proportions – Marital Residence (5%); Separate Property - Found....................100

N. Proportions – Marital Residence (70%); Valuation – Law Practice ($0) 101

O. Proportions – Medical Practice (30%); Trust Not Distributed 102

P. Proportions – Stock Options (50%) 103

Q. Security Deposit; Transfer Taxes..105

IX. EVIDENCE 106

A. Hearsay – Statements of Children – Custody 106

B. Hearsay – Statements of Children – Family Offense 106

C. Medical Records – Foundation 108

D. Negative Inference Improper 108

X. FAMILY OFFENSE 109

A. Assault 2d, Attempted Assault 3d, Menacing 2d – Found 109

B. Criminal Mischief 4th – Not Found 110

C. Extension of Order of Protection 110

D. Harassment 2d -Found...112

E. Harassment 2d, Menacing 2d – Found 113

F. Harassment 2d, Menacing 3d – Found 114

G. Harassment 2d – Sufficiency 116

H. Intimate Relationship 117

I. Venue 118

J. Violation - Dismissed... 119

K. Violation – Incarceration; Self-Incrimination Privilege 119

XI. INCOME TAX 120

A. Dependency Exemptions – Conditions 120

XII. MAINTENANCE 121

A. Denied.. 121

B. Denied – Distributive Award as Factor 123

C. Denied – Duration of Temporary Award as Factor; Earning Capacity 124

D. Durational – Affirmed 125

E. Durational – Affirmed; Percentage of Bonus 129

F. Durational – Age 66; Imputed Income 130

G. Durational – Amount Reduced, Duration Increased; Health Insurance; Imputed Income; Life Insurance; Tax-Free..130

H. Durational – Increased to Age 62; Health Insurance; Life Insurance; Retroactivity..133

I. Non-Durational – Affirmed 135

J. Termination – Cohabitation 136

XIII. PATERNITY 137

A. Equitable Estoppel – Denied 137

XIV. PENDENTE LITE 138

A. Counsel Fees 138

B. Counsel Fees – Custody 138

XV. PROCEDURE 138

A. Service – Failure to Notify SCU of Address Change 138

B. Time to Appeal 139

{M1594952.1 }

XVI. LEGISLATIVE AND COURT RULE ITEMS 140

A. Authentication – Party Production of Documents 140

B. Court-Appointed Special Advocates 140

C. Family Offense – Coercion 3rd Added 140

D. Family Offense – Firearms 140

E. Judicial Notice – Internet Mapping.. 140

F. Judgments of Divorce – Incorporation, Retain Jurisdiction and Future Application Paragraphs, Part Deux 141

G. Statement of Client's Rights and Responsibilities 142

H. Trial Subpeona Documents 143

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These materials cover the period September 10, 2018 through April 25, 2019.

I. AGREEMENTS

A. Enforcement – Statute of Limitations

In Svatovic v. Svatovic, 2018 Westlaw 6052110 (1st Dept. Nov. 20, 2018), both parties appealed from, among other things, a March 2017 Supreme Court judgment which, after a hearing in the wife's 2014 divorce action, determined that the husband was entitled to $250,000 from the wife as his share of the former marital residence, pursuant to the terms of a September 1995 agreement. The parties were married in 1974 and have 2 children. The agreement provided that the residence would be sold "as quickly as possible" when the children attained age 22, which occurred in May 2003. The First Department modified, on the law, "to declare that enforcement of the parties' separation agreement is barred by the applicable statute of limitations and that all claims regarding the sale of the former marital residence and payment of equitable distribution therefrom are dismissed as time barred," based upon the 6 year statute of limitations

set forth in CPLR 213(2).

B. Interpretation – Emancipation

In Goldstein v. Goldstein, 2018 Westlaw 5931506 (2d Dept. Nov. 14, 2018), both parties appealed from, among other things, an October 2016 Supreme Court order, which granted the father's October 2014 motion to terminate child support based upon an emancipation clause in the parties' 1999 stipulation, incorporated into their 200 judgment of divorce, and which denied his motion for recoupment of $7,846 in child support paid to the mother while the motion was pending. The child permanently relocated to the father's residence on June 30, 2014, which constituted an emancipation event under the stipulation. The child submitted an affidavit stating that she "made the decision to permanently reside" with the father as of June 30, 2014, has not spent overnights at the mother's house since that date, and that, although she began college in late August 2014, she considers the father's house her home "and intend[s] to return there during school breaks and holidays." The Second Department affirmed, holding that the father established an emancipation event, but was not entitled to recoupment based upon the "strong public policy in this State, which the Child Support Standards Act did not alter, against restitution or recoupment of the overpayment of child support."

C. Interpretation – Pension & DRO

In McPhillips v. McPhillips, 2018 Westlaw 5020373 (2d Dept. Oct. 17, 2018), the husband appealed from February 2016 and March 2017 Supreme Court orders, which, in effect, denied his motions for leave to enter his proposed domestic relations order and an amended domestic relation order, and granted the wife's cross motion for leave to enter her proposed domestic relations order. The Second Department modified the February 2016 order, on the law, by denying the wife's cross motion and modified the March 2017 order, on the law, by granting

the husband's motion, except to the extent that the wife shall not be required to share in the cost of his election of a survivor benefit for his second wife. The parties' stipulation, incorporated into a January 1994 divorce judgment, provided for a "fifty/fifty division of all of [the husband's] pension benefits accumulated from the date of this marriage, May 7, 1977, through the date of service of the summons and complaint, January 28, 1989," and that the wife is "to be the recipient of 50 percent of any and all benefits payable to the [husband] upon his retirement which were accumulated during that period of time." The husband retired in July 2010, and in 2014, the parties each submitted a proposed DRO. The wife's proposed DRO calculated her share of the husband's pension benefits based on "a fraction for which the numerator shall be credited service accrued between May 7, 1977 and January 28, 1989, and the denominator shall be the total number of months of service credit . . . which [the husband] has *at the time of retirement*." The husband's proposed DRO employed a fraction in which "the numerator . . . shall be the total number of months of credited service between the [husband's] date of initial credited service in the Retirement System, or the date of the parties' marriage, that being May 7, 1977, whichever is later, up to the date of the division of marital assets, that being January 28, 1989, and the denominator shall be the total number of months of credited service which the Participant had in the Retirement System *as of the date of the division of marital assets, that being January 28, 1989*" (emphasis added). The Appellate Division held that the formula set forth in the wife's proposed DRO conflicts with the stipulation of settlement, which provided for a "fifty/fifty division of all pension benefits accumulated from the date of this marriage, May 7, 1977, *through the date of service of the summons and complaint, January 28, 1989*," and that the wife is "to be the recipient of 50 percent of any and all benefits payable to the [husband] upon his retirement *which were accumulated during that period of time*" (emphasis added). The Second

Department noted that the "stipulation of settlement made no reference to the formula set forth in *Majauskas v Majauskas* (61 NY2d 481), nor can such a reference be implied from the unambiguous terms of the stipulation." The Court concluded that since the wife's share of the husband's pension is limited to 50% of "*any and all* benefits payable to the defendant upon his retirement which were accumulated" from the date of the marriage, to wit: May 7, 1977, through the date of the service of the summons and complaint, January 28, 1989, the wife shall not be required to share in the cost of the defendant's election of a survivor benefit for his second wife."

In Econopouly v. Econopouly, 2018 Westlaw 6797467 (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.

D. Residence Sale – Court Imposed Terms Reversed

In Sitbon-Robson v. Robson, 95 NYS3d 797 (1st Dept. Apr. 4, 2019), the wife appealed from a May 2018 Supreme Court order, which directed that if the marital residence was not sold by June 30, 2018, the parties were to confer with the broker who would set the asking price, and if not sold by September 30, 2018, the parties were permitted to apply for a receiver to sell the residence. The First Department modified, on the law, to delete Supreme Court's foregoing directives. The parties entered into a prior stipulation which addressed the pricing and sale of the marital residence. The Appellate Division noted that "the parties did not challenge the validity of the stipulation or consent to the alteration of those terms," and Supreme Court therefore "lacked the authority to reform those terms to what it thought was proper."

E. Set Aside Denied

In Bradley v. Bradley, 2018 Westlaw 6537058 (1st Dept. Dec. 13, 2018), both parties appealed from an August 2017 Supreme Court order, which, without a hearing, denied the wife's motion to vacate the divorce judgment and incorporated stipulation and the husband's cross motion for counsel fees and sanctions. The First Department affirmed, finding an "absence of fraud, overreaching, mistake or duress" and noting that: the wife "was represented by able and experienced counsel, had been involved in negotiations for a period of time, came close to an agreement two weeks prior to reaching settlement, and spent the entire day negotiating the final terms of the settlement"; "the court conducted a proper allocution of the wife who represented that she understood the terms of the stipulation"; and the wife's "submission of two unsworn letters from physicians was insufficient to establish that she was so incapacitated as to warrant setting aside the stipulation." The Appellate Division held that "the wife has since ratified the stipulation of settlement by seeking disbursements in accordance with its terms." With regard to

the husband's cross appeal seeking sanctions and fees, the First Department concluded that the husband "failed to show that the challenged conduct, while without legal merit, was 'so egregious as to constitute frivolous conduct within the meaning of 22 NYCRR 130-1.1.'"

F. Set Aside – Duress and Unconscionability – Summary Judgment Denied

In Gandham v. Gandham, 2019 Westlaw 1272551 (2d Dept. Mar. 20, 2019), the wife appealed from February 2017 and March 2017 Supreme Court orders which, respectively, granted a nonparty's motion to quash certain subpoenas she issued, and granted the husband's motion for summary judgment dismissing her counterclaim to enforce a June 2016 stipulation of settlement. The Second Department affirmed the order granting the nonparty's motion to quash and reversed, on the facts, the order granting the husband's motion for summary judgment. The parties' June 2016 stipulation settled the husband's 2014 action for divorce and provided that said action would be discontinued. The husband commenced a second action later in June 2016 and the wife counterclaimed for enforcement of the June 2016 stipulation, against which counterclaim the husband moved for summary judgment, alleging that the stipulation, was "the product of duress and was unconscionable." The husband claimed that the stipulation "transferred virtually all of the marital assets to the defendant and all of the marital debts to the plaintiff," but also "recited that the transfers were 'to compensate the [defendant] for all the marital assets wasted by the [plaintiff],' including payments to women with whom the [plaintiff] allegedly had adulterous relationships and whom he held out publicly as his wives." In December 2016, the wife served subpoenas duces tecum and a subpoena seeking testimony on a nonparty -- one of the women with whom the wife alleged the husband had an adulterous relationship. Supreme Court's February 2017 order granted the motion to quash because: (1) the subpoenas did not comply with CPLR 3101(a)(4) [failure to state the circumstances or reasons

the evidence was needed]; and (2) the nonparty demonstrated that the evidence sought was "utterly irrelevant" to the action. The Appellate Division, in affirming the February 2017 order, disagreed "that the testimony sought from the nonparty was utterly irrelevant," but agreed with Supreme Court "that the subpoenas were defective since, among other things, the defendant failed to provide the nonparty with the required explanation of the circumstances or reasons requiring disclosure either on the face of the subpoenas or in any accompanying material," citing CPLR 3101[a][4]. The Court concluded that "Supreme Court should not have granted the plaintiff's motion *** for summary judgment dismissing the defendant's counterclaim." The Second Department held: "Assuming the facts alleged in the stipulation regarding the plaintiff's wasteful conduct are proven, the stipulation is not unconscionable on its face, and the plaintiff failed to establish, prima facie, his entitlement to judgment as a matter of law dismissing the counterclaim on the basis that the stipulation is unconscionable (citations omitted)." As to duress, in denying summary judgment to the husband, the Appellate Division found that he "met his prima facie burden for judgment as a matter of law dismissing the defendant's counterclaim based upon the defense of duress, by proffering evidence demonstrating that the defendant coerced him to sign the stipulation by making credible threats that she would commit suicide if he refused to sign the stipulation. However, in opposition, the defendant raised a triable issue of fact as to whether the plaintiff executed the stipulation under duress."

G. Set Aside – Duress, Coercion, Fraud & Unconscionability – Summary Judgment Denied in Part; Ratification Not Found

In Shah v. Mitra, 2019 Westlaw 1549204 (2d Dept. Apr. 10, 2019), the parties were married in 2001 and have two children. The wife appealed from a January 2019 Supreme Court order, which among other things, denied her motion to dismiss the husband's counterclaim based

upon unconscionability and granted the husband's cross-motion for summary judgment upon the same counterclaim, so as to set aside certain portions of a December 2015 postnuptial agreement. The husband cross-appealed from the dismissal of his counterclaims upon the grounds of fraud, coercion and duress, and from the denial of his cross-motion for summary judgment upon the same counterclaims. The December 2015 agreement provided "that it would be considered a marital settlement agreement in the event the parties divorce." The wife commenced a divorce action in June 2016, seeking incorporation of the agreement. The Second Department modified, on the law, by denying the husband's cross-motion for summary judgment upon his unconscionability counterclaim (and which had resulted in the setting aside of certain provisions of the agreement), and otherwise affirmed. The Appellate Division rejected the wife's ratification claim, holding that her documentary evidence "failed to establish, as a matter of law, that the defendant ratified the agreement." With regard to his fraud counterclaim, the husband alleged that the wife promised him that if he signed the agreement, she would "fully commit to working on the parties['] marital issues and that there will be no divorce." He further alleged that the wife further represented that the agreement would "prevent [a] divorce" and that at the time that she made such representations, "she knew such representations were false." The Second Department, as did Supreme Court, found that "the factual allegations underlying the defendant's claims of fraudulent inducement are flatly contradicted by the terms of the agreement. Contrary to the defendant's allegations, the unambiguous terms of the agreement explicitly preserved both parties' 'right to obtain a judgment of divorce from the other' and further provided that, in the event that either party sought to exercise their right to a divorce, the agreement would be incorporated but not merged into a judgment of divorce. The agreement also contained a clause which provided that its terms 'may not be changed orally but only by a written agreement signed

by both parties.' Inasmuch as the defendant's answer does not contain any other allegedly false misrepresentations attributable to the plaintiff, we agree with the court's determination to grant those branches of the plaintiff's motion which were pursuant to CPLR 3211(a) to dismiss the defendant's first counterclaim. *** Furthermore, under such circumstances, we also agree with the court's determination to deny that branch of the defendant's motion which was, in effect, for summary judgment on his first counterclaim." As to the issue of coercion, the husband's counterclaim alleged that in the three months leading up to the execution of the agreement, the wife told him that "if he did not sign the [agreement] . . . the marriage . . . would be over." With respect to duress, the Appellate Division found that the husband's counterclaim stated that the wife "exerted pressure" on him "by representing to [him] that unless he executed the [agreement], their marriage would terminate" and held that the husband's counterclaims for coercion and duress "are not supported by sufficient allegations from which it could reasonably be found that the agreement is unenforceable on the grounds of duress or coercion," noting that "the exercise or threatened exercise of a legal right [here, starting a divorce action] [does] not amount to duress (citations omitted). Nor are the defendant's allegations sufficient to allege coercion (citations omitted)." With respect to the issue of unconscionability, the Second Department held that "the defendant's pleadings, as amplified by his submissions in opposition to the plaintiff's motion and in support of his cross motion (citation omitted), are sufficient to allege both procedural and substantive unconscionability (citation omitted)." The husband alleged "that although the agreement was prepared by a mediator, the mediator was not independent and that the financial terms contained therein were based on the [wife's] wishes" and that "the process was rushed, that his interaction with the mediator consisted of a single, hour-long session, and that he was compelled to sign the agreement before consulting with his attorney." The husband

claimed that the agreement required him "to waive his right and interest in virtually all marital property, including most retirement assets, the [p]laintiff's lucrative medical practice, the marital residence, other real property accumulated during the marriage and reasonable spousal maintenance and child support." Further, the husband stated that although there existed a "tremendous disparity in the parties' respective incomes," he was required to match the plaintiff's contributions towards the children's operating account. The Court concluded that the husband sufficiently stated a cause of action alleging unconscionability, and noted that while the wife disputes many of the husband's factual allegations, including his description of the events leading up to the execution of the agreement, the effect of the substantive terms of the agreement, and his valuation of the parties' marital assets and income, the documentary evidence submitted in support of her motion failed to "utterly refute[ ] [the defendant's] factual allegations as a matter of law (citation omitted)." The Appellate Division rejected the husband's argument that he was entitled to judgment as a matter of law upon his unconscionability counterclaim, and held that Supreme Court erred by granting him summary judgment thereon. The Court concluded that the husband's evidentiary submissions upon his cross-motion "failed to demonstrate, prima facie, that the agreement is one 'such as no person in his or her senses and not under delusion would make on the one hand, and as no honest and fair person would accept on the other' (citation omitted)."

H. Set Aside – Unconscionability – Disclosure and Hearing Ordered

In Mizrahi v. Mizrahi, 2019 Westlaw 1782170 (2d Dept. Apr. 24, 2019), the wife appealed from an April 2016 Supreme Court order, which, in her January 2016 divorce action, denied her motion to set aside the parties' January 2015 separation agreement and granted the husband's cross motion to dismiss her unconscionability claim, and *sua sponte* (based upon the

agreement's loser pays clause) awarded the husband $4,000 in counsel fees. The parties were married on August 15, 1996 and have two children together. The Second Department reversed, on the law, and remitted to Supreme Court for financial disclosure and a hearing, holding that the wife "raised an inference that the parties' separation agreement was invalid, sufficient to warrant a hearing." The Appellate Division found that the December 2015 agreement "was the product of a mediation conducted by the attorney who prepared the document." The husband had counsel and the wife consulted with an attorney. The agreement states, in bold print, that the wife's consulting attorney advised her not to sign the agreement "based upon the fact that there has been no discovery in the matter whatsoever, and [the attorney's] considered opinion that the support provisions in the agreement are not adequate to meet the [plaintiff's] and children's basic needs." The wife had no income and the husband represented his income to be $100,000 per year. The agreement provided, among other things, that the husband would: pay child support of $3,000 per month; pay $500 per month in maintenance; provide health insurance for the children; 75% of the children's uninsured medical expenses; pay the plaintiff a lump sum of $45,000 for a share in his business. The Appellate Division noted that the wife's rent was over $5,200 per month, while her combined support was $3,500 per month and that she was in the process of being evicted due to missed rental payments. The Second Department concluded: "Given that the agreement's support provisions were insufficient to cover the rent for the marital residence and other basic needs of the plaintiff and the children, as well as the lack of financial disclosure regarding the value of the defendant's business, condominium, and actual income, questions of fact existed as to whether the separation agreement was invalid, sufficient to warrant a hearing (citations omitted). Given the lack of any financial disclosure, the Supreme Court should have exercised its equitable powers and directed disclosure regarding the parties' finances

at the time the agreement was executed, to be followed by a hearing to test the validity of the separation agreement."

II. ATTORNEY & CLIENT

A. Disqualification – Associate Changed Firms

In Janczewski v. Janczewski, 92 NYS3d 665 (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."

B. Disqualification – Contact with Children

In Anonymous 2017-1 v. Anonymous 2017-2, 2018 Westlaw 5316851, NY Law Journ. Nov. 9, 2018 at 21, col. 5 (Sup. Ct. Nassau Co., Lorintz, J., Oct.23, 2018), the mother received a speeding ticket in November 2017, and hired an attorney to handle the same. The mother thereafter became concerned that the ticket had not been resolved and that her license may have been suspended. The mother "feared that this could be used to justify her arrest, which she believed was being engineered by the [father], his counsel and [a] private investigator"; she observed the investigator parked near her home upon her return thereto on April 2, 2018, at which time he was photographing her, the children (ages 8 and 10) and their nanny. At or about the same time, the mother also observed a marked police car parked near her home. The mother then called her attorney regarding her fears of being arrested for driving with a suspended license, and the attorney then drove to the mother's home and transported her, the children and another adult to the home of a friend of the mother. The father moved to disqualify the mother's

attorney "based upon his alleged unauthorized contact with the children" in violation of Rules of Professional Conduct 4.2. Supreme Court "found it both relevant and helpful to conduct an *in camera* interview of both children" and held two individual *in camera* interviews of the children, each in the presence of the AFC. Supreme Court noted that "[b]oth children stated that they did not know their father's lawyer but verified that they knew their mother's lawyer, ***." Supreme Court concluded: "From the interview, it was clear that there were conversations between [the mother's attorney] and the children during the car ride" which "included discussions about what was happening with the private investigator. Additionally, the children were aware that the private investigator was hired by the [father]. This information was provided to them by the [mother]." Supreme Court granted the motion to disqualify the mother's attorney, holding: "By purporting to rescue their mother, in their presence and without their counsel, from an unlawful arrest engineered by their father, [the mother's attorney] risked influencing the children to think favorably of him and the [mother] and unfavorably of the [father]. In doing so, he acted against the best interests of the children. (citation omitted). Since [the mother's attorney] failed to notify the Attorney for the Child [AFC], *** who was appointed to protect the children's interests, [the AFC] was unable to act. *** [The mother's attorney's] failure to notify [the AFC], before or after the events of April 2, 2018, ***, evidence his indifference to the attorney-client relationship existing between the children and their counsel. His disqualification is therefore necessary to protect the rights of the children."

C. 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."

III. CHILD SUPPORT

A. Aunt & Uncle v. Father; Life Insurance – Reduced

In Matter of Lozaldo v. Cristando, 164 AD3d 1241 (2d Dept. Sept. 12, 2018), the father appealed from a June 2017 Family Court order, which denied his objections to so much of a March 2017 Support Magistrate order as directed him, after a hearing upon the petition of the children's maternal aunt and uncle, to pay 100% of the children's unreimbursed medical and educational expenses, and to maintain a $1,000,000 life insurance policy designating the children as irrevocable primary beneficiaries. The Second Department modified, on the facts and in the

exercise of discretion, by granting the father's objections to the extent of reducing his life insurance obligation to $750,000. The aunt and uncle were awarded residential custody of the children after the death of the mother, and share joint legal custody with the father. The Appellate Division noted that Family Court Act §413(1)(a) provides that "the *parents* of a child under the age of [21] years are chargeable with the support of such child ***" (emphasis added), but "does not require a third party who is not a parent to financially support a child." The Court reasoned that since the aunt and uncle had not adopted the children, the father was responsible for their support and Family Court's order was appropriate under the circumstances. The Second Department found that "in view of [the father's] obligations, the amount of insurance that the father must maintain should be reduced from the sum of $1,000,000 to the sum of $750,000."

B. College Denied; Imputed Income

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."

C. CSSA – Cap $300,000; Imputed Income

In Feng v. Jansche, 2019 Westlaw 1028961 (1st Dept. Mar. 5, 2019), both parties appealed from an October 2017 Supreme Court judgment which, upon a July 2017 decision after trial of the wife's 2013 divorce action: (1) distributed 40% of the stipulated valued of the husband's stock options and restricted stock units to the wife; (2) terminated the temporary maintenance award as of July 31, 2017 and declined to award the wife post-divorce maintenance;

(3) imputed income of $831,710 to the husband, imposed a CSSA income cap of $400,000 and made the child support award prospective; and (4) awarded the wife $25,000 in counsel fees. The First Department modified, on the law and the facts, to: (1) award the wife 50% of the value of the marital portion of defendant's stock options and restricted stock units; (2) impose a CSSA income cap of $300,000 and award child support retroactive to October 1, 2014; and (3) remand for further proceedings. The Appellate Division held that "[t]o the extent the marital portion of defendant's stock options and GSUs represents compensation, plaintiff's award should be increased from 40% to 50% of the value, or $126,487." With respect to maintenance, the First Department determined that Supreme Court "properly declined to award plaintiff post-divorce maintenance on the grounds that she holds a doctorate in computer science and is working full-time as a data scientist" and correctly terminated the temporary order as of July 2017 when its decision after trial was issued. The Court noted that the duration of temporary maintenance "was one of the factors [Supreme] court considered in determining that further maintenance was not warranted." On the issue of imputed income, the Appellate Division held that Supreme Court "properly imputed income to defendant based on the average of his total income for the years 2012 through 2014." As to child support, the First Department found that Supreme Court "correctly considered the standard of living the child would have enjoyed had the marriage remained intact in deviating from the statutory cap," but given the fact that the husband was ordered to pay 88% of extracurricular activities, summer camp, and private school, the Court reduced the CSSA income cap to $300,000. With respect to the issue of retroactivity, the Appellate Division agreed with the wife that Supreme Court "erred in making the child support award prospective only (citation omitted). It should be retroactive to October 1, 2014, the date on which plaintiff started receiving court-ordered pendente lite child support." The action was

remanded for a determination of retroactive child support owed, including add-on expenses, and whether the husband should pay arrears "in one sum or periodic sums." The First Department upheld the $25,000 counsel fee award, determining that Supreme Court properly considered "the financial circumstances of both parties together with all the other circumstances of the case, which may include the relative merit of the parties' positions," and given that the husband had already paid $120,000 of the wife's counsel fees, the total of $145,000 was more than half of her fees at the time of trial.

In Flom v. Flom, 2019 Westlaw 1064152 (1st Dept. Mar. 7, 2019), the wife appealed from a March 2017 Supreme Court judgment which, among other things: (1) distributed 40% of certain marital assets to the wife and 60% to the husband, including an in-kind distribution of an LLC; (2) apportioned 40% of the assets and liabilities related to certain investments to the wife and 60% to the husband; (3) awarded the wife $26,000 per month in taxable maintenance for 6 years; and (4) imputed annual income to the wife of $50,000 for CSSA purposes and applied the then-statutory cap of $141,000. The First Department modified, on the law and the facts, by: (1) increasing the wife's distribution of assets to 50%; (2) increasing her distribution of and responsibility for, the assets and liabilities of the investments to 50%; and (3) imposing a CSSA cap of $300,000, without imputing any income to the wife, and increasing child support for the parties' unemancipated child from $1,238 per month to $4,250 per month, retroactive to the entry of judgment. The Appellate Division held that Supreme Court "improvidently exercised its discretion in distributing the marital assets 60% to plaintiff and 40% to defendant," citing the principle that "where both spouses equally contribute to the marriage which is of long duration, a division should be made which is as equal as possible." The parties were married for 18 years and had 2 children. The Court found that "the referee divided the marital property unequally

solely because defendant was not employed outside the home and the parties hired domestic help, and thus, in the referee's view, she did not contribute equally to the marriage." The First Department cited the trial testimony, which established that the mother "was actively involved with the children, coaching their athletic teams, attending parent-teacher conferences, and, as plaintiff testified, being 'their mom.'" Increasing the marital property distribution to the wife to 50%, the Appellate Division stated: "It is undisputed that the parties enjoyed a lavish lifestyle, and the evidence indicated that defendant played a major role in managing the home, including entertaining clients and paying household expenses from the parties' joint account. The referee's finding that there was no evidence that defendant 'ever cooked a meal, dusted a table or mopped a floor' did not support the court's determination that she was therefore entitled to only 40% of the parties' marital assets." On the issue of marital debt, the First Department determined that Supreme Court "providently exercised its discretion in apportioning liability to defendant for failed investments *** that plaintiff personally guaranteed with a collateral account," finding that "[the husband's] conduct in guaranteeing the loans did not absolve defendant of joint liability." The Court concluded on this issue: "Since the investments were made during the marriage for the benefit of the parties, the parties should share [equally] in the losses." With regard to the in-kind distribution of the husband's interest in an LLC, which the Court increased to 50%, the Appellate Division rejected the husband's argument that the same "could not be distributed because defendant failed to value the asset" given that he proposed "prior to trial to distribute [the LLC interest] in lieu of maintenance." The Appellate Division upheld the maintenance award "based on the lavish lifestyle of the parties during the marriage, and the fact that [the wife] had not worked outside the home in over 20 years." Given the wife's now increased equitable distribution award, and Supreme Court's direction that the husband provide her with health

insurance until she qualifies for Medicare, the Court rejected the wife's argument for "at least 12 years, if not lifetime, maintenance." With regard to child support, the First Department held that there was "no basis" for the imputation of $50,000 in annual income to the wife and noted the referee's findings that: the husband "had significantly greater financial resources and a gross income that greatly exceeded defendant's"; the child enjoyed a "luxurious standard of living" during the marriage; and "no deviation from the then-income cap of $141,000 was warranted because plaintiff had voluntarily agreed to pay the child's educational expenses, coaching, tutoring and summer camp." The Court concluded that "given the factors considered, but subsequently disregarded, by the referee *** we find that a $300,000 income cap, which would result in a monthly basic child support award of $4,250, retroactive to entry of the judgment of divorce, would satisfy the child's 'actual needs' and afford him an 'appropriate lifestyle.'"

D. CSSA – COLA Vacated; $143,000 Cap Imposed

In Matter of Murray v. Murray, 164 AD3d 1451 (2d Dept. Sept. 26, 2018), the mother appealed from a September 2017 Family Court order, which denied her objections to a June 2017 Support Magistrate Order rendered after a hearing, reducing the father's child support obligation. The parties were divorced in January 2002. An October 2009 consent Family Court order set the father's child support obligation for two children at $740.56 per week, payable through the SCU. In March 2017, the SCU notified the parties of a proposed COLA order increasing the father's obligation to $822 per week for the remaining unemancipated child. The mother objected to the COLA order and after a hearing, the Magistrate capped the application of the CSSA to the parties' combined parental income of $371,697 at $143,000 and directed the father to pay $360 per week for the then 20 year old child who was entering her third year of college. On appeal, the Second Department affirmed, finding that the Support Magistrate "providently exercised her

discretion in applying the child support percentage to $143,000 of the parties' combined parental income," given that the mother "failed to demonstrate why *** it was unjust or inappropriate for the Support Magistrate to decline to apply the child support percentage to the parties' combined parental income over the statutory cap."

E. CSSA – Imputed Income

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."

F. CSSA – Imputed Income – Fiancé Support

In Matter of Picone v. Golio, 93 NYS3d 879 (2d Dept. Mar. 13, 2019), Golio, the non-custodial parent, appealed from a June 2018 order denying his objections to a December 2017 Support Magistrate order, which, after a hearing, upon imputing an additional $47,600 to his earned income, directed him to pay child support of $1,460 per month for 2 children. The Second Department affirmed, noting that the Support Magistrate determined that Golio's annual income was $94,532, including imputed income of $47,600 "based upon his testimony regarding his access to and receipt of financial support from his fiancé," which constitutes "money, goods, or services provided by relatives and friends," as defined by FCA §413[1][b][5][iv].

G. 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.

H. Enforcement – Medical Evidence in Defense Inadequate; Modification – Denied – SSD Not Determinative

In Matter of Linda D. v. Theo C., 2018 Westlaw 5985456 (1st Dept. Nov. 15, 2018), the father appealed from a September 2017 Family Court order, which granted the mother's objections by modifying a March 2017 Support Magistrate order, which, after a hearing,

determined the father was not in willful violation of a child support order and granted his petition for a downward modification, to the extent of vacating the modified order of support, dismissing the father's downward modification petition, and reinstating the prior order for $1,200 in monthly child support. The First Department affirmed, finding that "the father failed to rebut the prima facie evidence of his willful violation of the order of support" and holding that "the Support Magistrate mistakenly relied on letters from the father's health care providers that had not been properly admitted into evidence." The Appellate Division further determined that Family Court properly dismissed the father's downward modification, noting that the father's "receipt of Social Security disability benefits did not preclude a finding that he was capable of work."

I. 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.

J. Modification – Income Decrease Caused by Relocation Nearer to Child

In Matter of Parmenter v. Nash, 2018 Westlaw 5875499 (4th Dept. Nov. 9, 2018), the father appealed from a June 2017 Family Court order, which denied his objection to a Support Magistrate order dismissing his petition for downward modification, based upon a decrease in his income due to his relocation. The Fourth Department reversed, on the law, granted the father's objection, reinstated his petition, and remitted to Family Court. From 2013 to 2015, the parties resided together with their son in northern Virginia. In 2015, the mother relocated with the child to Onondaga County. Six months later, the father quit his job in Virginia and moved to New York in order to be closer to the child. The Appellate Division held that the general rule, holding a non-custodial parent responsible for a voluntarily cessation of higher paying employment, "should not be inflexibly applied where a parent quits a job for a sufficiently compelling reason, such as the need to live closer to a child (citations omitted) ." The Court concluded that "[t]he equities weigh heavily in favor of the father here given that it was the mother who moved the child hundreds of miles away from the father and thereby created the difficulties inherent in long-distance parenting."

K. Modification – Medical Evidence Inadequate; Public Assistance Arrears Cap Denied

In Matter of Mandile v. Deshotel, 2018 Westlaw 5875868 (4th Dept. Nov. 9, 2018), the mother appealed from a November 2016 Family Court order, which confirmed a Support

Magistrate order that she willfully violated a prior child support order and awarded the father a money judgment. The Fourth Department affirmed, finding that the mother failed to pay the amounts directed by the support order, and the burden thus shifted to her to submit "some competent, credible evidence of [her] inability to make the required payments" (citations omitted). The Appellate Division held that the mother failed to meet her burden, and while she "presented some evidence of medical conditions that allegedly disabled her from work, her medical records indicate that the diagnoses related to those conditions were 'based solely on [the mother's] subjective complaints, rather than any objective testing.'" (Citations omitted). The Support Magistrate found that "the mother did not seek treatment for her alleged conditions until shortly after the father filed his first violation petition and that she had testified several years earlier that she did not intend to work because she could be fully supported by her paramour." The Fourth Department rejected the mother's arrears cap argument, noting that if "the sole source of a noncustodial parent's income is public assistance, unpaid child support arrears in excess of five hundred dollars shall not accrue," citing FCA 413(1)(g), and finding that here, although "the mother received public assistance and did not maintain employment, circumstantial evidence suggested that she 'ha[d] access to, and receive[d], financial support from [her live-in paramour].'" (Citations omitted).

L. Modification – 2010 Amendments – Changed Circumstances

In Bishop v. Bishop, 2019 Westlaw 1051899 (2d Dept. Mar. 6, 2019), the mother appealed from an October 2016 Supreme Court order which, without a hearing: (1) granted the father's motion pursuant to CPLR 3211(a)(7) to dismiss her April 2016 petition for an upward modification of the child support provisions of an October 2013 judgment incorporating an April 2013 stipulation; and (2) denied her cross motion pursuant to Domestic Relations Law §238 and

22 NYCRR §130-1.1 for counsel fees. The Second Department modified, on the law, by: (1) denying the father's motion to dismiss; and (2) by reversing the denial of the mother's cross motion pursuant to Domestic Relations Law §238 for counsel fees, and remitting for a hearing on upward modification of child support and counsel fees. The April 2013 stipulation provided that the father would pay the mother $3,000 per month in child support. In May 2016, following the mother's April 2016 Family Court modification petition, the father moved in Supreme Court to: appoint a forensic psychiatrist to determine whether a modification of custody was in the children's best interests; transfer the Family Court petition to Supreme Court; and, as above stated, dismiss the modification petition. On consent, Supreme Court converted the modification petition into a post-judgment motion, and the father's motion to appoint a forensic psychiatrist was withdrawn. The April 2013 stipulation specifically opted out of the 3 year and 15% modification grounds, meaning that the wife had the burden of establishing "a substantial change in circumstances," as defined by DRL §236[B][9][b][2][i]. The Appellate Division noted that when evaluating a claim of "substantial change in circumstances," a court must consider "the increased needs of the children, the increased cost of living insofar as it results in greater expenses for the children, a loss of income or assets by a parent or a substantial improvement in the financial condition of a parent, and the current and prior lifestyles of the children," and must hold a hearing "where the parties' evidentiary submissions disclose the existence of genuine issues of fact." The Second Department found that "the parties' evidentiary submissions raised genuine issues of fact with regard to whether an increased cost of living and expenses related to the children and an increase in the plaintiff's income warranted upward modification" and Supreme Court should have denied the father's motion to dismiss and should have held a hearing. As to counsel fees, the Court held: "***given the presumption that counsel fees should

be awarded to the less monied spouse (*see* Domestic Relations Law §238), the Supreme Court also should have held a hearing on *** defendant's cross motion *** pursuant to Domestic Relations Law §238 ***." The Appellate Division concluded that "Supreme Court providently exercised its discretion in denying that branch of [the mother's] cross motion *** pursuant to 22 NYCRR 130-1.1 for an award of counsel fees based on her contention that *** plaintiff's motion ** to appoint a forensic psychiatrist was frivolous."

M. Modification – 2010 Amendments – Denial Vacated

In Fasano v. Fasano, 164 AD3d 1421 (2d Dept. Sept. 26, 2018), the mother appealed from a June 2017 Supreme Court judgment which denied her motion to modify an October 2012 stipulation, which set the father's child support obligation for two children at $1,500 per month. The October 2012 stipulation varied from the CSSA, which would have required $1,994 per month on the first $130,000 of combined parental income (CPI) and $2,576 on the entire CPI. The stated reason for deviation was to allow the father to retain the marital residence as a place for the children. The wife commenced a divorce action in December 2013, and moved in June 2014 for upward modification, based upon the father's sale of the marital residence and move to a different school district, and significant uninsured health expenses for one child who had been hospitalized for mental illness. On appeal, the Second Department reversed, on the law and the facts, holding that Supreme Court should have granted the motion for upward modification, based upon "a substantial change in circumstances" as defined by DRL 236(B)(9)(b)(2)(i), and remitted for a new determination and calculation under the CSSA.

IV. COUNSEL & EXPERT FEES

A. After Stipulation – Increased

In Licostie v. Licostie, 2019 Westlaw 1782182 (2d Dept. Apr. 24, 2019), the wife

appealed from a September 2017 Supreme Court order which granted her motion for counsel fees only to the extent of $2,500. The parties' stipulation reserved the wife's right to move for counsel fees. The Second Department modified, on the facts and in the exercise of discretion, by increasing the counsel fee award to $7,500, considering "in particular, the disparity in the parties' incomes." To the same effect, also in a case with a stipulation allowing the wife to move for counsel fees, is D'Angio v. D'Angio, 2019 Westlaw 1782227 (2d Dept. Apr. 24, 2019), where the award was increased from $2,500 to $15,000, also in consideration of the disparity in the parties' incomes.

B. After Trial

In Belilos v. Rivera, 164 AD3d 1411 (2d Dept. Sept. 26, 2018), both parties appealed from an October 2015 Supreme Court judgment which awarded the wife maintenance of $5,000 per month for 5 years, restored $150,000 of the wife's inherited separate property, which had been placed in a joint account, to the wife, awarded the wife 25% of the husband's enhanced earning capacity from advanced degrees and certifications and 50% of the husband's business interests, and awarded the wife $75,000 in counsel fees and $15,000 in expert witness fees. The Second Department affirmed. As to the inheritance, the wife established that she received $150,000 from her uncle, which was deposited into a joint account because she had no bank accounts in her name alone, and further, the husband admitted at his deposition that he intended to return the $150,000 to the wife "to make things right." The Appellate Division upheld the 50% award of the business interests, and as to the 25% enhanced earning capacity award, found that the wife "demonstrated that she substantially contributed to the defendant's acquisitions of his advanced degrees and certifications." The Court upheld the maintenance, counsel fee and expert witness fee awards as appropriate exercises of discretion.

In Giallo-Uvino v. Uvino, 2018 Westlaw 5020409 (2d Dept. Oct. 17, 2018), the wife appealed from an April 2016 Supreme Court judgment of divorce which, upon a February 2016 decision of the court made after an inquest, among other things: (1) valued the husband's law practice as of the date of trial and determined that the practice had no value; (2) awarded her only 55% of the net proceeds of the sale ($561,266.75) of the marital residence; (3) declined to award her an attorney's fee and expert fees, and (4) determined that the wife was not entitled to an award of maintenance. The Second Department modified, on the law, on the facts, and in the exercise of discretion: (1) by awarding the wife 70% of the net proceeds of the sale of the marital residence; and (2) by awarding the wife an attorney's fee of $70,000. The parties were married in June 2000, and have one child. The wife worked as a registered nurse, and the husband was an attorney with his own law practice. In July 2012, the wife commenced this action for a divorce and the husband appeared in the action. He failed to appear for the trial in July 2015, and Supreme Court held an inquest. The Appellate Division held that "Supreme Court providently exercised its discretion in valuing the [husband's] law practice as of the date of trial, rather than the date of commencement of the action," given that the wife "failed to establish that the defendant, who was disbarred during the pendency of this action (citation omitted) intentionally lost his license in order to devalue his law practice (citation omitted) *** [and] failed to establish that the defendant's business had any value as of the date of trial." As to maintenance, the Second Department found: "considering the relevant factors, including, inter alia, the duration of the marriage, the present and future earning capacity of the parties, and the ability of the party seeking maintenance to become self-supporting, the Supreme Court did not improvidently exercise its discretion in declining to award maintenance to the plaintiff." The Appellate Division held that "Supreme Court improvidently exercised its discretion in awarding the plaintiff only

55% of the net proceeds of the sale of the marital residence" [and] [b]ased on the circumstances of this case, we find that the plaintiff is entitled to 70% of the net proceeds of the sale of the marital residence." As to counsel fees, the Court concluded that "Supreme Court improvidently exercised its discretion in declining to award the plaintiff an attorney's fee," and a factor to be considered is "whether either party has engaged in conduct or taken positions resulting in a delay of the proceedings or unnecessary litigation (citations omitted)." Here the Second Department found that the husband failed "to timely provide certain financial documentation which unnecessarily prolonged the litigation, [and] the court should have awarded the plaintiff an attorney's fee in the sum of $70,000."

In Gorman v. Gorman, 2018 Westlaw 5274250 (2d Dept. Oct. 24, 2018), the wife appealed from a December 2015 Supreme Court judgment which, after trial, awarded her only $4,500 per month in maintenance for 8 years, distributed marital property, and imputed annual income to her of $26,000, and the husband cross-appealed from so much of the judgment as failed to award him a share of bank accounts, as awarded maintenance, and $20,000 in counsel fees to the wife. The Second Department modified, on the law, on the facts, and in the exercise of discretion, by: (1) decreasing the amount of maintenance to $2,750 per month and making the same tax-free to the wife, but increasing the duration until the earliest of the wife's remarriage, her attainment of the age at which she becomes eligible for full Social Security benefits, or the death of either party; (2) requiring the husband to maintain $500,000 in life insurance for the wife so long as he is obligated to pay maintenance; (3) by directing the husband to provide health insurance for the wife until she becomes eligible for coverage through employment or through Medicare, whichever shall first occur; and (4) providing that the parties' joint checking account and savings accounts ($95,981.18 + $44,458.50), be equally divided between the parties, with a

$1,600 credit to the wife. The parties were married on May 16, 1987. The wife worked as a legal secretary for a period of time, and left the workforce to become a homemaker and to care for the parties' two children (now in their mid-to-late twenties), while the husband worked in various capacities connected with the US military, including defense contracting work in Iraq. The husband commenced the action in August 2011. As to maintenance, the Appellate Division found that "considering the relevant factors, including the ages of the parties, the long duration of the marriage and the extended absence of the defendant from the workforce, the distribution of the marital assets, the parties' respective past and future earning capacities, and the availability of retirement funds and pensions, the Supreme Court providently exercised its discretion in awarding the defendant durational, as opposed to lifetime, maintenance (citations omitted). However, rather than providing for a durational limitation of eight years and subjecting that award to termination upon the plaintiff's remarriage, under the circumstances of this case, the maintenance award should continue until the earliest of the defendant's remarriage, her attainment of the age at which she becomes eligible for full Social Security benefits, or the death of either party (citations omitted). "As to imputed income to the husband of $151,192, the Second Department found that "from 2008 through late 2013, the plaintiff was employed overseas in Iraq and, as a result of such employment, received a significantly augmented salary, enhanced overtime, and no-cost room and board. In December 2013, the plaintiff returned to the United States, taking up residence in Ohio, where he resides with his fiancée. As of the time of trial, the plaintiff was employed by the Department of Defense as a quality assurance inspector at a salary of $81,079 per year. The plaintiff did not submit a current statement of net worth. He acknowledged that his earnings are deposited into a joint checking account with his fiancée and that all of his monthly expenses are shared with his fiancée. The plaintiff also acknowledged that

he regularly gambles, to the point that he has received free hotel accommodations, airfare, vacations (including a cruise), and other free or discounted items because of his frequent gambling. In 2013, he reported gambling winnings of $11,250 on his tax return. He acknowledged winning $1,800 over two days of gambling in September 2014." The Appellate Division concluded that the imputed income to the husband should be $100,000. With regard to imputed income to the wife, the Court stated: "While we agree with the defendant that the Supreme Court should not have imputed income to her based on statistical information from the New York State Department of Labor that was not admitted in evidence at trial (citation omitted), there was evidence, nonetheless, that the defendant had earned $15 per hour as a legal secretary during the early part of the marriage. Even though she has been out of the work force for an extended period of time and does not have a college degree, she is in good health and has a sufficient employment history to warrant the conclusion that she is capable of earning at least the sum of $26,000 annually, which is the amount of income imputed to her by the court." The Second Department concluded on the issue of maintenance that the husband should pay the wife $2,750 per month, "which sum shall be neither tax deductible by the plaintiff nor taxable to the defendant." As to life insurance, the Appellate Division directed the husband "to purchase, pursuant to Domestic Relations Law §236(B)(8)(a), a life insurance policy in the amount of $500,000, designating the defendant as sole irrevocable beneficiary for only as long as the plaintiff is obligated to pay maintenance to the defendant." On the issue of health insurance, the Appellate Division held that Supreme Court "should have directed the plaintiff to provide health insurance for the plaintiff until she becomes eligible for coverage through employment or through Medicare." As to the marital residence, the Court held that "Supreme Court providently exercised its discretion in directing the sale of the marital residence because the parties' children

have reached majority, there is no need of a spouse as a custodial parent to occupy the residence for the children (citation omitted), and neither party submitted a market-based valuation of the marital residence. With regard to the bank accounts, the Court directed and equal division as to their commencement date values, but since the husband "purchased a diamond engagement ring for $3,200 for his fiancée prior to commencement of this action, and failed to prove that it was separate property," the wife is entitled to a 50% credit for the ring's purchase price ($1,600). Finally, the Second Department held that given "the relative financial circumstances of the parties and the relative merits of the parties' positions at trial, the Supreme Court providently exercised its discretion in awarding the defendant $20,000 in attorney's fees."

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."

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."

In Feng v. Jansche, 2019 Westlaw 1028961 (1st Dept. Mar. 5, 2019), both parties appealed from an October 2017 Supreme Court judgment which, upon a July 2017 decision after trial of the wife's 2013 divorce action: (1) distributed 40% of the stipulated valued of the husband's stock options and restricted stock units to the wife; (2) valued the marital funds at $410,696.82; (3) terminated the temporary maintenance award as of July 31, 2017 and declined to award the wife post-divorce maintenance; (4) imputed income of $831,710 to the husband, imposed a CSSA income cap of $400,000 and made the child support award prospective; and (5) awarded the wife $25,000 in counsel fees. The First Department modified, on the law and the facts, to: (1) award the wife 50% of the value of the marital portion of defendant's stock options and restricted stock units; (2) impose a CSSA income cap of $300,000 and award child support retroactive to October 1, 2014; and (3) remand for further proceedings. The Appellate Division held that "[t]o the extent the marital portion of defendant's stock options and GSUs represents compensation, plaintiff's award should be increased from 40% to 50% of the value, or $126,487." With respect to maintenance, the First Department determined that Supreme Court "properly declined to award plaintiff post-divorce maintenance on the grounds that she holds a doctorate in computer science and is working full-time as a data scientist" and correctly terminated the temporary order as of July 2017 when its decision after trial was issued. The Court noted that the duration of temporary maintenance "was one of the factors [Supreme] court considered in determining that further maintenance was not warranted." On the issue of imputed income, the Appellate Division held that Supreme Court "properly imputed income to defendant

based on the average of his total income for the years 2012 through 2014." As to child support, the First Department found that Supreme Court "correctly considered the standard of living the child would have enjoyed had the marriage remained intact in deviating from the statutory cap," but given the fact that the husband was ordered to pay 88% of extracurricular activities, summer camp, and private school, the Court reduced the CSSA income cap to $300,000. With respect to the issue of retroactivity, the Appellate Division agreed with the wife that Supreme Court "erred in making the child support award prospective only (citation omitted). It should be retroactive to October 1, 2014, the date on which plaintiff started receiving court-ordered pendente lite child support." The action was remanded for a determination of retroactive child support owed, including add-on expenses, and whether the husband should pay arrears "in one sum or periodic sums." The First Department upheld the $25,000 counsel fee award, determining that Supreme Court properly considered "the financial circumstances of both parties together with all the other circumstances of the case, which may include the relative merit of the parties' positions," and given that the husband had already paid $120,000 of the wife's counsel fees, the total of $145,000 was more than half of her fees at the time of trial.

In Jankovic v. Jankovic, 170 AD3d 1174 (2d Dept. Mar. 27, 2019), the husband appealed from a July 2016 Supreme Court judgment, rendered upon a January 2015 decision after trial in the husband's 2011 action, which awarded the wife $333 per month in non-durational maintenance and counsel fees of $15,000. The Second Department affirmed. The parties were married in 1978 and all of their children are emancipated. As to maintenance, the Appellate Division held that Supreme Court property considered "the 30-year duration of the marriage, the age of the defendant, her health, and her limited education, as well as her limited future earning capacity and the disparity in the parties' respective incomes." With respect to counsel fees, the

Second Department found that Supreme Court was within its discretion to consider the disparity in the parties' incomes and "particularly the plaintiff's refusal to pay defendant any of the sums awarded to her under a pendente lite order in the action, the complexity of the issues involved, and the relative merits of the parties' positions."

C. After Trial – Reduced

In Button v. Button, 2018 Westlaw 5292748 (3d Dept. Oct. 25, 2018), the husband appealed from a February 2017 Supreme Court judgment, which determined custodial and visitation issues, directed child support of $525 bi-weekly, counsel fees of $7,500 to the wife, equitable distribution of debt and the husband's NYS pension, and maintenance of $550 bi-weekly. The parties were married in October 2006 and have 3 children, born in 2012, 2013 and 2015. The parties were in their mid-30s at the time of trial and both in good health. The wife moved with the children from the marital residence in April 2015 and commenced this action in June 2015. Supreme Court continued temporary orders of custody and child support that had been entered in Family Court. The Appellate Division rejected the husband's argument that a reduction of his visitation was error, but agreed that Supreme Court erred by requiring that he provide all transportation and by failing to provide specific times for holiday visits. The Third Department noted "that it was unnecessary for Supreme Court to consider whether a change in circumstances had occurred because the temporary custody order was issued without the benefit of a full plenary hearing (citations omitted) and, further, did not address holiday and vacation schedules." The Court noted that the wife and children live with the wife's parents — a 45-minute drive from the marital residence where the husband continues to reside and that she "did not have a vehicle and arranged for her transportation needs entirely by borrowing vehicles from her parents and a sibling." As of the time of trial, the wife was to graduate from nursing school

in May 2018 and begin full-time employment as a registered nurse. The Appellate Division did not disturb the schedule, given that the husband received an additional 4 weeks in the summer and also received a holiday schedule, but found: "In light of the 1½-hour round trip between the parties' residences, the requirement that the husband provide all transportation unduly impairs his mid-week dinner visit; thus, we modify the judgment to provide that the parties shall equally share transportation for the mid-week dinner visits. We also modify the holiday and vacation schedules to include exchange times, as follows: Christmas Eve shall begin at 6:00 p.m. on December 23 and end at 8:00 p.m. on December 24; Christmas Day shall begin at 8:00 p.m. on December 24 and end on December 26 at 8:00 a.m., when the Christmas vacation begins; all other holidays shall begin at 6:00 p.m. the day preceding the holiday and end at 8:00 a.m. the day after the holiday; and the winter and spring school vacations shall begin at the end of the last school day prior to the vacation period and shall end at 6:00 p.m. on the last day of the vacation period." With regard to equitable distribution, the Appellate Division noted that the former marital residence had stipulated equity of $36,600, and the husband has a defined benefit pension plan with New York State. There was additional marital debt, which Supreme Court ordered be assumed $40,106 by the husband and $3,430 by the wife. The wife wanted the residence to be sold, but Supreme Court awarded the same, with its debt, to the husband. Supreme Court "appeared to equally divide the marital portion of the husband's New York retirement according to the *Majauskas* formula." With regard to the marital debt, the Third Department stated: "we cannot say that Supreme Court's distribution of the marital home and the parties' debt is unjust or inequitable." As to the issue of the pension, the husband argued that the court erred in ordering that he provide the wife with "the minimum survivor benefit" for his pension plan. The Appellate Division stated: "We take judicial notice of the applicable rules of the New York State and Local

Retirement System. A participant may designate a former spouse to receive a portion of the preretirement ordinary death benefit and may name others to receive the remainder of that benefit. However, only one beneficiary, or alternate payee, may be named for retirement benefits. We agree with the husband that it would be inequitable to require that he name the wife as a beneficiary of his retirement benefits and thereby preclude him from sharing those benefits with any other person, such as a subsequent spouse. In that regard, we note that the marital portion of the pension is small, the parties are relatively young and the wife has the prospect of gaining employment that should enable her to provide for retirement. Therefore, we modify the judgment by specifically awarding the wife one half of the marital portion of the husband's pension according to the *Majauskas* formula, including one half of the marital portion of the ordinary preretirement death benefit, but excluding any requirement that the husband elect any option that would continue postretirement benefits to the wife following his death." The Third Department agreed with the husband that the maintenance award was excessive and held: "Although Supreme Court properly awarded maintenance to the wife — who had been the primary caretaker of the children since the birth of the oldest child — while she obtained training as a registered nurse that would allow her to obtain employment and become self-sufficient, the maintenance award must be reassessed in light of its failure to consider the wife's needs and the husband's ability to pay." The Court noted that "neither party could continue to enjoy the predivorce standard of living, which was sustained only by incurring substantial debt, and the parties' negative net worth established that they were in significant financial distress at the time of trial. The obligations imposed on the husband by the judgment total approximately $48,806 annually. Payment of those obligations from his gross earnings of $73,083 would leave him with very little income to cover his own living expenses. At the time of trial, the wife's own living

expenses were modest. She incurred no housing expenses because she and the children were residing with her parents, and she had no vehicle of her own. Thus, her direct expenses were limited to gas, food and clothing. Accordingly, we reduce the amount of the maintenance award to $200 biweekly, retroactive to the date of commencement of the action and continuing until July 1, 2018." The Court recalculated the child support award, given reduced maintenance, and found that the presumptively correct amount of the husband's basic child support obligation for three children is $694.81 biweekly. With respect to counsel fees, the Appellate Division agreed that "Supreme Court abused its discretion by awarding the wife $7,500 in counsel fees." The Court concluded: "As aptly noted by Supreme Court, the marital debt exceeded the net value of the parties' assets; indeed, upon equitable distribution, each has a negative net worth. However, inasmuch as the husband was employed and the wife was unemployed while she completed her nursing education, Supreme Court properly found that the wife was the less monied spouse. Although the husband's income is greater than the wife's, his earnings are modest and are largely devoted to payment of maintenance, child support and marital debt. The fact of the matter is that neither party has sufficient assets or income for payment of counsel fees. Although an award of counsel fees to the wife was appropriate, upon consideration of the parties' financial circumstances, we reduce the award to $3,750."

D. Reversed – Debt, No Monied Spouse

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."

E. Enforcement and Modification of Child Support – Granted

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."

F. Enforcement of Child Support – Granted

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."

G. Sanctions; iPad Access Not Disclosed

In Strauss v. Strauss, 2019 Westlaw 1768592 (1st Dept. Apr. 23, 2019), the husband appealed from a February 2018 Supreme Court order, which granted the wife's motion for sanctions against him and his counsel, and from a May 2018 order of the same court which

awarded her attorneys $180,000 in counsel fees. The First Department affirmed the sanctions order and modified the counsel fee order, on the law and the facts, by vacating the award and remitting for a hearing thereon. The husband obtained access to the wife's iPad and private text messages, "falsely told her that he did not have the iPad and that it was lost, and provided the text messages to his counsel, who admittedly failed to disclose to opposing counsel or the court the fact that he was in possession of the iPad and text messages, until two years later when they disclosed that they intended to use the text messages at trial." The Appellate Division held that the wife "demonstrated that such conduct implicated criminal laws and, while [the husband] asserts that he needed to preserve the information for use in the custody trial, he also concedes that he had other evidence that would have supported his position at trial. Thus, there would have been no reason to rely on the text messages other than to harass and embarrass plaintiff (22 NYCRR §130-1.1[c][2]). The foregoing frivolous conduct supports the imposition of sanctions (22 NYCRR §130-1.2)." With regard to the issue of counsel fees, the First Department noted that the wife's motion did not include an affirmation from her attorneys explaining its invoices, and held that Supreme Court "insufficiently explained in its decision."

H. Submission Inadequate

In Prochilo v. Prochilo, 2018 Westlaw 5623823 (2d Dept. Oct. 31, 2018), the wife appealed from a March 2016 Supreme Court order, which denied her motion for counsel fees. The Second Department affirmed. The parties were married in August 2006 and the wife commenced the divorce action in May 2011. The parties' June 2015 stipulation resolved all issues except counsel fees; the wife had already received $24,000 in temporary fees. The wife argued that she was entitled to additional attorney's fees because the husband "was the monied spouse and he engaged in obstructionist conduct that prolonged litigation." The Appellate

Division held: "We see no basis to disturb the court's denial of the plaintiff's motion for an award of attorney's fees since the plaintiff failed to provide updated financial information and based her motion on a three-year-old net worth statement.

V. CUSTODY & VISITATION

A. Alcohol Abuse

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].

B. Domestic Violence; Interference with Parental Relationship

In Matter of Wojciulewicz v. McCauley, 2018 Westlaw 5875655 (4th Dept. Nov. 9, 2018), the father appealed from a February 2017 Family Court order which awarded primary legal and physical custody of the children to the mother. The Fourth Department affirmed, finding a sound and substantial basis in the record, noting that the mother "has been a victim of

domestic violence, first with the father when they resided together, and then with an abusive live-in boyfriend with whom she had other children." The Appellate Division found: "There are two critical factors that weigh in favor of the mother: the father's use of excessive punishment, including excessive corporal punishment, and his failure to foster the children's relationship with the mother. The record reflects multiple instances of excessive punishment from the father, the most serious of which involved striking one of the children multiple times with a belt. *** Additionally, the father made a concerted effort to interfere with contact between the children and the mother when the children were in his custody, as well as to interfere with contact between the children in his custody and their siblings. The record establishes that, for a period of six months, the mother was only able to see two of the children if she went to their school and saw them during lunch and the father prevented phone contact between the mother and the children."

C. 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."

D. Father – Interference – Absconding with Child

In Matter of Jarvis v. Lashley, 169 AD3d 1043 (2d Dept. Feb. 27, 2019), the mother appealed from a February 2017 Family Court order, which granted sole custody of a child born in 2011 to the father. The Second Department affirmed, noting that the parents lived together until the child was 4 years old, when in October 2015, the mother took the child to Georgia without telling the father. The Appellate Division found that the mother: "willfully interfered with the relationship between the father and the child by absconding with the child for three months and not facilitating contact between the father and the child during that time; *** [and] failed to foster a positive relationship between the child and the father after returning to New York."

E. Modification – Education; Hygiene; Rejection of Therapy; School Suspensions

In Matter of Richard I., Jr., v. Darcel I., 2019 Westlaw 1799257 (1st Dept. Apr. 25, 2019), the mother appealed from an April 2018 Family Court order which, after a hearing, modified a prior order so as to grant the father sole legal and physical custody of the subject child. The First Department affirmed, finding that while in the mother's custody, "the child struggled in school, was often late to school and had poor hygiene. The child was also suspended twice from school for violent behavior, and the mother failed to enroll him in therapy despite recommendations by the school. On the other hand, the father worked with the school to help the child improve, enrolled the child in individual therapy and participated in sessions with him, and consistently provided for the child's care and well-being (citations omitted)." The Appellate Division noted:

"The forensic evaluator found that both parents had a strong relationship with the child, but that the father was more willing than the mother to facilitate the noncustodial parent's relationship with the child (citation omitted)."

F. 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 claims 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."

G. Modification – Summary Judgment – Mental Health, Neglect

In Matter of Elisa N. v. Yoav I., 2019 Westlaw 1178745 (1st Dept. Mar. 14, 2019), the father appealed from a January 2016 Family Court order, which granted the mother's summary judgment motion upon her petition to modify an October 2014 custody order, and awarded her sole custody of the subject children. The October 2014 order was rendered following a hearing, and granted supervised visitation to the father "without end unless the father could demonstrate

that he was receiving treatment for his mental illness within the next six months." The First Department affirmed, holding that "a full plenary hearing was not required because [Family Court] possessed ample information to render an informed decision on the children's best interests and because the father offered no proof that he was in compliance with his treatment of his mental health issue." The Appellate Division determined that the "neglect finding against [the father] constituted a change in circumstances warranting a modification of the prior custody arrangement" and it was clear that the father "did not get such treatment and that the safety risk to the children has not been mitigated" since the prior order.

H. 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."

I. 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."

J. Modification - Without Hearing, Reversed

In Matter of Michael G. v Katherine C., 2018 Westlaw 6537034 (1st Dept. Dec. 13, 2018), the mother appealed from a December 2017 Family Court order, which granted the father's modification petition and awarded him sole legal and physical custody of the child, suspended the mother's access for a year, and prohibited the mother from filing any modification

petitions for a year. The First Department modified, on the law, by reversing so much of the order which suspended the mother's access to the child, and remanded for further proceedings. The Appellate Division noted that there were sufficient alleged changed circumstances, including: the father's claim that the mother had unilaterally prevented him from exercising his visitation under the prior order; the statement by ACS counsel that a report that the father had abused the child was unfounded; and the concerns of the father and the AFC that the mother had coached the then three-year-old child to make false allegations. The Appellate Division held that Family Court "erred when, without holding an evidentiary hearing, it made a final order transferring physical and legal custody to the father and suspending all contact between the mother and the child for a year," where the mother had been the child's primary caretaker. The Court concluded that Family Court's prohibition on future petitions, given "no evidence that the mother had a history of relitigating the same claim or otherwise engaging in frivolous litigation against the father," was not appropriate.

In Matter of Williams v. Jenkins, 2018 Westlaw 6519193 (2d Dept. Dec. 12, 2018), the father appealed from a March 2016 Supreme Court order which, without a hearing, granted the mother's June 2015 petition for sole legal and physical custody of the subject child and for permission to relocate with the child to Illinois, and suspended the father's parental access with the child. The Second Department reversed, on the law, and remitted for a hearing on the mother's petition before a different Justice and a new determination, pending which hearing, Supreme Court was directed to "expeditiously establish a new parental access schedule for the father, and the provisions of the order entered March 3, 2016, pertaining to the child's relocation shall otherwise remain in effect." The parties are unmarried and have one child together. A May 2014 Supreme Court order provided for joint legal custody with physical custody to the mother,

and directed that neither parent could relocate with the child outside New York City or the State of New Jersey, without the written consent of the other parent and the establishment of a mutually agreeable post-relocation parental access schedule, or court approval for relocation. The father claimed that the mother did relocate without court approval. The Appellate Division found that prior to a March 2016 court appearance "the father purportedly appeared at the courthouse and, inter alia, screamed and used inappropriate language at courthouse staff. Without conducting a hearing, the Supreme Court immediately entered an order awarding the mother sole legal and physical custody of the child, and permission to relocate with the child to Illinois." The March 2016 order further provided: "due to the father's disruptive and obstreperous behavior in the court room, having cursed at court personnel . . . all [of the father's parental access is] suspended," and that the father could petition for parental access upon completion of a drug treatment program. The Second Department concluded that the order "serve[d] more as a punishment to the [father] for h[is] misconduct than as an appropriate custody award in the child[ ]'s best interests. (Citation omitted). "

K. Refusal to Allow GAL to Meet Father's Girlfriend; Zones of Decision Making Rejected

In Amley v. Amley, 169 AD3d 605 (1st Dept. Feb. 26, 2019), the father appealed from an October 2016 Supreme Court order after trial, which awarded the mother sole custody of the parties' daughter. The First Department affirmed, noting that the father had not seen the child since March 2016 "due to his refusal to satisfy the court's precondition that he allow [the child's guardian ad litem] to meet his girlfriend, an indication that he apparently cares more about his own needs than those of his child." The Appellate Division held that Supreme Court "correctly set aside the parties' stipulations, which appear to have allocated arenas of decision-making to

each parent, because the stipulations required cooperation and coordination between the parents, which the court correctly found impeded by intense animosity at this juncture."

L. Relocation - Granted (FL) – Initial Custody Determination

In Matter of Ivan J. v. Kathryn G., 164 AD3d 1151 (1st Dept. Sept. 25, 2018), the father appealed from a November 2017 Family Court order which, after a nine day hearing, granted the mother's petition for custody and permitted her to relocate with the parties' child to Florida. The First Department affirmed, noting that where, as here, there is no prior custody order, the Tropea factors "do not govern, and relocation should be considered as one factor in determining the child's best interests." The Appellate Division found that the mother's "plan for caring for the child reflected an ability and willingness to be regularly and fully available for the child in ways that the father cannot and does not." The mother had obtained employment in Florida with the prospect of increasing salary and responsibility, and, further the child had a close relationship with a sister in Florida.

M. 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."

N. Relocation - Radius Clause Not Determinative

In Matter of Jaimes v. Gyerko, 2018 Westlaw 5274177 (2d Dept. Oct. 24, 2018), the father appealed from a June 2017 Family Court order which, without a hearing, granted the mother's motion to dismiss his petition to modify a March 2014 stipulated order, to enjoin her from relocation with the parties' children from Mamaroneck to Woodbridge, CT, and to appoint an attorney for the children. The Second Department reversed, on the law, denied the mother's motion, and remitted to Family Court for a hearing on the father's petition, holding that while the proposed relocation was within the 55 mile radius permitted by the March 2014 order, the father argued that the relocation would not be in the children's best interests. Therefore, the Appellate Division held that Family Court should not have granted a summary dismissal of the father's petition pursuant to CPLR 3211(a)(1), because the parties' agreement was "not dispositive, but rather, is a factor to be considered along with all of the other factors a hearing court should consider when determining whether the proposed relocation is in the best interests of the children."

O. School Change – Denied

In Verfenstein v. Verfenstein, 95 NYS3d 856 (2d Dept. Apr. 3, 2019), the mother appealed from an August 2017 Supreme Court order, which, after a hearing, denied the mother's motion for permission to enroll the child in the United Nations International School (UNIS), a

private school in Manhattan. The parties married in 2009 and had one child, who is biracial, and separated in 2010, at which time they agreed that the child would live with the mother in Queens. When the child began kindergarten, the parties agreed upon a public school near the father's home in Port Washington (Nassau County) and that the child would live with him on weekdays during the academic year. The father commenced the divorce action in 2016 and the mother moved in August 2016 for permission to enroll the child in UNIS, "contending that the child's educational and emotional well-being as a biracial child would be better suited by being in an ethnically and cultural diverse academic environment." An October 2016 stipulation resolved custody issues other than the school choice and a forensic evaluation was ordered. The Second Department affirmed, holding that the mother's contention was not supported by the evidence, and noting that the mother "conceded that she did not know the percentage of biracial children attending UNIS" and that the child had excelled academically. The Court concluded: "No evidence was presented that the child had been denied his biracial identity in the Port Washington school district, or that his status as a biracial child in that school district had hindered his academic or personal development."

P. Sole - Domestic Violence, Relocation (CA) Permitted

In Levitin v. Levitin, 2018 Westlaw 6332529 (2d Dept. Dec. 5, 2018), the father appealed from a September 2017 Supreme Court judgment of divorce, which, upon a November 2016 decision after trial, among other things, awarded the mother sole custody of the parties' 3 children and permission to relocate to California. The Second Department modified the judgment, on the facts and in the exercise of discretion, only by: (1) adding thereto a provision stating that with respect to the Jewish holidays of Rosh Hashanah, Succoth, Hanukkah, and Purim, commencing upon the close of the school day for all three children on the day prior to the

holiday and ending on the day prior to the children's return to school, the defendant shall have the children on all even numbered years and the plaintiff shall have the children on all odd numbered years, and (2) adding thereto a provision directing that the defendant's telephone contact with the children on Friday evenings and the beginning of Jewish holidays shall be one hour prior to sunset in New York City. The Appellate Division noted that "[t]he plaintiff [mother] alleged that she was the victim of domestic violence, including rape by the defendant" and Supreme Court "credited the plaintiffs allegations of domestic violence and rape." The Second Department held that "contrary to the defendant's contention, the Supreme Court properly considered the allegations of domestic violence, along with all the other relevant factors, in awarding sole custody of the parties' children to the plaintiff" and that "plaintiff's proposed relocation to California with the parties' children is in the best interests of the children." The Appellate Division concluded that the mother demonstrated that the father "ostracized and alienated her from their Orthodox Jewish community in New York, that she could not meet the family's living expenses in New York, and if she were permitted to relocate, she would receive, from her parents, financial assistance and assistance with child care, as well as the opportunity for her and the children to live with her parents rent-free."

Q. Summary Judgment Suspending Visits – Reversed

In Matter of Kenneth J. v. Lesley B., 2018 Westlaw 4778935 (1st Dept. Oct. 4, 2018), the father appealed from a June 2017 Family Court order, which granted the mother's motion for summary judgment and suspended all visitation and contact of any kind between the parties' child and he. The First Department reversed, and restored the pending petitions, holding that Family Court erred in modifying the existing order without a hearing, in reliance upon an in camera interview with the child, motion papers, unsworn letters from a therapist, and an unsworn

and uncertified mental health report, which was "not in admissible form, as is required on a motion for summary judgment."

R. Third Party – Grandparent v. Great Grandparent

In Matter of Cornell SJ v. Altemease RJ, 164 AD3d 1184 (1st Dept. Sept, 27, 2018), the children's (ages 9 and 11) adoptive mother, their maternal great-grandmother, appealed from a June 2017 Family Court order which granted guardianship to her son, the children's grandfather. The First Department modified, on the law and the facts, to the extent of remanding to Family Court to establish visitation for the great-grandmother. The Appellate Division found that the great-grandmother abandoned the children for 5 days without any adult care after an argument with her son, and she returned briefly and then left again and failed to contact the children, provide for them or visit them for almost 11 months. The Court found that the grandfather had been the children's primary caregiver and took care of all of their needs. The First Department concluded that Family Court erred by conditioning visitation upon the children's consent and the parties' agreement.

S. Third Party – Grandparent – Denied

In Miner v. Miner, 164 AD3d 1620 (4th Dept. Sept. 28, 2018), the maternal grandparents and the attorney for the child appealed from a February 2018 Family Court order, which granted sole custody of the children to the father. The Fourth Department affirmed, holding that the grandparents failed to establish extraordinary circumstances based upon an "extended disruption of custody," given that the longest period they had custody of the children was 7 months, following which the father regained custody. The Appellate Division found that the grandparents failed to establish standing by reason of alleged domestic violence against the mother, given that the charges against the father were dismissed.

In Matter of Jones v. Laubacker, 2018 Westlaw 6714408 (4th Dept. Dec. 21, 2018), the parents in an intact family appealed from a May 2018 Family Court order, which, following a hearing, granted the paternal grandmother visitation with two children, including an infant born approximately 5 months following the filing of her initial petition, for two weekends per month. The Family Court order was stayed pending appeal. The Fourth Department reversed, on the law, and dismissed the petitions, finding that Family Court's order "lacks a sound and substantial basis in the record." Prior to a June 25, 2017 incident at the grandmother's home, the older child had at least one overnight visit at the grandmother's home every weekend. On that date, the father and his brother "engaged in a heated argument, which involved yelling," and the father told the grandmother, "[N]o more weekends." An OCFS hot line report was made that same day. CPS investigated and the report was determined to be unfounded. The grandmother filed her first petition on June 28, 2017, which "accused the father of committing 'an incident of domestic violence' on June 25," and noted that a CPS investigation of the incident had commenced. A police officer interviewed the grandmother, who urged him to arrest the father for harassment, but the District Attorney declined to press charges. On November 24, 2017 the younger of the two subject children was born, prompting the grandmother to file a second petition seeking visitation. The Appellate Division noted that the Court of Appeals has emphasized that "the courts should not lightly intrude on the family relationship against a fit parent's wishes. The presumption that a fit parent's decisions are in the child's best interests is a strong one," citing Matter of E.S. v. P.D., 8 NY3d 150, 157 (2007). The Fourth Department found: "The parents here are fit. *** There was virtually no evidence to the contrary." The Appellate Division concluded: "Although the grandmother and the child have an extensive preexisting relationship, the grandmother exhibited a willingness to use her position in the legal system to undermine the

parental relationship by initiating Family Court proceedings almost immediately, rather than making a good faith attempt to fix her family relationships without resorting to litigation. That evidence makes it difficult to draw any conclusion other than that the grandmother 'is responsible for escalating a minor incident into a full-blown family crisis, totally ignoring the damaging impact [her] behavior would have on the [family relationships] and making no effort to mitigate that impact' (citation omitted). There is now palpable animosity between the parties. Approximately three months after the litigation commenced, the parents legally changed their hyphenated surname to remove the grandmother's surname. *** Although animosity alone is not a sufficient reason to deny visitation (citation omitted), here, the animosity threatens to disrupt the harmonious functioning of the family unit."

T. Third Party – Maternal Aunt – Alcohol Abuse; Supervised Visitation to Father

In Matter of Haims v. Lehmann, 2019 Westlaw 1782129 (2d Dept., Apr. 25, 2019), the maternal aunt appealed from a December 2017 Family Court order which, after a hearing: awarded her joint legal custody with the father (sole physical custody to her) and failed to award her sole legal custody of a daughter born in November 2011 to her sister (deceased in June 2015) and the father; discontinued the father's therapeutic supervised visitation; and awarded the father unsupervised visitation, including every weekend, Friday through Sunday, effective August 2018. The father cross-appealed from so much of the same order as awarded joint legal custody and sole physical custody to the maternal aunt. The Second Department modified, on the law and the facts, by: (1) awarding the maternal aunt sole legal custody; (2) reinstating the father's therapeutic supervised visitation and deleting the unsupervised visitation; and (3) remitting to Family Court to specify a schedule for the father's aforesaid visitation. The parents separated in March 2013 and the child primarily resided with the mother until May 2015, when the mother

was hospitalized and she stayed with the maternal aunt. Following the mother's death in June 2015, the child remained with the maternal aunt and her family. The maternal aunt filed for guardianship in August 2015, which proceeding was later converted, upon consent, to a custody proceeding. The Appellate Division held that "the maternal aunt sustained her burden of demonstrating the existence of extraordinary circumstances" including the evidence that "the father had abused alcohol for nearly 20 years, had a history of relapses during prior attempts to attain sobriety, and was only at the beginning stages of treatment to achieve sobriety during this most recent period of abstinence." The Second Department determined that Family Court "should not have awarded joint legal custody of the child to the parties given the hostility and antagonism between them" and "should have awarded sole legal custody of the child to the maternal aunt." With regard to the father's visitation, the Court concluded that Family Court's award "lacked a sound and substantial basis in the record."

U. Third Party – Standing – Equitable Estoppel

In Matter of Chimienti v. Perperis, 2019 Westlaw 1646344 (2d Dept. Apr. 17, 2019), Perperis, the biological mother of two children born in September 2014 and May 2016, appealed from a March 2018 Family Court order providing for joint custody with physical custody and final decision-making authority to her upon consent, based upon a September 2017 order rendered following a hearing and which determined that Chimienti had established standing via equitable estoppel. The Second Department affirmed, noting that the Court of Appeals in Matter of Brooke S.B. "expressly left open the issue of whether, in the absence of a preconception agreement, a former same-sex, nonbiological, nonadoptive partner of a biological parent could establish standing based upon equitable estoppel." The Appellate Division held that Family Court's finding that Chimienti "demonstrated by clear and convincing evidence that Perperis

created and fostered a parent-child relationship between Chimienti and the children is entitled to great weight" upon credibility grounds. The parties began a relationship in 2014 before the older child was conceived and remained together until early 2017, after the birth of the younger child in May 2016. Perperis allowed Chimienti access to the children for about 4 months following their separation, but then refused to allow access, and these proceedings ensued. The Court concluded by noting that Perperis "held out ***[Chimienti] to others as the co-parent of the children."

V. UCCJEA - Another Proceeding Pending

Matter of Kawisiiostha N. v. Arthur O., 170 AD3d 1445 (3d Dept. Mar. 28, 2019), the mother appealed from an August 2017 Family Court order which, *sua sponte*, dismissed her July 2017 petition seeking custody of 2 children born in 2009 and 2010, upon the ground that another court had continuing exclusive jurisdiction. The parents and children lived in the territory of the Pawnee Nation of Oklahoma, until December 2015, when the mother moved to NY with the children without the father's consent. In December 2015, the father filed for custody in the Tribal Court; the mother failed to appear and the Tribal Court granted the father full custody in February 2017. Family Court, upon the father's petition, enforced the Tribal Court order directing the return of the children to the Pawnee Nation. The Third Department affirmed, holding that a New York court may not exercise custody jurisdiction where another proceeding is pending in another state, unless that court terminates the proceeding, DRL 76-e(1), a circumstance not here present.

W. UCCJEA – Home State

In Matter of Montanez v. Tompkinson, 2018 Westlaw 6332479 (2d Dept. Dec. 5, 2018), the father appealed from a February 2018 Family Court order, which declined jurisdiction on the

ground that New York is an inconvenient forum and stayed the proceeding pending the reopening of the mother's custody proceeding in Hawaii. The Second Department reversed, on the facts and in the exercise of discretion, and remitted to Family Court. The child was born in New York in May 2016 and in early February 2017, the mother moved to Hawaii with the child, after the father allegedly perpetrated acts of domestic violence against her in the child's presence. On February 7, 2017, ACS commenced a neglect proceeding against the father in Family Court. The mother sought a temporary order of protection in Hawaii Court several weeks later. In May 2017, the father filed for custody in Family Court but was unable to serve the mother until December 2017. In August 2017, the mother filed for custody in Hawaii. The Hawaii Court, apparently unaware of either the neglect petition or the father's custody petition in New York, and upon the father's default, awarded the mother, among other things, sole legal and physical custody. The neglect petition was settled in January 2018, at which time Family Court learned of the Hawaii proceeding. Family Court conferred with the Hawaii Court, and learned that the father was personally served with the mother's petitions. Family Court then declined to exercise jurisdiction, on the ground that New York is an inconvenient forum and that Hawaii is a more appropriate forum, pursuant to Domestic Relations Law §76-f. The Appellate Division determined that Family Court speculated that the Hawaii Court would "likely entertain an application by the father to vacate his default, and then proceed on the merits of the mother's petition." The Second Department held that New York was the child's home state pursuant to the UCCJEA, and, therefore, the Hawaii Court lacked subject matter jurisdiction to make determinations on the mother's custody petition. The Court reasoned that Domestic Relations Law § 76-f(3) provides: "[i]f a court of this state determines that it is an inconvenient forum and that a court of another state is a more appropriate forum, it shall stay the proceedings *upon*

condition that a child custody proceeding be promptly commenced in another designated state and may impose any other condition the court considers just and proper" (emphasis added). The statute, on its face, presumes that a child custody proceeding *will be* commenced in the designated state, not that there already have been child custody proceedings conducted in that state. Here, the Family Court stayed the father's custody proceeding 'pending the *reopening* of the mother's custody proceeding in Hawaii' (emphasis added). Merely reopening the mother's custody proceeding in Hawaii does not ensure that the father will not be prejudiced by the evidence previously received in Hawaii without his participation." The Appellate Division concluded: "Therefore, the Family Court should not have declined to exercise jurisdiction and designated Hawaii as a more appropriate forum without first being assured by the Hawaii Court that all of its prior orders issued without subject matter jurisdiction were vacated. Further, any stay of the father's New York custody proceeding should have been upon the condition that child custody proceedings be promptly recommenced in Hawaii such that all parties would have the opportunity to be heard in a hearing de novo (*see* Domestic Relations Law §76-f[3])."

In Matter of Dean v. Sherron, 2018 Westlaw 6714141 (4th Dept. Dec. 21, 2018), the mother appealed from a September 2017 Family Court order, which dismissed her custody petition for lack of jurisdiction. The Fourth Department reversed, on the law, reinstated the petition and remitted to Family Court for further proceedings. The Appellate Division noted that a "period of temporary absence during the six-month time frame is considered part of the time period to establish home-state residency" pursuant to DRL §75-a[7] and that if a parent wrongfully removes a child from a state, the time following the removal is considered a temporary absence. The Fourth Department found that there were "disputed issues of fact whether the child's four-or five-month stay in North Carolina constituted a temporary absence

from New York State, in light of allegations that respondent father withheld the child from the mother for purposes of establishing a 'home state' in North Carolina (citations omitted) and whether the mother's absence from New York State interrupted the child's six-month pre-petition residency period required by Domestic Relations Law §76 (1) (a)."

X. 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.

Y. 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.

Z. 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."

AA. Visitation – Transportation Responsibility

In Button v. Button, 2018 Westlaw 5292748 (3d Dept. Oct. 25, 2018), the husband appealed from a February 2017 Supreme Court judgment, which determined custodial and visitation issues, directed child support of $525 bi-weekly, counsel fees of $7,500 to the wife, equitable distribution of debt and the husband's NYS pension, and maintenance of $550 bi-weekly. The parties were married in October 2006 and have 3 children, born in 2012, 2013 and 2015. The parties were in their mid-30s at the time of trial and both in good health. The wife moved with the children from the marital residence in April 2015 and commenced this action in June 2015. Supreme Court continued temporary orders of custody and child support that had been entered in Family Court. The Appellate Division rejected the husband's argument that a reduction of his visitation was error, but agreed that Supreme Court erred by requiring that he

provide all transportation and by failing to provide specific times for holiday visits. The Third Department noted "that it was unnecessary for Supreme Court to consider whether a change in circumstances had occurred because the temporary custody order was issued without the benefit of a full plenary hearing (citations omitted) and, further, did not address holiday and vacation schedules." The Court noted that the wife and children live with the wife's parents — a 45-minute drive from the marital residence where the husband continues to reside and that she "did not have a vehicle and arranged for her transportation needs entirely by borrowing vehicles from her parents and a sibling." As of the time of trial, the wife was to graduate from nursing school in May 2018 and begin full-time employment as a registered nurse. The Appellate Division did not disturb the schedule, given that the husband received an additional 4 weeks in the summer and also received a holiday schedule, but found: "In light of the 1½-hour round trip between the parties' residences, the requirement that the husband provide all transportation unduly impairs his mid-week dinner visit; thus, we modify the judgment to provide that the parties shall equally share transportation for the mid-week dinner visits. We also modify the holiday and vacation schedules to include exchange times, as follows: Christmas Eve shall begin at 6:00 p.m. on December 23 and end at 8:00 p.m. on December 24; Christmas Day shall begin at 8:00 p.m. on December 24 and end on December 26 at 8:00 a.m., when the Christmas vacation begins; all other holidays shall begin at 6:00 p.m. the day preceding the holiday and end at 8:00 a.m. the day after the holiday; and the winter and spring school vacations shall begin at the end of the last school day prior to the vacation period and shall end at 6:00 p.m. on the last day of the vacation period." With regard to equitable distribution, the Appellate Division noted that the former marital residence had stipulated equity of $36,600, and the husband has a defined benefit pension plan with New York State. There was additional marital debt, which Supreme Court ordered be

assumed $40,106 by the husband and $3,430 by the wife. The wife wanted the residence to be sold, but Supreme Court awarded the same, with its debt, to the husband. Supreme Court "appeared to equally divide the marital portion of the husband's New York retirement according to the *Majauskas* formula." With regard to the marital debt, the Third Department stated: "we cannot say that Supreme Court's distribution of the marital home and the parties' debt is unjust or inequitable." As to the issue of the pension, the husband argued that the court erred in ordering that he provide the wife with "the minimum survivor benefit" for his pension plan. The Appellate Division stated: "We take judicial notice of the applicable rules of the New York State and Local Retirement System. A participant may designate a former spouse to receive a portion of the preretirement ordinary death benefit and may name others to receive the remainder of that benefit. However, only one beneficiary, or alternate payee, may be named for retirement benefits. We agree with the husband that it would be inequitable to require that he name the wife as a beneficiary of his retirement benefits and thereby preclude him from sharing those benefits with any other person, such as a subsequent spouse. In that regard, we note that the marital portion of the pension is small, the parties are relatively young and the wife has the prospect of gaining employment that should enable her to provide for retirement. Therefore, we modify the judgment by specifically awarding the wife one half of the martial portion of the husband's pension according to the *Majauskas* formula, including one half of the marital portion of the ordinary preretirement death benefit, but excluding any requirement that the husband elect any option that would continue postretirement benefits to the wife following his death." The Third Department agreed with the husband that the maintenance award was excessive and held: "Although Supreme Court properly awarded maintenance to the wife — who had been the primary caretaker of the children since the birth of the oldest child — while she obtained training

as a registered nurse that would allow her to obtain employment and become self-sufficient, the maintenance award must be reassessed in light of its failure to consider the wife's needs and the husband's ability to pay." The Court noted that "neither party could continue to enjoy the predivorce standard of living, which was sustained only by incurring substantial debt, and the parties' negative net worth established that they were in significant financial distress at the time of trial. The obligations imposed on the husband by the judgment total approximately $48,806 annually. Payment of those obligations from his gross earnings of $73,083 would leave him with very little income to cover his own living expenses. At the time of trial, the wife's own living expenses were modest. She incurred no housing expenses because she and the children were residing with her parents, and she had no vehicle of her own. Thus, her direct expenses were limited to gas, food and clothing. Accordingly, we reduce the amount of the maintenance award to $200 biweekly, retroactive to the date of commencement of the action and continuing until July 1, 2018." The Court recalculated the child support award, given reduced maintenance, and found that the presumptively correct amount of the husband's basic child support obligation for three children is $694.81 biweekly. With respect to counsel fees, the Appellate Division agreed that "Supreme Court abused its discretion by awarding the wife $7,500 in counsel fees." The Court concluded: "As aptly noted by Supreme Court, the marital debt exceeded the net value of the parties' assets; indeed, upon equitable distribution, each has a negative net worth. However, inasmuch as the husband was employed and the wife was unemployed while she completed her nursing education, Supreme Court properly found that the wife was the less monied spouse. Although the husband's income is greater than the wife's, his earnings are modest and are largely devoted to payment of maintenance, child support and marital debt. The fact of the matter is that neither party has sufficient assets or income for payment of counsel fees. Although an award of

counsel fees to the wife was appropriate, upon consideration of the parties' financial circumstances, we reduce the award to $3,750."

VI. DISCLOSURE

A. 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 was 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."

B. Nonparty – Reasons Needed

In Gandham v. Gandham, 2019 Westlaw 1272551 (2d Dept. Mar. 20, 2019), the wife appealed from February 2017 and March 2017 Supreme Court orders which, respectively, granted a nonparty's motion to quash certain subpoenas she issued, and granted the husband's motion for summary judgment dismissing her counterclaim to enforce a June 2016 stipulation of settlement. The Second Department affirmed the order granting the nonparty's motion to quash and reversed, on the facts, the order granting the husband's motion for summary judgment. The

parties' June 2016 stipulation settled the husband's 2014 action for divorce and provided that said action would be discontinued. The husband commenced a second action later in June 2016 and the wife counterclaimed for enforcement of the June 2016 stipulation, against which counterclaim the husband moved for summary judgment, alleging that the stipulation, was "the product of duress and was unconscionable." The husband claimed that the stipulation "transferred virtually all of the marital assets to the defendant and all of the marital debts to the plaintiff," but also "recited that the transfers were 'to compensate the [defendant] for all the marital assets wasted by the [plaintiff],' including payments to women with whom the [plaintiff] allegedly had adulterous relationships and whom he held out publicly as his wives." In December 2016, the wife served subpoenas duces tecum and a subpoena seeking testimony on a nonparty -- one of the women with whom the wife alleged the husband had an adulterous relationship. Supreme Court's February 2017 order granted the motion to quash because: (1) the subpoenas did not comply with CPLR 3101(a)(4) [failure to state the circumstances or reasons the evidence was needed]; and (2) the nonparty demonstrated that the evidence sought was "utterly irrelevant" to the action. The Appellate Division, in affirming the February 2017 order, disagreed "that the testimony sought from the nonparty was utterly irrelevant," but agreed with Supreme Court "that the subpoenas were defective since, among other things, the defendant failed to provide the nonparty with the required explanation of the circumstances or reasons requiring disclosure either on the face of the subpoenas or in any accompanying material," citing CPLR 3101[a][4]. The Court concluded that "Supreme Court should not have granted the plaintiff's motion *** for summary judgment dismissing the defendant's counterclaim." The Second Department held: "Assuming the facts alleged in the stipulation regarding the plaintiff's wasteful conduct are proven, the stipulation is not unconscionable on its face, and the plaintiff

failed to establish, prima facie, his entitlement to judgment as a matter of law dismissing the counterclaim on the basis that the stipulation is unconscionable (citations omitted)." As to duress, in denying summary judgment to the husband, the Appellate Division found that he "met his prima facie burden for judgment as a matter of law dismissing the defendant's counterclaim based upon the defense of duress, by proffering evidence demonstrating that the defendant coerced him to sign the stipulation by making credible threats that she would commit suicide if he refused to sign the stipulation. However, in opposition, the defendant raised a triable issue of fact as to whether the plaintiff executed the stipulation under duress."

VII. ENFORCEMENT

A. Contempt – Health Insurance; Counsel Fees

In Estes v. Bradley, 2018 Westlaw 6519327 (2d Dept. Dec. 12, 2018), the wife appealed from a May 2016 Supreme Court order, which denied, as academic, her January 2016 motion to hold the husband in contempt, for failing to comply with an April 2013 order directing him to provide health insurance for her, and which granted her, without a hearing, counsel fees only to the extent of $10,000. The Second Department reversed, on the law and the facts, and in the exercise of discretion, and remitted for further proceedings. The parties entered into a stipulation of settlement in April 2015, so-ordered in July 2015, which provided that each party would obtain his or her own health insurance, at his or her own expense, after the judgment of divorce was entered. Despite the fact that the judgment of divorce was entered while the wife's January 2016 motion was pending, the Appellate Division held that her request that the husband be found in contempt of the April 2013 order, which mandated him to provide her with health insurance during the pendency of this action, was not rendered academic. With regard to counsel fees, the Second Department found that "although the Supreme Court providently exercised its discretion

in granting that branch of the defendant's motion which was for an award of an attorney's fee (citations omitted), we agree with the defendant that the court improvidently exercised its discretion in awarding her the sum of only $10,000." The Court concluded that $10,000 was "inadequate" and that "a hearing is necessary to determine the amount of a reasonable attorney's fee to which the defendant is entitled, in a sum to exceed $10,000."

B. Incarceration Upheld

In Matter of Garrett v. Jones, 2018 Westlaw 5659897 (3d Dept. Nov. 1, 2018), the father appealed from an April 2017 Family Court order, which revoked the suspension of his sentence of 30 days' incarceration, which suspension had been conditioned upon his making regular child support payments, for his child born in 2005, for 26 weeks following a November 2016 Court appearance. In February 2017, the matter was restored to the calendar upon the mother's allegation that the father was $350 in arrears since November 2016, and he made no further payments before the April 2017 hearing, at which time he stated that his "anticipated new employment had been delayed but that he expected to begin work soon." The Third Department affirmed, finding that "the father paid only $250 toward the total of approximately $950 in child support payments that became due between the entry of the order suspending his sentence of incarceration and the revocation of the suspension," and, further, that the father "failed to support his assertions that new employment was imminent with any evidence other than his own self-serving testimony." The Appellate Division held that "the father's consistent failure to take advantage of the opportunities offered to him by Family Court to comply with his child support obligations," constituted "good cause for the revocation of the suspension of his sentence."

C. Money Judgment – Credit for Payments Made

In Stern v. Stern, 2018 Westlaw 5020059 (2d Dept. Oct. 17, 2018), the husband appealed

from an October 2015 Supreme Court order, which granted the wife's July 2014 motion for a money judgment against him for $353,400, plus prejudgment interest. The Second Department reversed, on the law and the facts, denied an award of prejudgment interest, and remitted for a hearing and a new determination of the motion for a money judgment. The parties were married in August 1980 and the wife commenced this action for divorce in May 2006. A September 2006 preliminary conference order provided as to pendente lite relief: "Status quo [voluntary support payments and household expenses] to be maintained. No motion at this time." During the matrimonial trial, the wife moved for emergency pendente lite relief and a January 2009 order directed the husband to pay the wife's car insurance and $200 per week as interim maintenance. The parties were divorced by an April 2010 judgment of divorce, which directed the husband to pay the wife maintenance retroactive to the date of the commencement of this action, May 26, 2006, and continuing until October 25, 2009. The judgment of divorce also provided that the husband was entitled to credits against his maintenance obligation "for payments of *pendente lite* spousal maintenance actually made pursuant to Court Order." The husband argued in opposition to the wife's motion that he was entitled to credits totaling $393,516.53 against his maintenance obligation. The Appellate Division held that the husband "is entitled to credits against his maintenance obligation as established in the judgment of divorce with regard to the plaintiff's share of such expenses such as mortgage, real estate taxes, and automobile insurance payments" and rejected the wife's contention that the husband's voluntary payments made pursuant to the preliminary conference order, which does not specifically enumerate the payments to be made, cannot qualify as "payments of *pendente lite* spousal maintenance actually made pursuant to Court Order." The Court concluded that to deny the husband a credit for payments made on account of the wife's expenses "would not only be inequitable by providing a windfall for the

benefitted spouse, but it would also discourage voluntary support payments during the pendency of matrimonial actions and likely cause a precipitous rise of pendente lite motion practice by nonmonied spouses." The Second Department concluded: "The amount of credit to which the defendant is entitled cannot be determined on this record. While some payments documented by the defendant appear to be for the benefit of the plaintiff only and could qualify for a credit against maintenance, others are plainly for the children, professional expenses, and other expenses which would not be within the ambit of expenses which the plaintiff would be responsible to pay out of the maintenance she receives." As to prejudgment interest, the Court found that the husband "correctly contends that prejudgment interest should not be assessed against him since he made substantial payments in good faith pursuant to the preliminary conference order, negating a finding of willfulness which would trigger such an award."

D. Receiver Appointed

In Caponera v. Caponera, 165 AD3d 1221 (2d Dept. Oct. 31, 2018), the husband appealed from a September 2015 Supreme Court order, which granted the wife's motion to appoint her as receiver of the marital residence. The Second Department affirmed. The parties' April 2010 stipulation, which was incorporated into a September 2010 judgment, provided that the wife would have exclusive occupancy of the marital residence until November 1, 2013, unless she remarried or cohabited with an unrelated adult, in which case the marital residence would be placed on the market for sale. A July 2014 so-ordered stipulation provided that the marital residence would be transferred to the wife, who married shortly thereafter. The husband then refused to effectuate the transfer of ownership and the wife moved to be appointed as receiver of the marital residence. The Appellate Division held that given "the acrimonious relationship between the parties and the defendant's willful failure to cooperate in effectuating

the transfer of ownership of the marital residence to the plaintiff, as required by the parties' July 2014 so-ordered stipulation, the Supreme Court providently exercised its discretion in appointing the plaintiff to be the receiver of the marital residence."

VIII. EQUITABLE DISTRIBUTION

A. Credit for Funds Dissipated; 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."

B. 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."

In Flom v. Flom, 2019 Westlaw 1064152 (1st Dept. Mar. 7, 2019), the wife appealed from a March 2017 Supreme Court judgment which, among other things: (1) distributed 40% of certain marital assets to the wife and 60% to the husband, including an in-kind distribution of an LLC; (2) apportioned 40% of the assets and liabilities related to certain investments to the wife and 60% to the husband; (3) awarded the wife $26,000 per month in taxable maintenance for 6 years; and (4) imputed annual income to the wife of $50,000 for CSSA purposes and applied the then-statutory cap of $141,000. The First Department modified, on the law and the facts, by: (1) increasing the wife's distribution of assets to 50%; (2) increasing her distribution of and responsibility for, the assets and liabilities of the investments to 50%; and (3) imposing a CSSA cap of $300,000, without imputing any income to the wife, and increasing child support for the

parties' unemancipated child from $1,238 per month to $4,250 per month, retroactive to the entry of judgment. The Appellate Division held that Supreme Court "improvidently exercised its discretion in distributing the marital assets 60% to plaintiff and 40% to defendant," citing the principle that "where both spouses equally contribute to the marriage which is of long duration, a division should be made which is as equal as possible." The parties were married for 18 years and had 2 children. The Court found that "the referee divided the marital property unequally solely because defendant was not employed outside the home and the parties hired domestic help, and thus, in the referee's view, she did not contribute equally to the marriage." The First Department cited the trial testimony, which established that the mother "was actively involved with the children, coaching their athletic teams, attending parent-teacher conferences, and, as plaintiff testified, being 'their mom.'" Increasing the marital property distribution to the wife to 50%, the Appellate Division stated: "It is undisputed that the parties enjoyed a lavish lifestyle, and the evidence indicated that defendant played a major role in managing the home, including entertaining clients and paying household expenses from the parties' joint account. The referee's finding that there was no evidence that defendant 'ever cooked a meal, dusted a table or mopped a floor' did not support the court's determination that she was therefore entitled to only 40% of the parties' marital assets." On the issue of marital debt, the First Department determined that Supreme Court "providently exercised its discretion in apportioning liability to defendant for failed investments *** that plaintiff personally guaranteed with a collateral account," finding that "[the husband's] conduct in guaranteeing the loans did not absolve defendant of joint liability." The Court concluded on this issue: "Since the investments were made during the marriage for the benefit of the parties, the parties should share [equally] in the losses." With regard to the in-kind distribution of the husband's interest in an LLC, which the Court increased to 50%, the Appellate

Division rejected the husband's argument that the same "could not be distributed because defendant failed to value the asset" because he proposed "prior to trial to distribute [the LLC interest] in lieu of maintenance." The Appellate Division upheld the maintenance award "based on the lavish lifestyle of the parties during the marriage, and the fact that [the wife] had not worked outside the home in over 20 years." Given the wife's now increased equitable distribution award, and Supreme Court's direction that the husband provide her with health insurance until she qualifies for Medicare, the Court rejected the wife's argument for "at least 12 years, if not lifetime, maintenance." With regard to child support, the First Department held that there was "no basis" for the imputation of $50,000 in annual income to the wife and noted the referee's findings that: the husband "had significantly greater financial resources and a gross income that greatly exceeded defendant's"; the child enjoyed a "luxurious standard of living" during the marriage; and "no deviation from the then-income cap of $141,000 was warranted because plaintiff had voluntarily agreed to pay the child's educational expenses, coaching, tutoring and summer camp." The Court concluded that "given the factors considered, but subsequently disregarded, by the referee *** we find that a $300,000 income cap, which would result in a monthly basic child support award of $4,250, retroactive to entry of the judgment of divorce, would satisfy the child's 'actual needs' and afford him an 'appropriate lifestyle.'"

C. 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."

D. Debt – Student Loans (Each Own); Wasteful Dissipation Not Found

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."

E. Debt – Student Loan

In Ragucci v. Ragucci, 170 AD3d 1481 (3d Dept. Mar. 28, 2019), the husband appealed from a January 2018 Supreme Court judgment, which held him solely responsible for a $224,000 student loan for the college education of the parties' middle child, born in 1990. The Third Department affirmed. The subject child attended a private college at a cost of $36,000 per year, and college savings accounts from the paternal grandfather were insufficient to cover the total costs. The husband testified that he and the wife told the child that her chosen college was cost prohibitive and that, if she wanted to attend, she would be responsible to pay for her education. The Appellate Division found: "Significantly, only the husband's personal information and signature appear on the loan application. We further note that it is undisputed that the husband was in charge of the family's finances during the marriage. Ultimately, the principal balance on the student loan totaled more than $154,000." The husband testified that, with the assistance of his father, he made the student loan payments starting in 2009, and stopped making payments in April 2012 when his father became ill. The husband mistakenly believed that the child had thereafter taken responsibility for the loan repayments; apparently, the child had instead been making payments on other loans. The student loan went into default, resulting in imposition of more than $43,000 in additional fees and collection costs. The Court concluded: "Supreme Court found that the wife had no knowledge of the student loan. The wife testified that she was not aware of the loan prior to this divorce action, and that she believed that the grandfather had

contributed to the child's education costs, as with the parties' other children. The husband did not assert in his testimony that he and the wife ever discussed the loan, and further admitted that he had never asked the wife to contribute to the loan repayments. In 2012, he listed the loan in his interrogatories as his individual obligation. Moreover, the husband testified that it was his understanding that, as the co-signer on the loan, he was obligated to make payments on the loan in the event of a default. Under these circumstances, we cannot say that Supreme Court abused its discretion in allocating the student loan debt solely to the husband."

F. Debt - Unequal; Pension – No Survivor Benefit

In Button v. Button, 2018 Westlaw 5292748 (3d Dept. Oct. 25, 2018), the husband appealed from a February 2017 Supreme Court judgment, which determined custodial and visitation issues, directed child support of $525 bi-weekly, counsel fees of $7,500 to the wife, equitable distribution of debt and the husband's NYS pension, and maintenance of $550 bi-weekly. The parties were married in October 2006 and have 3 children, born in 2012, 2013 and 2015. The parties were in their mid-30s at the time of trial and both in good health. The wife moved with the children from the marital residence in April 2015 and commenced this action in June 2015. Supreme Court continued temporary orders of custody and child support that had been entered in Family Court. The Appellate Division rejected the husband's argument that a reduction of his visitation was error, but agreed that Supreme Court erred by requiring that he provide all transportation and by failing to provide specific times for holiday visits. The Third Department noted "that it was unnecessary for Supreme Court to consider whether a change in circumstances had occurred because the temporary custody order was issued without the benefit of a full plenary hearing (citations omitted) and, further, did not address holiday and vacation schedules." The Court noted that the wife and children live with the wife's parents — a 45-

minute drive from the marital residence where the husband continues to reside and that she "did not have a vehicle and arranged for her transportation needs entirely by borrowing vehicles from her parents and a sibling." As of the time of trial, the wife was to graduate from nursing school in May 2018 and begin full-time employment as a registered nurse. The Appellate Division did not disturb the schedule, given that the husband received an additional 4 weeks in the summer and also received a holiday schedule, but found: "In light of the 1½-hour round trip between the parties' residences, the requirement that the husband provide all transportation unduly impairs his mid-week dinner visit; thus, we modify the judgment to provide that the parties shall equally share transportation for the mid-week dinner visits. We also modify the holiday and vacation schedules to include exchange times, as follows: Christmas Eve shall begin at 6:00 p.m. on December 23 and end at 8:00 p.m. on December 24; Christmas Day shall begin at 8:00 p.m. on December 24 and end on December 26 at 8:00 a.m., when the Christmas vacation begins; all other holidays shall begin at 6:00 p.m. the day preceding the holiday and end at 8:00 a.m. the day after the holiday; and the winter and spring school vacations shall begin at the end of the last school day prior to the vacation period and shall end at 6:00 p.m. on the last day of the vacation period." With regard to equitable distribution, the Appellate Division noted that the former marital residence had stipulated equity of $36,600, and the husband has a defined benefit pension plan with New York State. There was additional marital debt, which Supreme Court ordered be assumed $40,106 by the husband and $3,430 by the wife. The wife wanted the residence to be sold, but Supreme Court awarded the same, with its debt, to the husband. Supreme Court "appeared to equally divide the marital portion of the husband's New York retirement according to the *Majauskas* formula." With regard to the marital debt, the Third Department stated: "we cannot say that Supreme Court's distribution of the marital home and the parties' debt is unjust or

inequitable." As to the issue of the pension, the husband argued that the court erred in ordering that he provide the wife with "the minimum survivor benefit" for his pension plan. The Appellate Division stated: "We take judicial notice of the applicable rules of the New York State and Local Retirement System. A participant may designate a former spouse to receive a portion of the preretirement ordinary death benefit and may name others to receive the remainder of that benefit. However, only one beneficiary, or alternate payee, may be named for retirement benefits. We agree with the husband that it would be inequitable to require that he name the wife as a beneficiary of his retirement benefits and thereby preclude him from sharing those benefits with any other person, such as a subsequent spouse. In that regard, we note that the marital portion of the pension is small, the parties are relatively young and the wife has the prospect of gaining employment that should enable her to provide for retirement. Therefore, we modify the judgment by specifically awarding the wife one half of the martial portion of the husband's pension according to the *Majauskas* formula, including one half of the marital portion of the ordinary preretirement death benefit, but excluding any requirement that the husband elect any option that would continue postretirement benefits to the wife following his death." The Third Department agreed with the husband that the maintenance award was excessive and held: "Although Supreme Court properly awarded maintenance to the wife — who had been the primary caretaker of the children since the birth of the oldest child — while she obtained training as a registered nurse that would allow her to obtain employment and become self-sufficient, the maintenance award must be reassessed in light of its failure to consider the wife's needs and the husband's ability to pay." The Court noted that "neither party could continue to enjoy the predivorce standard of living, which was sustained only by incurring substantial debt, and the parties' negative net worth established that they were in significant financial distress at the time

of trial. The obligations imposed on the husband by the judgment total approximately $48,806 annually. Payment of those obligations from his gross earnings of $73,083 would leave him with very little income to cover his own living expenses. At the time of trial, the wife's own living expenses were modest. She incurred no housing expenses because she and the children were residing with her parents, and she had no vehicle of her own. Thus, her direct expenses were limited to gas, food and clothing. Accordingly, we reduce the amount of the maintenance award to $200 biweekly, retroactive to the date of commencement of the action and continuing until July 1, 2018." The Court recalculated the child support award, given reduced maintenance, and found that the presumptively correct amount of the husband's basic child support obligation for three children is $694.81 biweekly. With respect to counsel fees, the Appellate Division agreed that "Supreme Court abused its discretion by awarding the wife $7,500 in counsel fees." The Court concluded: "As aptly noted by Supreme Court, the marital debt exceeded the net value of the parties' assets; indeed, upon equitable distribution, each has a negative net worth. However, inasmuch as the husband was employed and the wife was unemployed while she completed her nursing education, Supreme Court properly found that the wife was the less monied spouse. Although the husband's income is greater than the wife's, his earnings are modest and are largely devoted to payment of maintenance, child support and marital debt. The fact of the matter is that neither party has sufficient assets or income for payment of counsel fees. Although an award of counsel fees to the wife was appropriate, upon consideration of the parties' financial circumstances, we reduce the award to $3,750."

G. 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." With regard to the choice of written submissions as opposed to a trial, the

Court stated: "While we disapprove of this unorthodox procedure, the resort to it provides no basis for reversal given the explicit consent by counsel to forgo the parties' respective rights to a trial on the contested issues."

H. Marital Property Presumption

In Prokopov v. Doskotch, 166 AD3d 1408 (3d Dept. Nov. 29, 2018), the husband appealed from a December 2015 Supreme Court judgment which directed equitable distribution. The parties were married in January 2002 and have two children born in 2002 and 2009. The wife commenced the divorce action in February 2013. The Third Department affirmed, rejecting the husband's argument that Supreme Court erred by characterizing as a marital asset, a certain rental property acquired by his mother and gifted to him. The Appellate Division found: (1) that the property was acquired in June 2008, in the name of the husband's mother, who deeded the property to the husband in August 2008; (2) in September 2012, the husband deeded the property back to his mother; and (3) the husband made a $1,000 down payment to acquire the property and provided a $50,504.49 bank check to pay the balance due at closing. The husband testified that his mother provided the funds used to purchase the property, and described a joint fund that he had with his mother, from which $58,314 had been withdrawn in January 2007 and deposited into his account pending the closing. The husband denied ever having access to or depositing any money into the joint fund. The wife testified that the funds to buy the rental property were from the husband's salary, and that the husband's mother had no income to place in the joint fund. The wife also testified that the husband personally performed substantial renovations on the property, collected the rents and used the funds to pay marital expenses. Supreme Court found that the husband's explanation as to his mother's interest in the property lacked credibility, and the Appellate Division noted that "no showing was made as to the actual source of funds deposited

into that account, which was opened in August 2005." The Court concluded: "It is also telling that, shortly after the wife informed the husband that she had consulted an attorney about a divorce, he transferred the property back to his mother. His explanation for doing so — to avoid arguments at home — was simply implausible. We conclude that the record evidence supports the court's determination to distribute the rental property as a marital asset."

I. Proportions – Bank Accounts – Credit for Use of Marital Funds; Marital Residence Sale Directed

In Gorman v. Gorman, 2018 Westlaw 5274250 (2d Dept. Oct. 24, 2018), the wife appealed from a December 2015 Supreme Court judgment which, after trial, awarded her only $4,500 per month in maintenance for 8 years, distributed marital property, and imputed annual income to her of $26,000, and the husband cross-appealed from so much of the judgment as failed to award him a share of bank accounts, as awarded maintenance, and $20,000 in counsel fees to the wife. The Second Department modified, on the law, on the facts, and in the exercise of discretion, by: (1) decreasing the amount of maintenance to $2,750 per month and making the same tax-free to the wife, but increasing the duration until the earliest of the wife's remarriage, her attainment of the age at which she becomes eligible for full Social Security benefits, or the death of either party; (2) requiring the husband to maintain $500,000 in life insurance for the wife so long as he is obligated to pay maintenance; (3) by directing the husband to provide health insurance for the wife until she becomes eligible for coverage through employment or through Medicare, whichever shall first occur; and (4) providing that the parties' joint checking account and savings accounts ($95,981.18 + $44,458.50), be equally divided between the parties, with a $1,600 credit to the wife. The parties were married on May 16, 1987. The wife worked as a legal secretary for a period of time, and left the workforce to become a homemaker and to care for the

parties' two children (now in their mid-to-late twenties), while the husband in various capacities connected with the US military, including defense contracting work in Iraq. The husband commenced the action in August 2011. As to maintenance, the Appellate Division found that "considering the relevant factors, including the ages of the parties, the long duration of the marriage and the extended absence of the defendant from the workforce, the distribution of the marital assets, the parties' respective past and future earning capacities, and the availability of retirement funds and pensions, the Supreme Court providently exercised its discretion in awarding the defendant durational, as opposed to lifetime, maintenance (citations omitted). However, rather than providing for a durational limitation of eight years and subjecting that award to termination upon the plaintiff's remarriage, under the circumstances of this case, the maintenance award should continue until the earliest of the defendant's remarriage, her attainment of the age at which she becomes eligible for full Social Security benefits, or the death of either party (citations omitted)." As to imputed income to the husband of $151,192, the Second Department found that "from 2008 through late 2013, the plaintiff was employed overseas in Iraq and, as a result of such employment, received a significantly augmented salary, enhanced overtime, and no-cost room and board. In December 2013, the plaintiff returned to the United States, taking up residence in Ohio, where he resides with his fiancée. As of the time of trial, the plaintiff was employed by the Department of Defense as a quality assurance inspector at a salary of $81,079 per year. The plaintiff did not submit a current statement of net worth. He acknowledged that his earnings are deposited into a joint checking account with his fiancée and that all of his monthly expenses are shared with his fiancée. The plaintiff also acknowledged that he regularly gambles, to the point that he has received free hotel accommodations, airfare, vacations (including a cruise), and other free or discounted items because of his frequent

gambling. In 2013, he reported gambling winnings of $11,250 on his tax return. He acknowledged winning $1,800 over two days of gambling in September 2014." The Appellate Division concluded that the imputed income to the husband should be $100,000. With regard to imputed income to the wife, the Court stated: "While we agree with the defendant that the Supreme Court should not have imputed income to her based on statistical information from the New York State Department of Labor that was not admitted in evidence at trial (citation omitted), there was evidence, nonetheless, that the defendant had earned $15 per hour as a legal secretary during the early part of the marriage. Even though she has been out of the work force for an extended period of time and does not have a college degree, she is in good health and has a sufficient employment history to warrant the conclusion that she is capable of earning at least the sum of $26,000 annually, which is the amount of income imputed to her by the court." The Second Department concluded on the issue of maintenance that the husband should pay the wife $2,750 per month, "which sum shall be neither tax deductible by the plaintiff nor taxable to the defendant." As to life insurance, the Appellate Division directed the husband "to purchase, pursuant to Domestic Relations Law §236(B)(8)(a), a life insurance policy in the amount of $500,000, designating the defendant as sole irrevocable beneficiary for only as long as the plaintiff is obligated to pay maintenance to the defendant." On the issue of health insurance, the Appellate Division held that Supreme Court "should have directed the plaintiff to provide health insurance for the plaintiff until she becomes eligible for coverage through employment or through Medicare." As to the marital residence, the Court held that "Supreme Court providently exercised its discretion in directing the sale of the marital residence because the parties' children have reached majority, there is no need of a spouse as a custodial parent to occupy the residence for the children (citation omitted), and neither party submitted a market-based valuation of the

marital residence. With regard to the bank accounts, the Court directed and equal division as to their commencement date values, but since the husband "purchased a diamond engagement ring for $3,200 for his fiancée prior to commencement of this action, and failed to prove that it was separate property," the wife is entitled to a 50% credit for the ring's purchase price ($1,600). Finally, the Second Department held that given "the relative financial circumstances of the parties and the relative merits of the parties' positions at trial, the Supreme Court providently exercised its discretion in awarding the defendant $20,000 in attorney's fees."

J. Proportions – Business (10% & 40%); Valuation Date - DOC

In Cotton v. Roedelbronn, 170 AD3d 595 (1st Dept. Mar. 26, 2019), the wife appealed from an October 2017 Supreme Court judgment, which awarded her 10% of the husband's business interests valued at $19.94 million and 40% of two other business interests valued at $3.28 million and $655,943, respectively, and maintenance of $20,000 per month for 3 years. The First Department affirmed, rejecting the wife's contention that the date of commencement valuation of the businesses was improper, and finding that the husband's business assets were actively managed. As to the proportions, the 10% award was upheld because "the value of these businesses was primarily derived from efforts made by plaintiff and his partners prior to the marriage, and that defendant made little, if any, contribution to the growth of these businesses" and, further, that the wife "at times acted as a hindrance to plaintiff's business dealings." The Appellate Division upheld the 40% award, declining to increase it to 50%, noting the Referee's finding that while the wife "made no direct contribution to these business entities, *** she shared in the parties' restrained lifestyle that allowed these particular investments to grow." The First Department affirmed the maintenance award, citing both the Referee's finding that the wife's statement of net worth was "riddled with misstatements, inaccuracies and unsubstantiated

expenses" and expert testimony "that this amount and duration would be sufficient to meet defendant's needs and allow her to re-enter the employment market."

K. Proportions - Business (50%); Enhanced Earning Capacity (25%); Separate Property Commingled, Restored

In Belilos v. Rivera, 164 AD3d 1411 (2d Dept. Sept. 26, 2018), both parties appealed from an October 2015 Supreme Court judgment which awarded the wife maintenance of $5,000 per month for 5 years, restored $150,000 of the wife's separate property, which had been placed in a joint account, to the wife, awarded the wife 25% of the husband's enhanced earning capacity from advanced degrees and certifications and 50% of the husband's business interests, and awarded the wife $75,000 in counsel fees and $15,000 in expert witness fees. The Second Department affirmed. As to the inheritance, the wife established that she received $150,000 as an inheritance from her uncle, which was deposited into a joint account because she had no bank accounts in her name alone, and further, the husband admitted at his deposition that he intended to return the $150,000 to the wife "to make things right." The Appellate Division upheld the 50% award of the business interests, and as to the 25% enhanced earning capacity award, found that the wife "demonstrated that she substantially contributed to the defendant's acquisitions of his advanced degrees and certifications." The Court upheld the maintenance, counsel fee and expert witness fee awards as appropriate exercises of discretion.

L. 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."

M. Proportions- Marital Residence (5%); Separate Property – Found

In Larowitz v. Lebetkin, 170 AD3d 578 (1st Dept. Mar. 26, 2019), the husband appealed from an October 2015 Supreme Court judgment, which, in the wife's 2011 action for divorce, valued the marital residence at $1.6 million, awarded him 5% of the appreciation thereof, and determined the wife's Merrill Lynch account to be her separate property. The date of the marriage is not specified; however, the Court's decision refers to 1995 as being "after the marriage" and 1982 being "well before the marriage." The First Department affirmed, rejecting the husband's argument that a 5% award is "only for spouses who commit heinous domestic violence," while noting that "he received 30% of two other assets and 50% of a third asset." The Appellate Division found that the husband's challenge to the neutral expert's marital residence appraisal, based on his testimony alone, was unavailing. The Court found that the wife "attested on her net worth statement, and testified at trial, that the Merrill Lynch account was opened in 1982, well before the marriage, for her and her sister's benefit, and was funded by gifts from her

father."

N. Proportions – Marital Residence (70%); Valuation – Law Practice ($0)

In Giallo-Uvino v. Uvino, 2018 Westlaw 5020409 (2d Dept. Oct. 17, 2018), the wife appealed from an April 2016 Supreme Court judgment of divorce which, upon a February 2016 decision of the court made after an inquest, among other things: (1) valued the husband's law practice as of the date of trial and determined that the practice had no value; (2) awarded her only 55% of the net proceeds of the sale ($561,266.75) of the marital residence; (3) declined to award her an attorney's fee and expert fees, and (4) determined that the wife was not entitled to an award of maintenance. The Second Department modified, on the law, on the facts, and in the exercise of discretion: (1) by awarding the wife 70% of the net proceeds of the sale of the marital residence; and (2) by awarding the wife an attorney's fee of $70,000. The parties were married in June 2000, and have one child. The wife worked as a registered nurse, and the husband was an attorney with his own law practice. In July 2012, the wife commenced this action for a divorce and the husband appeared in the action. He failed to appear for the trial in July 2015, and Supreme Court held an inquest. The Appellate Division held that "Supreme Court providently exercised its discretion in valuing the [husband's] law practice as of the date of trial, rather than the date of commencement of the action," given that the wife "failed to establish that the defendant, who was disbarred during the pendency of this action (citation omitted) intentionally lost his license in order to devalue his law practice (citation omitted) *** [and] failed to establish that the defendant's business had any value as of the date of trial." As to maintenance, the Second Department found: "considering the relevant factors, including, inter alia, the duration of the marriage, the present and future earning capacity of the parties, and the ability of the party seeking maintenance to become self-supporting, the Supreme Court did not improvidently

exercise its discretion in declining to award maintenance to the plaintiff." The Appellate Division held that "Supreme Court improvidently exercised its discretion in awarding the plaintiff only 55% of the net proceeds of the sale of the marital residence" [and] [b]ased on the circumstances of this case, we find that the plaintiff is entitled to 70% of the net proceeds of the sale of the marital residence." As to counsel fees, the Court concluded that "Supreme Court improvidently exercised its discretion in declining to award the plaintiff an attorney's fee," and a factor to be considered is "whether either party has engaged in conduct or taken positions resulting in a delay of the proceedings or unnecessary litigation (citations omitted)." Here the Second Department found that the husband failed "to timely provide certain financial documentation which unnecessarily prolonged the litigation, [and] the court should have awarded the plaintiff an attorney's fee in the sum of $70,000."

o. 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."

P. Proportions - Stock Options (50%)

In Feng v. Jansche, 2019 Westlaw 1028961 (1st Dept. Mar. 5, 2019), both parties appealed from an October 2017 Supreme Court judgment which, upon a July 2017 decision after trial of the wife's 2013 divorce action: (1) distributed 40% of the stipulated valued of the husband's stock options and restricted stock units to the wife; (2) valued the marital funds at $410,696.82; (3) terminated the temporary maintenance award as of July 31, 2017 and declined to award the wife post-divorce maintenance; (4) imputed income of $831,710 to the husband, imposed a CSSA income cap of $400,000 and made the child support award prospective; and (5) awarded the wife $25,000 in counsel fees. The First Department modified, on the law and the facts, to: (1) award the wife 50% of the value of the marital portion of defendant's stock options and restricted stock units; (2) impose a CSSA income cap of $300,000 and award child support

retroactive to October 1, 2014; and (3) remand for further proceedings. The Appellate Division held that "[t]o the extent the marital portion of defendant's stock options and GSUs represents compensation, plaintiff's award should be increased from 40% to 50% of the value, or $126,487." With respect to maintenance, the First Department determined that Supreme Court "properly declined to award plaintiff post-divorce maintenance on the grounds that she holds a doctorate in computer science and is working full-time as a data scientist" and correctly terminated the temporary order as of July 2017 when its decision after trial was issued. The Court noted that the duration of temporary maintenance "was one of the factors [Supreme] court considered in determining that further maintenance was not warranted." On the issue of imputed income, the Appellate Division held that Supreme Court "properly imputed income to defendant based on the average of his total income for the years 2012 through 2014." As to child support, the First Department found that Supreme Court "correctly considered the standard of living the child would have enjoyed had the marriage remained intact in deviating from the statutory cap," but given the fact that the husband was ordered to pay 88% of extracurricular activities, summer camp, and private school, the Court reduced the CSSA income cap to $300,000. With respect to the issue of retroactivity, the Appellate Division agreed with the wife that Supreme Court "erred in making the child support award prospective only (citation omitted). It should be retroactive to October 1, 2014, the date on which plaintiff started receiving court-ordered pendente lite child support." The action was remanded for a determination of retroactive child support owed, including add-on expenses, and whether the husband should pay arrears "in one sum or periodic sums." The First Department upheld the $25,000 counsel fee award, determining that Supreme Court properly considered "the financial circumstances of both parties together with all the other circumstances of the case, which may include the relative merit of the parties' positions," and

given that the husband had already paid $120,000 of the wife's counsel fees, the total of $145,000 was more than half of her fees at the time of trial.

Q. Security Deposits; Transfer Taxes

In Raposo v. Raposo, 164 AD3d 1383 (2d Dept. Sept. 19, 2018), both parties appealed from a November 2015 Supreme Court judgment, which, among other things, failed to direct the husband to transfer to the wife any security deposits for the rental properties which the judgment directed to be transferred to her. The Second Department modified, on the law and the facts, by directing the parties to equally share any transfer taxes resulting from the transfer of properties to the wife, and by directing the husband to transfer to the wife any security deposits pertaining to the rental properties transferred to her pursuant to the judgment. The parties were married for 31 years and the principal issue at trial was the equitable distribution of rental properties in Queens, which the husband developed and managed. The judgment awarded the wife an in-kind distribution of some of the rental properties, equal to approximately 45% of the equity of the parties' rental properties. The Appellate Division held that "Supreme Court's determination to distribute rental properties to the plaintiff in-kind, as opposed to awarding her a distributive award payable in installments, was not an improvident exercise of discretion," despite the husband's preference to retain ownership and control over all of the rental properties. The Second Department held that Supreme Court "should have directed that both parties equally share any transfer tax liability resulting from the transfers of rental properties to the plaintiff." The Court concluded that Supreme Court "should have directed the defendant to transfer to the plaintiff any security deposits that the defendant collected for the rental properties which were directed to be transferred to the plaintiff pursuant to the judgment of divorce (*see* General Obligations Law §7-105)."

IX. EVIDENCE

A. Hearsay – Statements of Children – Custody

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].

B. Hearsay – Statements of Children – Family Offense

In Matter of Kristie GG. V. Sean GG., 2018 Westlaw 6683333 (3d Dept. Dec. 20, 2018), the father appealed from a March 2017 Family Court order, which, upon the mother's family offense petition, found that he committed harassment in the second degree against the children and issued a 2-year order protection. The parties have 3 three children, born in 2000, 2002 and 2007, who, pursuant to a judgment of divorce, primarily reside with the mother in Otsego County and have visitation with the father. During a February 2016 visit in Otsego County, the father allegedly grabbed the middle child during an argument, in the presence of the other two children.

On consent, Family Court granted the motion of the attorney for the children to preclude the parties from calling the children as witnesses. Over the father's hearsay objections, two detectives testified as to the children's out-of-court statements about the incident. The mother also testified as to the children's statements. Video recordings of the police interviews with the children were admitted into evidence, over the father's objections. The father testified that he took the middle child by the arm to lead him outside the hotel but, after the child was disrespectful and hit the father's arm, the father grabbed the child by both arms to get him under control. The Third Department reversed, noting that "[o]nly competent, material and relevant evidence may be admitted in a fact-finding hearing," citing Family Court Act §834, and that "competent evidence excludes hearsay testimony unless an exception exists." Family Court relied upon Family Court Act §1046 (a) (vi): "previous statements made by the child relating to any allegations of abuse or neglect shall be admissible in evidence, but if uncorroborated, such statements shall not be sufficient to make a fact-finding of abuse or neglect." Clearly applicable to Family Court Act Article 10 and 10-A proceedings, courts have extended FCA 1046(a)(vi) to FCA Article 6 custody and visitation proceedings, and have allowed such out-of-court statements, so long as they relate to abuse or neglect and are sufficiently corroborated. Although this is a case of first impression in the Third Department, the First and Second Departments have held that the exception "has no application to family offense proceedings under article 8 (citations omitted)." The Appellate Division concluded that Family Court erred in admitting the children's out-of-court statements during the fact-finding hearing. Even though the father consented to the AFC's preclusion motion, the Third Department found that "his consent to the motion may have been based on a different understanding of its implication," and reversed and remitted for a new fact-finding hearing.

C. Medical Records – Foundation

In Matter of Jennings v. Domagala, 2018 Westlaw 6715079 (4th Dept. Dec. 21, 2018), the father appealed from an April 2017 Supreme Court order, which, after a hearing, granted the mother's motion for modification of the child support terms of an incorporated agreement, which provided for joint legal and shared physical custody of the child, and an opt out of the CSSA, whereby the parties waived child support from each other. The Appellate Division reversed, vacated the child support award and remitted for a new hearing. The mother alleged that she was no longer able to work due to injuries she sustained in an automobile accident. Over the father's objection, Supreme Court admitted into evidence two documents prepared by the mother's physician, to show that she was temporarily totally disabled. The Fourth Department found that the mother "failed to lay a proper foundation for the admission of those documents," citing CPLR 4518(a). The Appellate Division concluded: "Without those documents, plaintiff failed to meet her burden of establishing a substantial change in circumstances sufficient to warrant an upward modification of child support inasmuch as she 'did not provide competent medical evidence of [her] disability or establish that [her] alleged disability rendered [her] unable to work' (citations omitted)."

D. Negative Inference Improper

In Matter of William F.G. v. Lisa M.B., 2019 Westlaw ____ (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 without costs 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."

X. FAMILY OFFENSE

A. Assault 2d, Attempted Assault 3d, Menacing 2d – Found

In Matter of Amanda R. v. Daniel A.R., 2018 Westlaw 5985432 (1st Dept. Nov. 15, 2018), the father appealed from a September 2017 Family Court order which, after a hearing, found that he committed the menacing in the second degree, assault in the second degree, and

attempted assault in the third degree, and granted the mother a two year order of protection. The First Department affirmed, holding that the mother established, by a fair preponderance of the evidence, that the father committed menacing in the second degree (Penal Law §120.14), assault in the second degree (Penal Law §120.05[1]), and attempted assault in the third degree (Penal Law §120.00[1]). The mother testified that: in December 2010, while she was 8½ months pregnant, the father shoved her down onto a bed during an argument; in May 2012, during an argument, the father got on top of her and choked her causing her to lose consciousness, and causing her neck to swell and have red marks on it for numerous days; and in early September 2014, the father punched her very hard in the face causing her to fall and knock over a closet.

B. Criminal Mischief 4th – Not Found

In Matter of Ghassem T. v. Kevin T., 93 NYS3d 835 (1st Dept. Mar. 7, 2019), respondent (petitioner's son) appealed from an April 2017 Family Court order, which, after a hearing, found that he committed harassment in the second degree and criminal mischief in the fourth degree, and granted a one year order of protection in favor of his father. The First Department modified, on the law, to vacate the finding that the son committed criminal mischief in the fourth degree [PL 145.00(1)], upon the ground that the property he allegedly damaged "had been gifted to him by petitioner."

C. Extension of Order of Protection

In Matter of Jacobs v. Jacobs, 2018 Westlaw 6626785 (2d Dept. Dec. 19, 2018), the father appealed from a December 2017 Family Court order which, after a hearing, upon finding good cause to extend a 2-year April 2015 order of protection, which directed him to stay away from his son, extended the same for a period of five years. The Second Department affirmed, noting that Family Court Act §842 provides that upon motion, the Family Court may "extend the

order of protection for a reasonable period of time upon a showing of good cause or consent of the parties. The fact that abuse has not occurred during the pendency of an order shall not, in itself, constitute sufficient ground for denying or failing to extend the order." The Appellate Division found that "the father made statements to the petitioner's then-employer, the Westchester County Department of Correction, which needlessly caused a significant police response to the petitioner's home while the petitioner's eight-year-old son was visiting. In addition, since the imposition of the original order of protection, the father has commenced multiple court actions against the petitioner, all found to be lacking in merit." The Court concluded that "the father continued to interfere with the petitioner's peaceful existence and well-being," and the "finding of good cause to extend the order of protection is supported by the record."

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."

D. Harassment 2d – Found

In Matter of Mullings v. Mullings, 89 NYS3d 905 (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."

In Matter of Wilson v. Wilson, 169 AD3d 1279 (3d Dept. Feb. 28, 2019), the husband appealed from a November 2017 Family Court order which, following a hearing, found that he committed family offenses and granted the wife a 2-year order of protection. The Third Department affirmed. The parties resided together until February 2017, when the wife told the

husband to leave the marital residence due to his drug use. The Appellate Division found that beginning in the fall of 2016, during disputes which the wife testified were caused by the husband's crystal methamphetamine addiction, the husband "referred to petitioner in vulgar terms *** and *** grabbed her and pinned her in place while demanding that she listen to him." The wife further testified that on Christmas Eve 2016, the husband "pushed her onto a bed, clambered on top of her and punched a hole in the wall after she kicked him away." The husband conceded that in February 2017, he had "physically restrained [the wife] and punched a wall." The Third Department concluded that the testimony established that the husband "harbored an intent to annoy, harass or alarm" the wife and that he "committed, at the very least, the family offense of harassment in the second degree."

In Matter of Jasna Mina W. v. Waheed S., 170 AD3d 572 (1st Dept. March 26, 2019), the respondent appealed from a March 2018 Family Court order which, after a hearing, found that he committed harassment in the second degree. The First Department affirmed, holding that Family Court's order was properly based upon petitioner's testimony which "described physical contact, including poking and pinching her in order to harass her into having sex, and also a course of conduct including persistent unwanted communications, name calling and threats, all of which were intended to and did cause her alarm or seriously annoy her, and which served no legitimate purpose."

E. Harassment 2d , Menacing 2d- Found

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.

F. Harassment 2d, Menacing 3d – Found

In Matter of Erin C. v. Walid M., 2018 Westlaw 5259568 (1st Dept. Oct. 23, 2018), respondent appealed from a May 2017 Family Court order, which found that he had committed the family offenses of menacing in the third degree (PL §120.15) and harassment in the second degree (PL §240.26[3]) and granted petitioner a six-month order of protection against him. The

First Department affirmed. The Appellate Division held that petitioner's testimony met her burden of proof by a fair preponderance of the evidence, and "showed that she arrived home on the evening of February 25, 2016, to find respondent extremely agitated, and he began to 'stalk' her around the apartment, screaming insults at her with such intensity that she was forced to lock herself in her bedroom, fearing physical injury." The Court further found that "respondent continued to send petitioner multiple text messages, which were combative and insulting, for no legitimate purpose, through the night and over a period of days, at a time when, by all accounts, he was distraught that the parties, were not reconciling."

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."

G. Intimate Relationship

In Matter of Raigosa v. Zafirakopoulos, 2018 Westlaw 6519212 (2d Dept. Dec. 12,

2018), petitioner appealed from a January 2018 Family Court order, which, without a hearing, granted respondent's motion to dismiss her family offense petition for lack of subject matter jurisdiction pursuant to FCA §812(1)(e) [no "intimate relationship"]. The Second Department reversed, on the law, reinstated the petition, and remitted to Family Court for a hearing to determine whether there is subject matter jurisdiction pursuant to Family Court Act §812(1)(e), a new determination thereafter of the respondent's motion to dismiss, and further proceedings, if warranted. Petitioner alleged that the parties "have an intimate relationship," as they were living together as roommates. In dismissing the petition, Family Court found that the parties did not have an intimate relationship because their relationship was not sexual in nature. The relevant statute confers family offense jurisdiction over "persons who are not related by consanguinity or affinity and who are or have been in an intimate relationship regardless of whether such persons have lived together at any time." (Family Ct Act §812[1][e]). The "[f]actors the court may consider in determining whether a relationship is an 'intimate relationship' include but are not limited to: the nature or type of relationship, regardless of whether the relationship is sexual in nature; the frequency of interaction between the persons; and the duration of the relationship" (Family Ct Act §812[1][e]). The Appellate Division concluded that "Family Court's determination that the absence of sexual intimacy between the parties by itself conclusively established that there was no 'intimate relationship' within the meaning of Family Court Act §812(1)(e) was improper."

In Matter of Rizzo v. Pravato, 2019 Westlaw 1141778 (2d Dept. Mar. 13, 2019), petitioner appealed from a March 2018 Family Court order which, without a hearing, dismissed her March 2017 family offense petition against her step-aunt for lack of subject matter jurisdiction. The Second Department reversed, on the law, reinstated the petition, and remitted to

Family Court for a hearing to determine subject matter jurisdiction pursuant to Family Court Act §812(1)(e). Petitioner's mother was married to respondent's brother; respondent was the sister of petitioner's stepfather. Here, the issue is whether the parties are "members of the same family or household," FCA §812(1), defined as here relevant as "persons who are not related by consanguinity or affinity and who are or have been in an intimate relationship regardless of whether such persons have lived together at any time." FCA §812[1][a], [e]. The Appellate Division held that "Family Court should not have determined, without a hearing, that the parties were not and had never been in an intimate relationship," given that "the legislature left it to the courts to determine on a case-by-case basis what qualifies as an intimate relationship within the meaning of Family Court Act §812(1)(e) based upon consideration of factors such as the nature or type of relationship, regardless of whether the relationship is sexual in nature; the frequency of interaction between the persons; and the duration of the relationship." The Court concluded that "in light of the parties' conflicting allegations as to whether they had an 'intimate relationship' within the meaning of Family Court Act §812(1)(e), the Family Court *** should have conducted a hearing on that issue."

H. Sufficiency

In People v. Creecy, NY Law Journ. Nov. 5, 2018 at 17, col. 3 (Town Ct. Mamaroneck, Meister, J., Oct. 29, 2018), defendant moved to dismiss the information filed against him, alleging harassment in the 2d degree, PL 240.26(1), upon the ground of facial insufficiency. The information alleged that defendant, with intent to harass, annoy or alarm his wife, and threatening to subject her to physical contact, stated to her: "Brick by brick, dollar by dollar, body by body, I'm going to start with you, and I'm going to run through every person who has ever helped you." Defendant conceded he made the statement to his wife in their home, while

discussing their legal separation terms and being angered over her use of marital funds. The parties did not dispute that the above quote was a line from a Denzel Washington movie entitled "The Equalizer," which they had recently seen together. The Court denied the motion, rejecting Defendant's contention that because his statement was from a movie, it was somehow less threatening. The Court took judicial notice of the film's description as a "vigilante action thriller," its poster bearing an image of the star thereof carrying an automatic weapon and its "R" rating for "strong bloody violence and language throughout." The Court concluded: "Invoking language from a violent film that the parties had recently viewed together, and that evidently so strongly impressed the Defendant that he remembered the line verbatim, adds a chilling tone to it from which a threat of intended and imminent violence can easily be inferred."

I. Venue

In Matter of Natalie A. v. Chadwick P., 2018 Westlaw 6174920 (1st Dept. Nov. 27, 2018), the mother appealed from a December 2017 Family Court order which granted the father's motion to change venue and transferred the mother's family offense and custody petitions to Clinton County. The First Department reversed, on the law, and denied the father's motion. The Appellate Division noted that the parties lived in Clinton County from 2011 to until September 23, 2017, "when the mother fled to escape a physical altercation in the home." The First Department held that "Family Court failed to consider the allegations of domestic violence against [the mother] by the father in Clinton County, which precipitated her abrupt move to safety in New York County, where her parents live, and the indicia of her residence in New York City" which included "a sworn affidavit that she had already secured a full-time job, health insurance, and a pediatrician for the child." The Court concluded: "The allegations of domestic violence and the safety of the mother support keeping New York County as the venue for these

proceedings."

J. Violation – Dismissed

In Matter of Scobie v. Zimmerman, 2018 Westlaw 5288914 (3d Dept. Oct. 25, 2018), petitioner appealed from a September 2017 Family Court order which, *sua sponte* at the initial appearance, dismissed her petition seeking to find respondent in willful violation of a "refrain from" order of protection. The Third Department affirmed and found: "The petition contains what purports to be quotations from a conversation between respondent and his attorney in the county courthouse while petitioner was in an adjoining room. Although petitioner asserts that respondent made a threat to her life and said that she would disappear, the quoted language does not directly refer to petitioner. Even if it did, there is no allegation that respondent directed his remarks toward petitioner or that he intended for her to overhear him. Indeed, there is no allegation that respondent was aware that petitioner was nearby or listening to his private conversation with his attorney. The allegations in the petition are facially insufficient to demonstrate any acts that would constitute menacing, harassment or any other willful violation of the order of protection."

K. 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."

XI. INCOME TAX

A. Dependency Exemptions – Conditions

In Haggerty v. Haggerty, 2019 Westlaw 409799 (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."

XII. MAINTENANCE

A. Denied

In Giallo-Uvino v. Uvino, 2018 Westlaw 5020409 (2d Dept. Oct. 17, 2018), the wife appealed from an April 2016 Supreme Court judgment of divorce which, upon a February 2016 decision of the court made after an inquest, among other things: (1) valued the husband's law practice as of the date of trial and determined that the practice had no value; (2) awarded her only 55% of the net proceeds of the sale ($561,266.75) of the marital residence; (3) declined to award her an attorney's fee and expert fees, and (4) determined that the wife was not entitled to an

award of maintenance. The Second Department modified, on the law, on the facts, and in the exercise of discretion: (1) by awarding the wife 70% of the net proceeds of the sale of the marital residence; and (2) by awarding the wife an attorney's fee of $70,000. The parties were married in June 2000, and have one child. The wife worked as a registered nurse, and the husband was an attorney with his own law practice. In July 2012, the wife commenced this action for a divorce and the husband appeared in the action. He failed to appear for the trial in July 2015, and Supreme Court held an inquest. The Appellate Division held that "Supreme Court providently exercised its discretion in valuing the [husband's] law practice as of the date of trial, rather than the date of commencement of the action," given that the wife "failed to establish that the defendant, who was disbarred during the pendency of this action (citation omitted) intentionally lost his license in order to devalue his law practice (citation omitted) *** [and] failed to establish that the defendant's business had any value as of the date of trial." As to maintenance, the Second Department found: "considering the relevant factors, including, inter alia, the duration of the marriage, the present and future earning capacity of the parties, and the ability of the party seeking maintenance to become self-supporting, the Supreme Court did not improvidently exercise its discretion in declining to award maintenance to the plaintiff." The Appellate Division held that "Supreme Court improvidently exercised its discretion in awarding the plaintiff only 55% of the net proceeds of the sale of the marital residence" [and] [b]ased on the circumstances of this case, we find that the plaintiff is entitled to 70% of the net proceeds of the sale of the marital residence." As to counsel fees, the Court concluded that "Supreme Court improvidently exercised its discretion in declining to award the plaintiff an attorney's fee," and a factor to be considered is "whether either party has engaged in conduct or taken positions resulting in a delay of the proceedings or unnecessary litigation (citations omitted)." Here the Second Department

found that the husband failed "to timely provide certain financial documentation which unnecessarily prolonged the litigation, [and] the court should have awarded the plaintiff an attorney's fee in the sum of $70,000."

B. Denied – Distributive Award as Factor

In Oppenheim v. Oppenheim, 2019 Westlaw 362109 (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 defendant 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."

C. Denied - Duration of Temporary Award as Factor; Earning Capacity

In Feng v. Jansche, 2019 Westlaw 1028961 (1st Dept. Mar. 5, 2019), both parties appealed from an October 2017 Supreme Court judgment which, upon a July 2017 decision after trial of the wife's 2013 divorce action: (1) distributed 40% of the stipulated valued of the husband's stock options and restricted stock units to the wife; (2) valued the marital funds at $410,696.82; (3) terminated the temporary maintenance award as of July 31, 2017 and declined to award the wife post-divorce maintenance; (4) imputed income of $831,710 to the husband, imposed a CSSA income cap of $400,000 and made the child support award prospective; and (5) awarded the wife $25,000 in counsel fees. The First Department modified, on the law and the facts, to: (1) award the wife 50% of the value of the marital portion of defendant's stock options and restricted stock units; (2) impose a CSSA income cap of $300,000 and award child support retroactive to October 1, 2014; and (3) remand for further proceedings. The Appellate Division held that "[t]o the extent the marital portion of defendant's stock options and GSUs represents compensation, plaintiff's award should be increased from 40% to 50% of the value, or $126,487." With respect to maintenance, the First Department determined that Supreme Court "properly declined to award plaintiff post-divorce maintenance on the grounds that she holds a doctorate in computer science and is working full-time as a data scientist" and correctly terminated the temporary order as of July 2017 when its decision after trial was issued. The Court noted that the duration of temporary maintenance "was one of the factors [Supreme] court

considered in determining that further maintenance was not warranted." On the issue of imputed income, the Appellate Division held that Supreme Court "properly imputed income to defendant based on the average of his total income for the years 2012 through 2014." As to child support, the First Department found that Supreme Court "correctly considered the standard of living the child would have enjoyed had the marriage remained intact in deviating from the statutory cap," but given the fact that the husband was ordered to pay 88% of extracurricular activities, summer camp, and private school, the Court reduced the CSSA income cap to $300,000. With respect to the issue of retroactivity, the Appellate Division agreed with the wife that Supreme Court "erred in making the child support award prospective only (citation omitted). It should be retroactive to October 1, 2014, the date on which plaintiff started receiving court-ordered pendente lite child support." The action was remanded for a determination of retroactive child support owed, including add-on expenses, and whether the husband should pay arrears "in one sum or periodic sums." The First Department upheld the $25,000 counsel fee award, determining that Supreme Court properly considered "the financial circumstances of both parties together with all the other circumstances of the case, which may include the relative merit of the parties' positions," and given that the husband had already paid $120,000 of the wife's counsel fees, the total of $145,000 was more than half of her fees at the time of trial.

D. Durational – Affirmed

In Belilos v. Rivera, 164 AD3d 1411 (2d Dept. Sept. 26, 2018), both parties appealed from an October 2015 Supreme Court judgment which awarded the wife maintenance of $5,000 per month for 5 years, restored $150,000 of the wife's separate property, which had been placed in a joint account, to the wife, awarded the wife 25% of the husband's enhanced earning capacity from advanced degrees and certifications and 50% of the husband's business interests,

and awarded the wife $75,000 in counsel fees and $15,000 in expert witness fees. The Second Department affirmed. As to the inheritance, the wife established that she received $150,000 as an inheritance from her uncle, which was deposited into a joint account because she had no bank accounts in her name alone, and further, the husband admitted at his deposition that he intended to return the $150,000 to the wife "to make things right." The Appellate Division upheld the 50% award of the business interests, and as to the 25% enhanced earning capacity award, found that the wife "demonstrated that she substantially contributed to the defendant's acquisitions of his advanced degrees and certifications." The Court upheld the maintenance, counsel fee and expert witness fee awards as appropriate exercises of discretion.

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."

In Flom v. Flom, 2019 Westlaw 1064152 (1st Dept. Mar. 7, 2019), the wife appealed from a March 2017 Supreme Court judgment which, among other things: (1) distributed 40% of certain marital assets to the wife and 60% to the husband, including an in-kind distribution of an

LLC; (2) apportioned 40% of the assets and liabilities related to certain investments to the wife and 60% to the husband; (3) awarded the wife $26,000 per month in taxable maintenance for 6 years; and (4) imputed annual income to the wife of $50,000 for CSSA purposes and applied the then-statutory cap of $141,000. The First Department modified, on the law and the facts, by: (1) increasing the wife's distribution of assets to 50%; (2) increasing her distribution of and responsibility for, the assets and liabilities of the investments to 50%; and (3) imposing a CSSA cap of $300,000, without imputing any income to the wife, and increasing child support for the parties' unemancipated child from $1,238 per month to $4,250 per month, retroactive to the entry of judgment. The Appellate Division held that Supreme Court "improvidently exercised its discretion in distributing the marital assets 60% to plaintiff and 40% to defendant," citing the principle that "where both spouses equally contribute to the marriage which is of long duration, a division should be made which is as equal as possible." The parties were married for 18 years and had 2 children. The Court found that "the referee divided the marital property unequally solely because defendant was not employed outside the home and the parties hired domestic help, and thus, in the referee's view, she did not contribute equally to the marriage." The First Department cited the trial testimony, which established that the mother "was actively involved with the children, coaching their athletic teams, attending parent-teacher conferences, and, as plaintiff testified, being 'their mom.'" Increasing the marital property distribution to the wife to 50%, the Appellate Division stated: "It is undisputed that the parties enjoyed a lavish lifestyle, and the evidence indicated that defendant played a major role in managing the home, including entertaining clients and paying household expenses from the parties' joint account. The referee's finding that there was no evidence that defendant 'ever cooked a meal, dusted a table or mopped a floor' did not support the court's determination that she was therefore entitled to only 40% of

the parties' marital assets." On the issue of marital debt, the First Department determined that Supreme Court "providently exercised its discretion in apportioning liability to defendant for failed investments *** that plaintiff personally guaranteed with a collateral account," finding that "[the husband's] conduct in guaranteeing the loans did not absolve defendant of joint liability." The Court concluded on this issue: "Since the investments were made during the marriage for the benefit of the parties, the parties should share [equally] in the losses." With regard to the in-kind distribution of the husband's interest in an LLC, which the Court increased to 50%, the Appellate Division rejected the husband's argument that the same "could not be distributed because defendant failed to value the asset" because he proposed "prior to trial to distribute [the LLC interest] in lieu of maintenance." The Appellate Division upheld the maintenance award "based on the lavish lifestyle of the parties during the marriage, and the fact that [the wife] had not worked outside the home in over 20 years." Given the wife's now increased equitable distribution award, and Supreme Court's direction that the husband provide her with health insurance until she qualifies for Medicare, the Court rejected the wife's argument for "at least 12 years, if not lifetime, maintenance." With regard to child support, the First Department held that there was "no basis" for the imputation of $50,000 in annual income to the wife and noted the referee's findings that: the husband "had significantly greater financial resources and a gross income that greatly exceeded defendant's"; the child enjoyed a "luxurious standard of living" during the marriage; and "no deviation from the then-income cap of $141,000 was warranted because plaintiff had voluntarily agreed to pay the child's educational expenses, coaching, tutoring and summer camp." The Court concluded that "given the factors considered, but subsequently disregarded, by the referee *** we find that a $300,000 income cap, which would result in a monthly basic child support award of $4,250, retroactive to entry of the judgment of

divorce, would satisfy the child's 'actual needs' and afford him an 'appropriate lifestyle.'"

In Cotton v. Roedelbronn, 2019 Westlaw ____ (1st Dept. Mar. 26, 2019), the wife appealed from an October 2017 Supreme Court judgment, which awarded her 10% of the husband's business interests valued at $19.94 million and 40% of two other business interests valued at $3.28 million and $655,943, respectively, and maintenance of $20,000 per year for 3 years. The First Department affirmed, rejecting the wife's contention that the date of commencement valuation of the businesses was improper, and finding that the husband's business assets were actively managed. As to the proportions, the 10% award was upheld because "the value of these businesses was primarily derived from efforts made by plaintiff and his partners prior to the marriage, and that defendant made little, if any, contribution to the growth of these businesses" and, further, that the wife "at times acted as a hindrance to plaintiff's business dealings." The Appellate Division upheld the 40% award, declining to increase it to 50%, noting the Referee's finding that while the wife "made no direct contribution to these business entities, *** she shared in the parties' restrained lifestyle that allowed these particular investments to grow." The First Department affirmed the maintenance award, citing both the Referee's finding that the wife's statement of net worth was "riddled with misstatements, inaccuracies and unsubstantiated expenses" and expert testimony "that this amount and duration would be sufficient to meet defendant's needs and allow her to re-enter the employment market."

E. Durational – Affirmed; Percentage of Bonus

In Rogowski v. Rogowski, 2019 Westlaw 1781817 (2d Dept. Apr. 24, 2019), the husband (as a *pro se* appellant) appealed from a March 2010 Supreme Court judgment which, following trial of the wife's 2008 divorce action, awarded the wife maintenance of $2,500 per month for 5

years and 60% of his annual employment bonus in excess of $14,200. The Second Department affirmed, holding that Supreme Court properly considered the statutory maintenance factors and noting: "Given that the parties agreed that the plaintiff would quit work and care for the children, and given the evidence adduced regarding the parties' respective incomes and future employment prospects, the court did not improvidently exercise its discretion in determining the amount or duration of maintenance. Also, contrary to the defendant's contention, the award of a portion of the defendant's annual employment bonus as a part of maintenance did not constitute an improper open-ended obligation (citations omitted)."

F. 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.

G. Durational - Amount Reduced, Duration Increased; Health Insurance; Imputed Income; Life Insurance; Tax-Free

In Gorman v. Gorman, 2018 Westlaw 5274250 (2d Dept. Oct. 24, 2018), the wife

appealed from a December 2015 Supreme Court judgment which, after trial, awarded her only $4,500 per month in maintenance for 8 years, distributed marital property, and imputed annual income to her of $26,000, and the husband cross-appealed from so much of the judgment as failed to award him a share of bank accounts, as awarded maintenance, and $20,000 in counsel fees to the wife. The Second Department modified, on the law, on the facts, and in the exercise of discretion, by: (1) decreasing the amount of maintenance to $2,750 per month and making the same tax-free to the wife, but increasing the duration until the earliest of the wife's remarriage, her attainment of the age at which she becomes eligible for full Social Security benefits, or the death of either party; (2) requiring the husband to maintain $500,000 in life insurance for the wife so long as he is obligated to pay maintenance; (3) by directing the husband to provide health insurance for the wife until she becomes eligible for coverage through employment or through Medicare, whichever shall first occur; and (4) providing that the parties' joint checking account and savings accounts ($95,981.18 + $44,458.50), be equally divided between the parties, with a $1,600 credit to the wife. The parties were married on May 16, 1987. The wife worked as a legal secretary for a period of time, and left the workforce to become a homemaker and to care for the parties' two children (now in their mid-to-late twenties), while the husband in various capacities connected with the US military, including defense contracting work in Iraq. The husband commenced the action in August 2011. As to maintenance, the Appellate Division found that "considering the relevant factors, including the ages of the parties, the long duration of the marriage and the extended absence of the defendant from the workforce, the distribution of the marital assets, the parties' respective past and future earning capacities, and the availability of retirement funds and pensions, the Supreme Court providently exercised its discretion in awarding the defendant durational, as opposed to lifetime, maintenance (citations omitted).

However, rather than providing for a durational limitation of eight years and subjecting that award to termination upon the plaintiff's remarriage, under the circumstances of this case, the maintenance award should continue until the earliest of the defendant's remarriage, her attainment of the age at which she becomes eligible for full Social Security benefits, or the death of either party (citations omitted)." As to imputed income to the husband of $151,192, the Second Department found that "from 2008 through late 2013, the plaintiff was employed overseas in Iraq and, as a result of such employment, received a significantly augmented salary, enhanced overtime, and no-cost room and board. In December 2013, the plaintiff returned to the United States, taking up residence in Ohio, where he resides with his fiancée. As of the time of trial, the plaintiff was employed by the Department of Defense as a quality assurance inspector at a salary of $81,079 per year. The plaintiff did not submit a current statement of net worth. He acknowledged that his earnings are deposited into a joint checking account with his fiancée and that all of his monthly expenses are shared with his fiancée. The plaintiff also acknowledged that he regularly gambles, to the point that he has received free hotel accommodations, airfare, vacations (including a cruise), and other free or discounted items because of his frequent gambling. In 2013, he reported gambling winnings of $11,250 on his tax return. He acknowledged winning $1,800 over two days of gambling in September 2014." The Appellate Division concluded that the imputed income to the husband should be $100,000. With regard to imputed income to the wife, the Court stated: "While we agree with the defendant that the Supreme Court should not have imputed income to her based on statistical information from the New York State Department of Labor that was not admitted in evidence at trial (citation omitted), there was evidence, nonetheless, that the defendant had earned $15 per hour as a legal secretary during the early part of the marriage. Even though she has been out of the work force

for an extended period of time and does not have a college degree, she is in good health and has a sufficient employment history to warrant the conclusion that she is capable of earning at least the sum of $26,000 annually, which is the amount of income imputed to her by the court." The Second Department concluded on the issue of maintenance that the husband should pay the wife $2,750 per month, "which sum shall be neither tax deductible by the plaintiff nor taxable to the defendant." As to life insurance, the Appellate Division directed the husband "to purchase, pursuant to Domestic Relations Law §236(B)(8)(a), a life insurance policy in the amount of $500,000, designating the defendant as sole irrevocable beneficiary for only as long as the plaintiff is obligated to pay maintenance to the defendant." On the issue of health insurance, the Appellate Division held that Supreme Court "should have directed the plaintiff to provide health insurance for the plaintiff until she becomes eligible for coverage through employment or through Medicare." As to the marital residence, the Court held that "Supreme Court providently exercised its discretion in directing the sale of the marital residence because the parties' children have reached majority, there is no need of a spouse as a custodial parent to occupy the residence for the children (citation omitted), and neither party submitted a market-based valuation of the marital residence. With regard to the bank accounts, the Court directed and equal division as to their commencement date values, but since the husband "purchased a diamond engagement ring for $3,200 for his fiancée prior to commencement of this action, and failed to prove that it was separate property," the wife is entitled to a 50% credit for the ring's purchase price ($1,600). Finally, the Second Department held that given "the relative financial circumstances of the parties and the relative merits of the parties' positions at trial, the Supreme Court providently exercised its discretion in awarding the defendant $20,000 in attorney's fees."

H. Durational - Increased to Age 62; Health Insurance; Life Insurance; Retroactivity

In DiLascio v. DiLascio, 2019 Westlaw 1141928 (2d Dept. Mar. 13, 2019), the wife appealed from a June 2016 Supreme Court judgment, upon October and December 2015 decisions after trial, which, among other things: (1) awarded her maintenance of only $140,000 per year until the earliest of May 1, 2022, the death of either party, or her remarriage; (2) directed that maintenance and child support would begin on the first day of the first month following entry of judgment and declined to make said awards retroactive to the September 2012 commencement of the action; and (3) directed the husband to maintain life insurance of only $500,000. The Second Department modified, on the law, on the facts, and in the exercise of discretion, by: (1) increasing the duration of maintenance so as to terminate at the earliest of the wife's age 62, the death of either party, or her remarriage; (2) directing that maintenance and child support shall be retroactive to September 19, 2012; (3) directing the husband to pay for the wife's health insurance for the same duration as his maintenance obligation; and (4) directing the husband to maintain a declining term policy of life insurance for the wife's benefit, until payment of child support, maintenance, and health insurance is completed, in an amount sufficient to secure those obligations. The Appellate Division remitted to Supreme Court for a calculation of the amount of retroactive maintenance and child support arrears from September 19, 2012, giving the husband appropriate credit for the actual amount of the carrying charges on the marital home and expenses he paid pursuant to the pendente lite order, and taking into account his payments of pendente lite maintenance and child support, and to determine an appropriate amount of life insurance to secure the payment of the maintenance, child support, and health insurance. The parties were married in 1997 and have two children, a son, who resides with the wife, and a daughter, who resides with the husband. The son became severely disabled at the age 5, has required 24-hour care and attends school with a private duty nurse, with nursing

care paid for by Medicare and supplemented by both parents for any gaps in coverage. The parties had a prenuptial agreement in which they were governed as to property by a "title scheme." The husband "had a highly lucrative career in the financial industry, and the [wife] last worked as an ultrasound technician before the marriage." As to maintenance, the Appellate Division agreed "with the Supreme Court's determination, upon its consideration of all of the factors set forth in Domestic Relations Law former §236(B)(6)(a), that, notwithstanding the plaintiff's care of their disabled son, an award of lifetime maintenance was not appropriate," but increased the award of durational maintenance until the wife's age 62, subject to the above termination events, as such an extension "would more realistically provide the plaintiff a sufficient opportunity to become self-supporting." With regard to retroactivity, the Court cited the statutory rule that the awards "are retroactive to, the date the applications for maintenance and child support were first made, which, in this case, was September 19, 2012," citing Domestic Relations Law §236[B][6][a] and [7][a]. On the health insurance issue, the Second Department held that "in light of all of the circumstances of this case, the defendant should be directed to pay the plaintiff's health insurance costs during the period the defendant is obligated to pay maintenance."

I. Non-Durational – Affirmed

In Jankovic v. Jankovic, 170 AD3d 1174 (2d Dept. Mar. 27, 2019), the husband appealed from a July 2016 Supreme Court judgment, rendered upon a January 2015 decision after trial in the husband's 2011 action, which awarded the wife $333 per month in non-durational maintenance and counsel fees of $15,000. The Second Department affirmed. The parties were married in 1978 and all of their children are emancipated. As to maintenance, the Appellate Division held that Supreme Court property considered "the 30-year duration of the marriage, the

age of the defendant, her health, and her limited education, as well as her limited future earning capacity and the disparity in the parties' respective incomes." With respect to counsel fees, the Second Department found that Supreme Court was within its discretion to consider the disparity in the parties' incomes and "particularly the plaintiff's refusal to pay defendant any of the sums awarded to her under a pendente lite order in the action, the complexity of the issues involved, and the relative merits of the parties' positions."

J. Termination – Cohabitation

In Kelly v. Leaird Kelly, 2019 Westlaw 1218215 (4th Dept. Mar. 15, 2019), the former husband (husband) appealed from an August 2017 Supreme Court order which, after a hearing, denied his motion to terminate maintenance to the former wife (wife) upon the ground of cohabitation. The Fourth Department reversed, on the law, and granted the husband's motion. The parties' incorporated agreement provided that maintenance ends if the wife remarries or if there is "a judicial finding of cohabitation pursuant to Domestic Relations Law §248." The Appellate Division reasoned: "Pursuant to Domestic Relations Law §248, cohabitation means 'habitually living with another person' (citations omitted)" and noted that the Court of Appeals "found that a common element 'in the various dictionary definitions [of cohabitation] is that they refer to people living together in a relationship or manner resembling or suggestive of marriage,'" citing Graev v Graev, 11 NY3d 262, 272 (2008). The Fourth Department noted, among other hearing testimony, that "it is undisputed that defendant reconnected with the man on a dating website and moved directly into his home from her marital residence, after which they commenced a sexual relationship. They have taken multiple vacations together, including for his family reunion, and they sometimes shared a room while on those vacations. Defendant wears a diamond ring on her left hand that the man purchased. They also testified regarding their

complicated financial interdependence." The Court concluded that "the record does not show that the sexual relationship between defendant and the man had ended" and found that the husband "established by a preponderance of the evidence that defendant was engaged in a relationship or living with the man in a manner resembling or suggestive of marriage."

XIII. PATERNITY

A. Equitable Estoppel – Denied

In Matter of Ramos v. Broderek, 2018 Westlaw 5931352 (2d Dept. Nov. 14, 2018), Broderek appealed from a September 2017 Family Court order, which declined to apply equitable estoppel and adjudicated him to be the father of a child born in March 2011. The Second Department affirmed. The mother and Broderek had an intimate relationship beginning in June or July 2010, and the mother testified that for approximately one month, after he became aware that she was pregnant, Broderek acted as though he was the father of the unborn child. However, near the time of conception, the mother also had intimate relations with her ex-husband, who was excluded by an August 2011 DNA test. The ex-husband and the child never had a relationship. When the child was approximately four years old, the mother married another man, with whom the child does not have a close relationship. A December 2016 DNA test indicated a 99.99% probability that Broderek was the father. In January 2017, the mother filed a paternity petition against Broderek. The Appellate Division agreed that equitable estoppel did not apply and noted that the principle "does not involve the equities between [or among] the . . . adults" and "[t]he paramount concern in applying equitable estoppel in paternity cases is the best interests of the subject child" (citations omitted). The Court concluded that "the evidence did not demonstrate a close relationship between the child and either the mother's former or current husband such that the application of equitable estoppel would be in the child's best interests."

XIV. PENDENTE LITE

A. 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."

B. 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 ***."

XV. PROCEDURE

A. Service – Failure to Notify SCU of Address Change

In Matter of L. v. A., NY Law Journ. Nov. 5, 2018 at 17, col. 5 (Fam. Ct. Bronx Co., Bahr, S.M., Oct. 16, 2018), Family Court rejected respondent's contention, in the context of his

motion to vacate a default order finding him in willful violation, that substituted service was invalid to his last known address, given that respondent had failed to advise SCU of his change of address, as required by FCA 443. The facts and history are set forth in the court's over 5 page, single-spaced decision, but of note is that the process server's affidavit of due diligence, submitted in support of the mother's application for substituted service, stated that the server had spoken with respondent's ex-wife, who advised that the father no longer lived at the last address on file with SCU, and that "he is avoiding service as there are multiple orders out against him."

B. Time to Appeal

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 contention that his interpretation of the stipulation, which appeared to be that the wife's entitlement was based on the 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.

XVI. LEGISLATIVE AND COURT RULE ITEMS

A. Authentication – Party Production of Documents

New CPLR Rule 4540-a is **added, effective January 1, 2019,** to provide that "material produced by a party in response to a demand pursuant to article thirty-one of this chapter for material authored or otherwise created by such party shall be presumed authentic when offered into evidence by an adverse party. Such presumption may be rebutted by a preponderance of evidence proving such material is not authentic, and shall not preclude any other objection to admissibility." A06048/S04869, Laws of 2018, Chapter 219.

B. Court-Appointed Special Advocates

Judiciary Law §212(2) is **amended, effective October 1, 2018**, to adopt rules and regulations standardizing the use of court-appointed special advocate (CASA) programs and governing the structure, administration and operation of such programs, and to create a new Judiciary Law article 21-C requiring such CASA volunteers to only exercise the functions and duties specifically authorized by the court. A01050/S02059-A, Laws of 2018, Chapter 291.

C. 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.

D. 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 with federal law. A.10272/S.08121, Laws of 2018, Chapter 60.

E. Judicial Notice – Internet Mapping

CPLR Rule 4511 is **amended, effective December 28, 2018** is amended, by adding a new subdivision (c), which provides, among other things: "Every court shall take judicial notice of an image, map, location, distance, calculation, or other information taken from a web mapping service, a global satellite imaging site, or an internet mapping tool, when requested by a party to the action, subject to a rebuttable presumption that such image, map, location, distance, calculation, or other information fairly and accurately depicts the evidence presented. *** A party intending to offer such image or information at a trial or hearing shall, at least thirty days before the trial or hearing, give notice of such intent, providing a copy or specifying the internet address at which such image or information may be inspected. No later than ten days before the trial or hearing, a party upon whom such notice is served may object to the request for judicial notice of such image or information, stating the grounds for the objection." A11191/S09061, Laws of 2018, Chapter 516.

F. Judgments of Divorce – Incorporation, Retain Jurisdiction and Future Application Paragraphs, Part Deux

Administrative Order AO/269/18, dated September 20, 2018, amends 22 NYCRR 202.50(b)(3), **effective for all divorce submissions made after September 30, 2018, but not enforced until October 30, 2018**, regarding two matters pertaining to judgments: (1) Last year, a new prescribed decretal paragraph was added pertaining to incorporation of an agreement into a judgment, which is now labeled as box A and there is no change to that language. There is a new box B, which would cover, for example, a pure default in an uncontested divorce, where the court is deciding the ancillary issues, and now gives the check box option: "there is no settlement agreement." (2) Last year's amendments, which require the "retain jurisdiction" paragraph and the "any applications brought in Supreme Court" paragraph, have now been modified to require,

in 3 places, the insertion of the words "if any." The amendment is set forth in its entirety below (additions are underlined and deletions are bracketed [ ]) and may also be found at the Divorce Resources web page of our matrimonial practice committee http://ww2.nycourts.gov/divorce/legislationandcourtrules.shtml and is incorporated into the very latest version of form UD-11, the judgment of divorce http://ww2.nycourts.gov/divorce/divorce_withchildrenunder21.shtml

Fill in Box A or Box B. whichever, applies:

A. □ **ORDERED AND ADJUDGED** that the Settlement Agreement entered into between the parties on the day of , □ an original OR □ a transcript of which is on file with this Court and incorporated herein by reference, shall survive and shall not be merged into this judgment, and the parties are hereby directed to comply with all legally enforceable terms and conditions of said agreement as if such terms and conditions were set forth in their entirety herein; [and]

OR

B. □There is no Settlement Agreement entered between the parties; and it is further

ORDERED AND ADJUDGED, that the Supreme Court shall retain jurisdiction to hear any applications to enforce the provisions of said Settlement Agreement, if any, or to enforce or modify the provisions of this judgment, provided the court retains jurisdiction of the matter concurrently with the Family Court for the purpose of specifically enforcing, such of the provisions of that (separation agreement)(stipulation agreement, if any), as are capable of specific enforcement, to the extent permitted by law, and of modifying such judgment with respect to maintenance, support, custody or visitation to the extent permitted by law, or both; and it is further

ORDERED AND ADJUDGED, that any applications brought in Supreme Court to enforce the provisions of said Settlement Agreement, if any, or to enforce or modify the provisions of this Judgment shall be brought in a County wherein one of the parties reside; provided that if there are minor children of the marriage, such applications shall be brought in a County wherein one of the parties or the child or children reside, except, in the discretion of the judge, for good cause. Good cause applications shall be made by motion or order to show cause. Where the address of either party and any child or children is unknown and not a matter of public record, or is subject to an existing confidentiality order pursuant to DRL §254 or FCA §154-b, such applications may be brought in the County where the Judgment was entered; and it is further

G. 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.

H. Trial Subpoena Documents

CPLR §2305 is **amended, effective August 24, 2018**, to add a new subdivision (d), providing that where a trial subpoena directs service of the subpoenaed documents to the attorney or self-represented party at the return address set forth in the subpoena, a copy of the subpoena shall be served upon all parties simultaneously and the party receiving such subpoenaed records, in any format, shall deliver a complete copy of such records in the same format to all opposing counsel and self-represented parties where applicable, forthwith. A06047/S04867, Laws of 2018, Chapter 218. Applies to all actions pending on or after the effective date.

Dated: April 28, 2019

At: Albany, NY