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"

SUPPLEMENTAL OUTLINE

(April 26, 2019 – July 5, 2019)

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TABLE OF CONTENTS

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These materials cover the period April 26, 2019 through July 5, 2019.

COURT OF APPEALS NOTES

In Pangea Capital Mgt., LLC v. Lakian, 2019 Westlaw 2583109 (June 25, 2019), the Court of Appeals, in response to a certified question from the Second Circuit, held that where an entered divorce judgment grants a spouse an interest in real property pursuant to DRL 236 and the spouse does not docket the divorce judgment in the county where the property is located, that spouse's interest is not subject to attachment by a subsequent judgment creditor who has so docketed its judgment (CPLR 5203) and seeks to execute against the property. The parties were married in 1977 and in 2002 purchased a home in Suffolk County for $4.5 million, with title in the husband's name having been immediately transferred to a trust for which the husband was sole trustee, with the sole power to revoke and terminate the trust, and of

which the parties were each 50% beneficiaries as tenants in common. The parties settled the wife's 2013 New York County divorce action by written agreement in 2015, which provided that the wife would receive 62.5% of the sale proceeds of the Suffolk County property plus $75,000 and the husband would receive the remainder. A June 2015 divorce judgment incorporated the agreement. In 2012, Pangea, the husband's former employer, brought an action against the husband and a co-worker (with whom he was romantically involved) alleging that they had defrauded Pangea by diverting millions of dollars to themselves. The action was discontinued in favor of arbitration, which awarded $14 million to Pangea in January 2016. Pangea brought an action in US District Court to enforce the award against the husband and obtained an order of attachment against the property. The husband sought modification of the attachment order to permit the sale of the property and the federal court allowed the wife to intervene. The parties agreed to the sale and that the over $5 million in proceeds would be deposited in court, pending the outcome of Pangea's claim. The federal court confirmed the award against the husband and entered a judgment in Pangea's favor in November 2016, which Pangea promptly docketed in Suffolk County. The Court of Appeals concluded that the wife did not become the husband's judgment creditor, and thus, this was not a case of competing judgment creditors under CPLR 5203 with priority according to first in time docketing. Rather, the Court of Appeals held that the judgment of divorce was "a final settling of accounts" between spouses with an equitable interest in all marital property, such that legal rights to specific marital property vest upon the judgment of divorce, creating actual independent ownership

interests upon divorce.

I. AGREEMENTS

A. Interpretation – Arbitration

In Rosen v. Rosen, 2019 Westlaw 2030218 (2d Dept. May 8, 2019), the wife appealed from a July 2017 Supreme Court order, which granted the husband's motion to compel arbitration of her claims for child support enforcement and modification, and to stay proceedings pending such arbitration. The Second Department reversed, on the law, denied the husband's motion to compel arbitration of the enforcement claim and to stay arbitration, and remitted for a new determination of the husband's motion to compel arbitration of the modification claim and to stay proceedings thereon. The parties married in 2002 and have 2 children. A May 2014 arbitration agreement submitted certain issues to a Rabbinic Court, which rendered a decision later incorporated into the parties' stipulation and December 2014 judgment of divorce. The stipulation provided for biweekly child support of $1,003. In December 2017, the wife filed a Family Court petition seeking modification and enforcement of child support, prompting the husband's above-mentioned motion in Supreme Court. Finding that the stipulation was ambiguous as to whether the agreement to arbitrate child support modification issues before a Rabbinic Court was subject to a two-year limit, the Appellate Division determined that Supreme Court should have held a hearing to consider extrinsic evidence on that issue. However, the Second Department found that the stipulation did not require arbitration of child support enforcement issues.

B. Post Judgment – Enforcement

In Schaff v. Schaff, 172 AD3d 1421 (2d Dept. May 29, 2019), the former wife (wife) appealed from a July 2017 Supreme Court order, which granted the former husband's

(husband) December 2016 motion to amend the parties' October 2005 judgment of divorce (which incorporated a 2004 separation agreement and permitted Supreme Court to enforce its terms), so as to enforce the terms of the parties' December 2007 and September 2008 child support modification agreements, both of which were signed, but not acknowledged. The wife cross-moved for a determination of child support arrears. The parties have 3 children, all now emancipated, and their 2004 separation agreement provided for custody to the wife and child support of $446 per week payable by the husband. The December 2007 agreement changed custody of one child to the husband and reduced child support to $1,256 per month. The September 2008 agreement provided that "[c]hild support will end, effective immediately." The Second Department affirmed, rejecting the wife's argument that the husband was required to commence a plenary action, noting that he was "seeking to enforce the terms of the parties' separation agreement, which he asserts were modified by the 2007 writing and the 2008 writing." The Appellate Division reasoned that the separation agreement permitted written modifications and that the judgment conferred continuing jurisdiction upon Supreme Court to enforce the terms thereof. The Court further rejected the wife's contention that the unacknowledged agreements were unenforceable under DRL 236(B)(3), given that the parties were no longer married. The Second Department concluded that the 2007 and 2008 agreements were unambiguous and that Supreme Court was not required to conduct a hearing before determining that the same were enforceable.

II. CHILD SUPPORT

A. Approximately Even Custodial Time; Recoupment Allowed

In Matter of Rapp v. Horbett, 2019 Westlaw 2896748 (4th Dept. July 5, 2019), the mother appealed from a June 2017 Family Court order, which denied her objections to a

Support Magistrate order awarding the father $125 per week in child support for the period April 2, 2015 to January 1, 2016, during which period the parties "shared near equal access time with the child and the father had the higher income." The Fourth Department modified on the law, vacated the foregoing order and remitted for further proceedings, to establish a credit to the mother against any arrears accruing after January 1, 2016, when the mother "did not diligently exercise her access time and the father spent far more time with the child." The Appellate Division allowed recoupment to "relieve the mother of an erroneously-imposed financial obligation" and in consideration of her "significantly less income and *** [receipt of] certain public benefits, while the father received substantial disability and pension benefits and had significant assets."

B. Imputed Income; Social Security Taxes

In Johnson v. Johnson, 2019 Westlaw 2127532 (3d Dept. May 16, 2019), the husband appealed from an August 2017 Supreme Court judgment which, after trial of the wife's December 2015 divorce action, awarded the wife $17,031, representing 50% of capital contributions from marital assets to 2 marital businesses and child support of $723.33 per month. The parties were married in 2003 and have one child born in 2002. The husband contended on appeal, among other things, that Supreme Court erred by imputing income for purposes of maintenance and child support, and in awarding the wife 50% the contributions to the marital businesses. Supreme Court considered the wife's 2016 W-2 statements, which indicated that her 2016 gross income was $31,360, and the husband's 2016 tax return, which indicated that his 2016 reported gross income was $39,093. The court then imputed income to the wife based on her projected 2017 income of $57,200 and to the husband based on $60,282 he took from the marital businesses in 2016, less FICA taxes from the wife's and husband's

incomes of "7.65% and 15.3% respectively" and concluded that the wife's CSSA income was $52,824.20 and the husband's CSSA income was $51,058.85, pro rata shares of 50.85% and 49.15%, respectively. The Appellate Division held that "where as here, a party pays for personal expenses through a business account, the court has the authority to impute income" and may also do so "where there is clear and undisputed evidence of a party's actual income during the pendency of the proceeding." The Third Department noted that "the CSSA allows statutory deductions for FICA taxes 'actually paid,'" but Supreme Court reduced the husband's 2016 income by 15.3% and determined that his income was $51,058.85, despite the fact that the husband "actually paid" self-employment FICA taxes of $6,162 in 2016. The Appellate Division found that the wife's CSSA income was $52,824.40 as determined, the husband's CSSA income was $60,282, less $6,162, and that the combined parental income was $106,944, 49% attributable to the wife and 51% to the husband. The basic child support obligation (17%) is $18,180 and the husband's presumptively correct share is $9,272 per year or $773 per month. The Appellate Division found that: it was "not disputed that marital funds were used to create both businesses and that both were marital property"; "in the absence of any expert evidence, the court properly declined to value and distribute a share of the marital businesses" and there was "no abuse of discretion in the court's award to the wife representing her contributions from marital assets to start the businesses."

C. Over Cap - Upheld

In Candea v. Candea, 2019 Westlaw 2363775 (2d Dept. June 5, 2019), the parties were married in 1997 and both appealed from a March 2017 Supreme Court judgment which, after a 2016 trial of the wife's March 2015 divorce action, among other things, awarded the wife maintenance of $2,133 per month for 7 years, directed the husband to pay child support of

$4,133 per month for 2 children born in 2003 on the parties' income over the CSSA cap, awarded the wife a separate property credit of $51,895 for inherited funds, directed that certain stock be sold and equally divided, without directing an equal sharing of tax liability, and denied the wife's request for $25,000 in counsel fees. The Second Department modified, on the law, by reversing the separate property credit to the wife, holding that when she deposited inherited funds into a joint account, she "created a presumption that the funds were marital," and failed to rebut that presumption by establishing that the deposit was "only as a matter of convenience without the intention of creating a beneficial interest." The Court held that the wife further failed to establish a correlation between the funds so deposited and the subsequent purchase of gold coins and other precious metals. The Appellate Division otherwise affirmed as to the above-stated issues, finding that Supreme Court considered the maintenance factors in arriving at an appropriate award and that Supreme Court's application of the CSSA to all income over the cap "primarily due to the [husband's] considerable income and the standard of living to which the children were accustomed" was a provident exercise of discretion. The Second Department found that the tax issue raised by the husband was unpreserved and that the wife's claim for counsel fees was properly denied, "considering the equities and circumstances of the case, including the parties' respective financial conditions."

D. UIFSA– Choice of Law Clause Invalid

In Matter of Brooks v. Brooks, 171 AD3d 1462 (4th Dept. Apr. 26, 2019), the mother appealed from an August 2017 Family Court order denying her objections to a Support Magistrate order, which, upon her 2016 petition, modified a registered 2011 New Jersey judgment of divorce which incorporated an agreement permitting modification every two years and which stated: "notwithstanding the future residence or domicile of each party, this

Agreement shall be interpreted, governed, adjudicated and enforced in New Jersey in accordance with the laws of the State of New Jersey." The mother contends on appeal that Family Court improperly denied her objections, upon the ground that the Support Magistrate erred in applying New Jersey law in calculating the father's modified child support obligation for the parties' children. The Fourth Department reversed, on the law, granted the mother's objections and remitted to Family Court. Family Court concluded that pursuant to the choice of law provisions of Family Court Act § 580-604, "the law of the issuing state (in this case, New Jersey) governs the nature, extent, amount and duration of current payments under a . . . support order [that has been registered in New York]." The Appellate Division noted that where, as here, the parents reside in this state "and the child does not reside in the issuing state, a tribunal of this state has jurisdiction to enforce and to modify the issuing state's child support order in a proceeding to register that order," citing FCA §580-613 [a] and 28 USC §1738B [e] [1] and [i]. The Fourth Department, agreeing with the mother, held that "New York law must be applied to determine the father's child support obligation here inasmuch as the statute further provides that '[a] tribunal of this state exercising jurisdiction under this section shall apply . . . the procedural and substantive law of this state to the proceeding for enforcement or modification' (Family Ct Act §580-613[b])." The Court further noted that the choice of law provisions of FCA §580-604 do not control "inasmuch as that section applies to proceedings seeking to enforce prior child support orders or to calculate and collect related arrears and does not apply to proceedings, as here, seeking to modify such an order." The Fourth Department concluded: "the Support Magistrate erred in determining that the choice of law provision in the separation agreement controls over the statute. Although courts will generally enforce a choice of law clause 'so long as the chosen law bears a reasonable

relationship to the parties or the transaction' (citations omitted), courts will not enforce such clauses where the chosen law violates 'some fundamental principle of justice, some prevalent conception of good morals, [or] some deep-rooted tradition of the common weal' (citations omitted). *** Under New York law, child support obligations are required to be calculated pursuant to the Child Support Standards Act (citation omitted)" and parents are obligated until a child's age 21.

III. COUNSEL & EXPERT FEES

A. After Trial – Denied

In Candea v. Candea, 2019 Westlaw 2363775 (2d Dept. June 5, 2019), the parties were married in 1997 and both appealed from a March 2017 Supreme Court judgment which, after a 2016 trial of the wife's March 2015 divorce action, among other things, awarded the wife maintenance of $2,133 per month for 7 years, directed the husband to pay child support of $4,133 per month for 2 children born in 2003 on the parties' income over the CSSA cap, awarded the wife a separate property credit of $51,895 for inherited funds, directed that certain stock be sold and equally divided, without directing an equal sharing of tax liability, and denied the wife's request for $25,000 in counsel fees. The Second Department modified, on the law, by reversing the separate property credit to the wife, holding that when she deposited inherited funds into a joint account, she "created a presumption that the funds were marital," and failed to rebut that presumption by establishing that the deposit was "only as a matter of convenience without the intention of creating a beneficial interest." The Court held that the wife further failed to establish a correlation between the funds so deposited and the subsequent purchase of gold coins and other precious metals. The Appellate Division otherwise affirmed as to the above-stated issues, finding that Supreme Court considered the

maintenance factors in arriving at an appropriate award and that Supreme Court's application of the CSSA to all income over the cap "primarily due to the [husband's] considerable income and the standard of living to which the children were accustomed" was a provident exercise of discretion. The Second Department found that the tax issue raised by the husband was unpreserved and that the wife's claim for counsel fees was properly denied, "considering the equities and circumstances of the case, including the parties' respective financial conditions."

B. After Trial - Granted

In Beyel v. Beyel, 2019 Westlaw 2608376 (2d Dept. June 26, 2019), the wife appealed from a September 2016 Supreme Court judgment, rendered upon a December 2015 decision after trial of the wife's 2013 divorce action, which awarded her maintenance of only $3,000 per month for 7 years and counsel fees of only $10,000. The Second Department modified, on the facts and in the exercise of discretion, by increasing the duration of maintenance to 10½ years and upheld the counsel fee award. The Appellate Division noted: the parties were married 27 years; the wife's age at the time of trial (unspecified) and her limited full-time work experience; and the disparity in the parties' incomes and education levels. With respect to counsel fees, the Second Department held that the same was proper, given "the amount of the distributive award [unspecified] and the maintenance award."

In Carlucci v. Carlucci, 2019 Westlaw 2844567 (2d Dept. July 3, 2019), the husband appealed from an April 2018 Supreme Court order which, following a 2017 stipulation of settlement in the wife's 2016 action providing for written submission of the issue of counsel fees, awarded the wife $37,370. The Second Department affirmed, noting the rebuttable presumption of counsel fees in favor of the wife and agreeing with Supreme Court's determination, which considered "the overall financial circumstances of the parties and the

defendant's conduct during the course of the litigation."

C. After Trial – Granted (41%)

In Hofmann v. Hofmann, 2019 Westlaw 2504654 (1st Dept. June 18, 2019), the wife appealed from a July 2018 Supreme Court judgment which, after trial, among other things, awarded her 41% of counsel fees, 25% of certain investments associated with the husband's former employment, and denied maintenance. The First Department upheld the counsel fee award "in view of her substantial distributive award and the evidence that payment of her remaining counsel fees will not affect her ability to meet her living expenses." The Appellate Division modified, on the law and the facts, to award the wife 50% of the funds and investments derived from the husband's former employment, upon the ground that the same constituted compensation and were in part purchased with marital funds. The First Department affirmed the denial of maintenance as "supported by the record, which shows that [the wife's] distributive award – now substantially increased – would generate cash flow sufficient to render her self-supporting."

D. Agreement

In Wolman v. Shouela, 171 AD3d 664 (1st Dept. Apr. 30, 2019), the husband appealed from a January 2018 Supreme Court order which directed him to pay the wife's counsel fees in the sum of $325,000. The parties' agreement provides: "the Husband shall pay all of his and the Wife's reasonable counsel fees in connection with" his motion to modify visitation. The First Department affirmed, rejecting the husband's argument that he "was entitled to a hearing on the issue of reasonable counsel fees because the billing statements submitted in support of the wife's motion for counsel fees were not reasonably detailed." The Appellate Division found that Supreme Court, "being fully familiar with all of the underlying

proceedings, appropriately determined that the fees sought were reasonable by reviewing the detailed billing statements and the motion papers *** [and] reflected a significant reduction to the amount originally sought by the wife." The First Department declined to consider the husband's arguments that "some billing entries were improperly or excessively redacted and that the charges regarding photocopying were not reasonable, because those issues were not raised before the motion court." The Court refused "to consider the husband's arguments, raised for the first time on appeal, that counsel fees should not have been awarded to the wife because her motion failed to comply with 22 NYCRR 1400.2 and 1400.3 and Domestic Relations Law §237(b)."

E. Attorney for Child – Non-compliance with Part Rules

In Basile v. Wiggs, 2019 Westlaw 2608381 (2d Dept. June 26, 2019), the father appealed from a June 2017 Supreme Court money judgment in favor of the AFC for $8,876. The Second Department reversed, on the law, and remitted to Supreme Court. Supreme Court's October 2014 order directed the father to pay all of the AFC's fees, including an initial $3,000 deposit and provided that the AFC could not demand payments except as authorized by the order, with further fees to be sought by application on notice to the parties, in accordance with the applicable Matrimonial Part Operational Rules. The AFC sent periodic demands for payment to the father's attorney without court approval and then sought the subject money judgment, which the father opposed, citing the October 2014 order and the Part Rules. The Second Department deemed the motion for a money judgment to be a motion for further fees and instructed Supreme Court to allow the father an opportunity to respond.

IV. CUSTODY & VISITATION

A. Custody – AFC Appeal Standing; Child's Wishes; Modification Petition

Dismissed

In Matter of Newton v. McFarlane, 2019 Westlaw 2363541 (2d Dept. June 5, 2019), the attorney for the child appealed from a December 2017 Family Court order which, after a hearing, granted the mother's petition to modify a November 2013 order, which had awarded sole legal and physical custody of the parties' daughter born in November 2002 to the father, so as to direct that the mother shall have sole legal and physical custody. The Second Department reversed, on the law and the facts, and dismissed the mother's petition. The Appellate Division concluded that: the AFC had the authority to pursue the appeal and that the child was aggrieved by Family Court's order; Family Court should not have held a hearing without determining that the mother had alleged and established a sufficient change in circumstances to warrant an inquiry into whether the child's best interests were served by a modification; and Family Court erred by failing to give due consideration to the expressed wishes of the child. Among other things, the Second Department held that: the child's alleged academic difficulties were neither new nor related to the father's parenting; the father's handling of the child's taking and/or distribution of explicit photographs was appropriate and more proactive than the mother's response thereto; and the mother's move to a location in New Jersey closer than her previous residence did not constitute a sufficient change in circumstances.

B. Hague Convention – Return to Habitual Residence

In Eidem v. Eidem, NY Law Journ. May 3, 2019 (S.D.N.Y., Sullivan, J., Apr. 29, 2019, Docket No. 18-CV-6153), the father was a citizen of Norway and the mother was born in NY, holding dual citizenship in Norway and the US. The parents lived together in Norway from 2005 to 2013 and married in June 2008. There were two children, born in August 2008

and December 2010. Among other things, the older child has special medical needs and the younger child "has had difficulties with verbal skills." The mother filed for separation in June 2013 and the parties were divorced in Norway in 2014. The parties had a written agreement providing for joint custody, "permanent place of abode" with the mother, and visitation to the father every other Wednesday and Thursday, alternate weekends from Friday to Monday, and alternating holidays. In the summer of 2016, the father signed "a letter of parental consent" allowing the mother to take the children to the US for 1 year, to return before the August 2017 start of school in Norway. The children had never traveled outside of Norway prior to the summer of 2016, except to visit Sweden. The father visited the children in NY in December 2016 and began coordinating the children's return to Norway in January 2017. The mother had decided by April 2017 that she was not returning to Norway and misled the father, by telling him that she had purchased return tickets for August 8, 2017. The father and paternal grandfather went to the airport, but the children were not on the flight; only after the plane landed did the mother admit that "she had lied about purchasing airline tickets and explained that she was going to keep the children in the United States." The mother then cut off all contact between the father and children. The father tried calling at least a dozen times, to no avail. The father filed his petition for return of the children on July 6, 2018 and the Court held a hearing on October 9, 2018. The mother brought the children to the hearing, and to prior proceedings, for no apparent reason, and the Court "expressed concern that [the mother] was using the children to bolster her arguments regarding the traumatic effect of the litigation on them." The mother testified that a babysitter had unexpectedly cancelled the morning of the hearing; the mother's counsel then sought to withdraw and the Court held a hearing on October 17, 2018, at which time the mother "admitted she had perjured herself at the October

9 hearing." The mother's counsel was permitted to withdraw from representing her. Following post-trial submissions, the Court held a conference in November 2018, during which the mother stated that "she does not currently intend to return to Norway with the children if the Court orders their return to Norway." The Court postponed its decision due to surgeries upon the older child in late 2018 and through March 2019. The parties made further submissions in April 2019 as to their respective abilities to access and provide medical care for the older child and his ability to travel safely to Norway, and to attend to the children's other special needs. Finding, among other things, that "the last shared intent of the parties was clearly for the children to be habitual residents of Norway," and that "[n]early all the children's extended family resides in Norway, including their maternal grandmother and paternal grandparents," and rejecting the mother's "grave risk of harm" defense, the Court ordered the children to be returned to Norway no later than June 29, 2019.

C. Modification – Alcohol Use; Care of Child; Domestic Violence; Joint to Sole; Social Media and Texting

In Matter of Jennifer D. v. Jeremy E., 2019 Westlaw 2031519 (3d Dept. May 9, 2019), the mother appealed from a July 2017 Supreme Court order, which, following a hearing, modified a May 2015 consent order (joint legal custody and shared placement) so as to grant the father sole legal custody of a child born in 2009. The Third Department affirmed, noting that "it was undisputed that the mother and the father were no longer able to constructively communicate regarding the child [,]*** transportation arrangements often resulted in verbal conflict and, although both parents supported counseling for the child, they could not cooperate and each separately arranged for the child to see different providers [,]" thus supporting Supreme Court's conclusion that "joint custody was no longer feasible ***." As to

modification, the Appellate Division cited "the mother's transient living situation and persisting lack of employment" in support of the award of sole custody to the father, "noting that the mother "had moved at least six times since the prior order and did not have a lease agreement for her current residence, where she and the child shared a bedroom." The Third Department further found: "The mother did not dispute having made inappropriate posts to her social-networking account regarding alcohol and drug abuse and violence toward children. She further admitted to having sent affectionate text messages to her former paramour while he served time in jail for reckless endangerment related to his 2016 attack upon her." The Court noted the father's allegations that "the mother abused alcohol and drugs and failed to properly clean and clothe the child," and that "the mother's former paramour also testified on the father's behalf, alleging that the mother used drugs and alcohol in the presence of the child and did not care for the child." The father and his wife share a home where he has lived for 3 years, along with the child's paternal grandmother. The Appellate Division concluded that "a sound and substantial basis exists to support Supreme Court's determination that the best interests of the child are served by awarding sole custody to the father," along with visitation to the mother 3 weekends per month and in alternating weeks during the summer recess.

D. Modification – Dental Needs Not Addressed

In Matter of Kinne v. Byrd, 171 AD3d 1495 (4th Dept. Apr. 26, 2019), the mother appealed from a March 2018 Family Court order, which modified a prior order by awarding the father primary physical custody of the child. The Fourth Department affirmed, finding that testimony established that "the mother failed to seek any dental treatment for the child until he was four years old and suffering from a severe toothache (citations omitted). When the child was eventually examined by a dentist in August 2016, it was determined that he was at high

risk for tooth decay and needed tooth extractions, crowns, and 'pulpal therapy.' The mother nonetheless failed to seek any treatment for the child's pressing dental problems during the ensuing months. By the time the father became aware of the child's significant dental needs in May 2017, the child was suffering from a toothache that made it difficult for him to eat. We thus conclude that there was a change in circumstances based on the mother's demonstrated lack of concern for the child's dental needs and her failure to timely obtain necessary dental treatment (citation omitted)." The Appellate Division concluded that "Family Court properly determined that it is in the best interests of the child to modify the parties' existing custody arrangement by awarding the father primary physical custody of the child" and that the Court's decision was based upon a "careful weighing of [the] appropriate factors . . . , and . . . has a sound and substantial basis in the record."

E. Modification – Passport Authority; Visitation with Grandmother

In Cohen v. Cohen, 2019 Westlaw 2113003 (2d Dept. May 15, 2019), the father appealed from a March 24, 2014 Supreme Court order, which designated the mother as the sole custodial parent of a child born in 2001 for passport and travel purposes, and denied his motion to direct the mother to allocate 1/3 of the child's travel time to Israel to visiting with the paternal grandmother and to direct visitation between the paternal grandmother and the child when she visited the US. The parties were married in 2001 and entered into a consent custody order in December 2011. The mother alleged that the father unreasonably blocked passport issuance for the child unless the mother agreed to have the child spend half of his time with the father's family members in Israel, while not contributing to the child's expenses. The Second Department affirmed, holding that the father "failed to make the requisite showing" to warrant modification of the prior order, while noting that the visitation schedule

contained in the December 2011 consent order did not contain any provision for visitation with the paternal grandmother. The Court concluded that while the mother opposed the father's request to allocate 1/3 of the child's trip to Israel to visiting the paternal grandmother, "the record does not demonstrate that she refused meaningful contact between the paternal grandmother and the child."

F. Modification – Post-Petition Events; Treating Psychiatrist Testimony

In Matter of Lela B. v. Shoshanah B., 2019 Westlaw 2031412 (1st Dept. May 9, 2019), respondent appealed from a June 2018 Family Court order which, after a hearing, eliminated her Wednesday overnight visitation with the parties' child and modified the holiday and access schedule. The First Department affirmed, stating: "While the better practice would have been for the Family Court to appoint a neutral forensic given the circumstances of this case, including the different views as to the reasons for the child's psychological difficulties, it was not reversible error for the court to allow the child's treating psychiatrist to testify and make recommendations for modification of the access schedule (citations omitted). The treating psychiatrist had the relevant credentials, met with and interviewed both parents, and performed a thorough assessment of the child." The Appellate Division rejected respondent's argument that "the treating psychiatrist's neutrality was compromised because he had been retained by petitioner," noting "sufficient evidence in the record, in addition to the treating psychiatrist's testimony, to support the court's determination that Wednesday overnights were a cause of the child's symptoms." The First Department noted that while "respondent's expert disagreed with, and criticized, the treating psychiatrist's separation anxiety diagnosis, his testimony was based solely on his review of trial transcripts, and he did not have the benefit of in-person interviews with the child or his parents." The Court found that Family Court's

"determination to give greater weight to the treating psychiatrist's testimony is entitled to deference and should not be disturbed on appeal." The Appellate Division rejected respondent's argument "that the JHO erred in admitting evidence of events that postdated pleadings from 2014 and 2015," given that the hearing was held pursuant to its prior orders requiring a hearing, including a June 20, 2017 order, Matter of Lela G. v Shoshanah B., 151 AD3d 593 (1st Dept. 2017), and noting that "respondent herself relied on recent evidence about the child in support of her arguments."

G. Modification – School Absences & Performance; Sex Offender in Home

In Matter of Phillip M. v. Precious B., 2019 Westlaw 2375122 (1st Dept. June 6, 2019), the mother appealed from a June 2018 Family Court order which, after a hearing, modified a June 2015 order by awarding sole legal custody to the father. The First Department affirmed, noting that while the child was in the mother's custody, "the child was excessively absent and late to school, to the detriment of her academic performance." The Appellate Division found that the mother "failed to appreciate the danger that her relationship with an abusive, level three sex offender posed to the child, even bringing the child to see him while he was incarcerated, despite knowing that he was a convicted sex offender and having an active order of protection against him." The Court concluded that the father was "able to ensure that the child's education and emotional needs are met" and "has provided the child with a safe and stable home."

H. Temporary – No Hearing - Exigent Circumstances

In Matter of Daclin-Goyatton v. Cousins, 2019 Westlaw 2274966 (2d Dept. May 29, 2019), the mother appealed (by permission) from an August 2018 Family Court order which, without a hearing, awarded temporary custody of the parties' child to the father, with

supervised access to her. The Second Department affirmed, noting: "Where undisputed facts are before the court, a hearing is not necessary." The Appellate Division agreed with Family Court's determination, rendered prior to a hearing, given that the father "demonstrated the necessary exigent circumstances."

I. Temporary – No Hearing – Reversed

In Matter of Sandra Y. v. Jahi J.Y., 2019 Westlaw 2749816 (1st Dept. July 2, 2019), the attorney for the child (AFC) appealed from a November 2018 Family Court order which granted temporary custody. The First Department reversed, on the law, and remanded for a hearing. The Appellate Division found that Family Court's temporary order was: "based exclusively on school records and allegations of educational neglect, which the parties were not given an opportunity to challenge by way of a hearing"; "over the objection of the [AFC] *** based on statements and observations in a court-ordered investigation (COI) report regarding the father's violent nature and possible drug abuse"; and devoid of any articulation of "an emergency situation that warranted the imposition of a new custody order without a hearing."

J. Temporary Relocation Granted

In Matter of Michael BB v. Kristen CC, 2019 Westlaw 2375401 (3d Dept. June 6, 2019), the mother appealed from a June 2018 Family Court order, which granted the father's petition to modify a December 2016 Family Court order, which provided for joint legal and physical custody of their child born in 2011, by permitting him to temporarily relocate with the child to Texas for 2 years so that he could attend a US Army Physician Assistant Program and awarding the mother all of the child's school breaks and all but two weeks of the summer. The Third Department affirmed, noting that the father is on active duty service, and that the

PA program, which will be free of charge (as opposed to programs in New York which would result in student loan debt) and which will allow him to earn a greater income, starting at $71,000 and increasing to $150,000 after 5 years, although the father acknowledged that nearly all of the child's extended family is in New York. The Court further noted the father's significant involvement in the child's life and that his paramour was also involved in the child's daily life to a great degree and was prepared to leave her employment to provide afterschool care to the child in Texas. In contrast, the mother frequently worked in the evenings, even during her time with the child, and if she had the child full time upon the father's relocation, she would be required to rely upon her parents more frequently for child care.

K. UCCJEA – Home State Jurisdiction

In Matter of Nemes v. Tutino, 2019 Westlaw 1872475 (4th Dept. Apr. 26, 2019), the father appealed from a November 2017 Family Court order, which denied his motion to vacate a February 2017 order of the same court pursuant to CPLR Rule 5015(a)(4) upon the ground of lack of subject matter jurisdiction. The parties are the parents of a child born in New Jersey on February 18, 2015 and who lived with both parents in NJ until the mother relocated to NY on July 15, 2015, according to her petition for sole custody filed January 8, 2016. The father's cross-petition, also seeking sole custody, alleged that the mother moved to NY on an unspecified date in August 2015. The parties appeared in Family Court 6 times between February and November 2016. The father did not appear on the 7th court date and Family Court dismissed his cross petition for failure to appear and granted the mother sole legal and physical custody and visitation in NY as agreed, not to include overnight visitation. The Fourth Department reversed, on the law, granted the father's motion to vacate the

February 2017 order and dismissed the petition and cross-petition. The Appellate Division stated: "Instead of claiming home state jurisdiction under Domestic Relations Law §76(1)(a), the mother essentially argues that the court had subject matter jurisdiction over this proceeding under the safety net provision of section 76(1)(d), which confers jurisdiction to make custody determinations when, insofar as relevant here, no court of any other state would have jurisdiction under the criteria specified in [section 76(1)](a).' We reject the mother's reliance on section 76(1)(d). Under the special UCCJEA definition of 'home state' applicable to infants under six months old (Domestic Relations Law §75-a[7]; NJ Stat Ann §2A:34-54), New Jersey was the child's 'home state' between the date of his birth (February 18, 2015) and the alleged date of his move to New York (July 15, 2015). Because the UCCJEA confers continuing jurisdiction on the state that 'was the home state of the child within six months before the commencement of the proceeding' if a parent lives in that state without the child (Domestic Relations Law §76[1][a]; NJ Stat Ann §2A:34-65 [a][1]), it follows that New Jersey retained continuing jurisdiction of this matter until January 15, 2016, i.e., six months after the child's alleged move to New York on July 15, 2015 and one week after the instant proceeding was commenced on January 8, 2016 (citations omitted). Thus, New York lacked jurisdiction under section 76(1)(d) because New Jersey could have exercised jurisdiction under the criteria of section 76(1)(a) on the date of this proceeding's commencement (see NJ Stat Ann §2A:34-65[a][1] [identical New Jersey provision to Domestic Relations Law §76(1)(a)]). After all, section 76(1)(d) applies only when no state could have exercised jurisdiction under the criteria of section 76(1)(a) at the commencement of the proceeding, and that is simply not the situation here." The Court noted further: "Although this case reflects a fact pattern of first impression in New York (see B.B. v A.B., 31 Misc3d 608, 612 [Sup Ct,

Orange County 2011] [so noting]), our interpretation of the interplay between sections 76(1)(a) and 76(1)(d) is consistent with the Washington State Court of Appeals' decision in In re McGlynn (154 Wash App 1020 [Ct App 2010]). As far as we can discern, McGlynn is the only foreign case to squarely address the precise fact pattern at bar." The Court concluded: "Finally, the mother argues that the court had subject matter jurisdiction because 'New York was the state in which the child was present at the commencement of the proceedings.' But that contention is interdicted by Domestic Relations Law §76(3), which says that the subject child's '[p]hysical presence . . . is not necessary or sufficient to make a child custody determination.' Indeed, by examining the court's jurisdiction through the lens of the child's physical presence instead of his 'home state,' the mother would have us resurrect a jurisdictional modality that has been defunct for over 40 years."

L. Visitation – Activity Precedence Reversed; Increased – Substance Abuse Unsubstantiated; Police Exchange Reversed

In Matter of Cuccia-Terranova v. Terranova, 2019 Westlaw 2843762 (2d Dept. July 3, 2019), the father appealed from a May 2018 Family Court order, which: limited his weekend visitation to the 3rd weekend from noon Saturday to noon Sunday; did not provide weekday visitation; awarded even year Christmas Day visits from noon to 9 p.m. and no odd year access; directed retrieval and drop off and the local police station; directed that his visits could not adversely affect the children's school, religious or extracurricular activities; and directed that if he cancelled visits, he got no makeup time unless the mother agreed. The Second Department modified, on the facts and in the exercise of discretion, by: granting him visits on Thursdays from after school until 5:30 p.m. or if no school, from noon, and increasing the 3rd weekend access to Saturdays at 10 a.m. to Sundays at 6 p.m.; granting him Christmas Eve

access in odd years from the earlier or noon or release from school to 9 p.m.; deleting the police station provision and substituting curbside at mother's residence or another agreed location; and deleting the activity conditions and the no makeup provision. The Appellate Division noted no prior issues with the father's previous exercise of weeknight and alternate weekend overnight visitation, that the mother's allegations of drug and alcohol abuse were insufficient to curtail visitation, and rejected her contention that the children "were very busy with activities" which made a fixed schedule "difficult." The police station provision was unsupported by any prior issues or problems. The Second Department found Family Court's failure to provide odd year Christmas access deprived the children of contact and that Family Court "improvidently exercised its discretion to direct that the *** activities of the children are always to take precedence," since the mother is permitted to unilaterally determine such activities. The Appellate Division also found that the preclusion of makeup time was also improvident.

M. Visitation – Supervised – Special Needs Child

In Matter of Michael J.M. v. Antoinette T., 2019 Westlaw 2585112 (1st Dept. June 25, 2019), the father appealed from a January 2018 Family Court order which, after a hearing, denied his motion for unsupervised visitation, which were presently supervised by his aunt, a nurse, at her home. The First Department affirmed, finding that despite "having multiple opportunities over a year-long period, petitioner failed to educate himself about how to address the child's special needs, and how to provide proper care for her when she is with him." The child's special needs included cerebral palsy, autism, asthma, sleep apnea and speech defects.

N. Visitation – Modification – Child's Wishes (9 y/o); Missed Activities; False Sex Abuse Allegations

In Matter of Princetta S.S. v. Felix Z. J., 2019 Westlaw 2619916 (1st Dept. June 27, 2019), the mother appealed from an October 2015 Supreme Court order which dismissed her petition for modification of visitation. The First Department reversed, on the law, and remanded to Family Court for a hearing. The Appellate Division held that the mother's allegations that: the father had been making baseless sex abuse allegations against her; the now almost 9-year-old child wanted to spend one weekend per month with the mother; and that the father was not taking the child to her extracurricular activities as required, could all constitute changes in circumstances.

V. DISCLOSURE

A. Child's Mental Health Records

In Matter of Valerie S. (Jose S.), 63 Misc3d 1229(A) (Fam. Ct. Bronx Co. May 9, 2019, Taylor, J.), ACS filed a petition against the father in August 2018, alleging that he sexually abused the subject child over the course over several years, starting when she was 4 years old. In April 2019, ACS served a CPLR 3101(d) expert witness disclosure stating that the child's therapist would testify regarding the child's treatment and her diagnosis of PTSD related to the father's alleged abuse. The father moved for release of the child's mental health records. Family Court found that there was good cause for release of confidential mental health records, citing FCA 1038(d) and MHL 33.13(c)(3), noting that there was a showing of no alternative and effective means of obtaining the information. 42 CFR 2.64(d). Family Court noted that it was obligated to define the scope of the disclosure, and to limit the same to what is necessary for the movant's legitimate purposes, MHL 33.13(f), while concluding that

the interests of justice significantly outweighed the child's need for confidentiality, given the allegations against the father. The Court stated that it would conduct an *in camera* examination of the records before distributing records to counsel, "to the extent the records contain information consistent with the parameters of the disclosure laws."

B. Denied – Agreement Not Set Aside

In Langer v. Langer, 63 Misc3d 1208(A) (Sup. Ct. Nassau Co., Dane, J., Mar. 26, 2019), the parties were married in December 1996 and entered into a written agreement in November 2013, following the husband's commencement of a divorce action in June 2013, which agreement resolved custody of 3 children (born in 1998, 1999 and 2000) and all financial issues. Both parties were represented by "seasoned matrimonial counsel." In July 2017, the husband filed his Compliant, an RJI and request for preliminary conference. The wife, who was a stay at home mother, moved in November 2018 for an order permitting her to serve disclosure demands covering the 5 years prior to November 2013 and the time period subsequent thereto. The husband cross-moved for, among other things, summary judgment, granting him a divorce and incorporation of the agreement, counsel fees and sanctions. The agreement waived the right to disclosure, provided for approximately $3.2 million dollars in equitable distribution to the wife, $7,540 per month in child support, based upon the husband's stated income of $312,000 per year, and $12,500 per month in maintenance for 9 years. Supreme Court found that it must consider the grounds to set aside an agreement when determining the wife's requests for disclosure, and found on the facts presented that: (1) there was no duress or overreaching in the negotiation of the agreement; (2) that the husband's alleged failure to make full disclosure does not, standing alone, constitute fraud or overreaching; (3) while there is precedent to allow disclosure of a party's financial

circumstances at the time of the agreement, the wife waived the same in the agreement; (4) in the absence of a statement of net worth from the wife, the Court could not find the maintenance provisions to be unfair, unreasonable or unconscionable; and (5) given the agreement's terms for child support, maintenance and equitable distribution, the Court could not say that the same was unconscionable. As to the parties' motions, Supreme Court, among other things: (1) denied the wife's motion for disclosure, unless and until the agreement is set aside (providing a good review of the law in this area); (2) extended her time to challenge the agreement to April 29, 2019; (3) directed that she answer Plaintiff's Complaint by the same date; (4) denied the husband's request for counsel fees, upon the ground that neither party had provided a statement of net worth; and (5) denied the husband's application for sanctions.

VI. EQUITABLE DISTRIBUTION

A. Business – Share of Capital Contributions

In Johnson v. Johnson, 2019 Westlaw 2127532 (3d Dept. May 16, 2019), the husband appealed from an August 2017 Supreme Court judgment which, after trial of the wife's December 2015 divorce action, awarded the wife $17,031, representing 50% of capital contributions from marital assets to 2 marital businesses and child support of $723.33 per month. The parties were married in 2003 and have one child born in 2002. The husband contended on appeal, among other things, that Supreme Court erred by imputing income for purposes of maintenance and child support, and in awarding the wife 50% the contributions to the marital businesses. Supreme Court considered the wife's 2016 W-2 statements, which indicated that her 2016 gross income was $31,360, and the husband's 2016 tax return, which indicated that his 2016 reported gross income was $39,093. The court then imputed income to the wife based on her projected 2017 income of $57,200 and to the husband based on $60,282

he took from the marital businesses in 2016, less FICA taxes from the wife's and husband's incomes of "7.65% and 15.3% respectively" and concluded that the wife's CSSA income was $52,824.20 and the husband's CSSA income was $51,058.85, pro rata shares of 50.85% and 49.15%, respectively. The Appellate Division held that "where as here, a party pays for personal expenses through a business account, the court has the authority to impute income" and may also do so "where there is clear and undisputed evidence of a party's actual income during the pendency of the proceeding." The Third Department noted that "the CSSA allows statutory deductions for FICA taxes 'actually paid,'" but Supreme Court reduced the husband's 2016 income by 15.3% and determined that his income was $51,058.85, despite the fact that the husband "actually paid" self-employment FICA taxes of $6,162 in 2016. The Appellate Division found that the wife's CSSA income was $52,824.40 as determined, the husband's CSSA income was $60,282, less $6,162, and that the combined parental income was $106,944, 49% attributable to the wife and 51% to the husband. The basic child support obligation (17%) is $18,180 and the husband's presumptively correct share is $9,272 per year or $773 per month. The Appellate Division found that: it was "not disputed that marital funds were used to create both businesses and that both were marital property"; "in the absence of any expert evidence, the court properly declined to value and distribute a share of the marital businesses" and there was "no abuse of discretion in the court's award to the wife representing her contributions from marital assets to start the businesses.

B. Conditioned Upon Get Delivery – Reversed

In Cohen v. Cohen, 2019 Westlaw 2112972 (2d Dept. May 15, 2019), the husband appealed from a second amended January 2015 Supreme Court Judgment, upon a July 2012 decision after trial and a March 2014 order, which directed him provide the wife with a Get

prior to receiving any distribution of marital property. The Second Department modified, on the law, stating: "We disagree with the Supreme Court's determination directing the defendant to provide the plaintiff with a Get. Domestic Relations Law §253 does not provide that a defendant in an action for divorce, where the marriage was solemnized by a member of the clergy or a minister, must provide the plaintiff with a Get. Since the court should not have directed the defendant to provide the plaintiff with a Get, the penalties imposed due to the defendant's failure to do so must be vacated (citations omitted)." Note that this decision may be at odds with the Court's prior decisions in Pinto v. Pinto, 260 AD2d 622 (2d Dept. 1999) and Schwartz v. Schwartz, 235 AD2d 468 (2d Dept. 1997).

c. Proportions – Investments – Increased (25% to 50%)

In Hofmann v. Hofmann, 2019 Westlaw 2504654 (1st Dept. June 18, 2019), the wife appealed from a July 2018 Supreme Court judgment which, after trial, among other things, awarded her 41% of counsel fees, 25% of certain investments associated with the husband's former employment, and denied maintenance. The First Department upheld the counsel fee award "in view of her substantial distributive award and the evidence that payment of her remaining counsel fees will not affect her ability to meet her living expenses." The Appellate Division modified, on the law and the facts, to award the wife 50% of the funds and investments derived from the husband's former employment, upon the ground that the same constituted compensation and were in part purchased with marital funds. The First Department affirmed the denial of maintenance as "supported by the record, which shows that [the wife's] distributive award – now substantially increased – would generate cash flow sufficient to render her self-supporting."

D. Separate Property – Commingling Found; Tax Sharing Unpreserved

In Candea v. Candea, 2019 Westlaw 2363775 (2d Dept. June 5, 2019), the parties were married in 1997 and both appealed from a March 2017 Supreme Court judgment which, after a 2016 trial of the wife's March 2015 divorce action, among other things, awarded the wife maintenance of $2,133 per month for 7 years, directed the husband to pay child support of $4,133 per month for 2 children born in 2003 on the parties' income over the CSSA cap, awarded the wife a separate property credit of $51,895 for inherited funds, directed that certain stock be sold and equally divided, without directing an equal sharing of tax liability, and denied the wife's request for $25,000 in counsel fees. The Second Department modified, on the law, by reversing the separate property credit to the wife, holding that when she deposited inherited funds into a joint account, she "created a presumption that the funds were marital," and failed to rebut that presumption by establishing that the deposit was "only as a matter of convenience without the intention of creating a beneficial interest." The Court held that the wife further failed to establish a correlation between the funds so deposited and the subsequent purchase of gold coins and other precious metals. The Appellate Division otherwise affirmed as to the above-stated issues, finding that Supreme Court considered the maintenance factors in arriving at an appropriate award and that Supreme Court's application of the CSSA to all income over the cap "primarily due to the [husband's] considerable income and the standard of living to which the children were accustomed" was a provident exercise of discretion. The Second Department found that the tax issue raised by the husband was unpreserved and that the wife's claim for counsel fees was properly denied, "considering the equities and circumstances of the case, including the parties' respective financial conditions."

VII. ENFORCEMENT

A. Contempt – Custody Order

In Matter of Guy v. Weichel, 2019 Westlaw 2518722 (2d Dept. June 19, 2019), the mother appealed from a June 2016 Supreme Court order which, after a hearing, granted the father's motion to hold the mother in civil contempt for violating certain provisions of a March 2014 order pertaining to custody of their child born in 2009. The Second Department affirmed, holding that "the record established by clear and convincing evidence that the mother violated the unequivocal provisions of the parties' final consent order by failing to inform the father of the child's travel outside of the country on three separate occasions, failing to produce the child for the father's parental access on two separate occasions, and unilaterally deciding to move the child to a new school."

VIII. EVIDENCE

A. Custody – Preclusion of Respondent's Testimony Reversed

In Matter of Liska J. v. Benjamin K., 2019 Westlaw 2835000 (3d Dept. July 3, 2019), the father appealed from a May 2017 Family Court order, which, following a 3 day trial in March 2017 of the mother's August 2016 petitions, granted the parties joint legal custody of a child born in 2011, primary physical custody to the mother and granted the father visitation on alternate weekends with an overnight every Wednesday. The father argued that Family Court deprived him of procedural due process when Family Court excluded testimony as to his fitness as a parent. Family Court's decision stated that because the father did not also file a custody petition it could "only take into consideration the testimony brought by the mother." While the father raised no objections at trial to Family Court's evidentiary limitations, the Third Department reversed, on the facts, and remitted to Family Court, holding that "the

court's failure to allow the father a full and fair opportunity to present evidence, coupled with the court's own limitations on its decision, constitutes a fundamental due process error ***."

B. Leading Questions – Adverse Party

In Matter of Argila v. Edelman, 2019 Westlaw 2843931 (2d Dept. July 3, 2019), the mother appealed from a June 2018 Family Court order, which denied her March 2017 petition to modify an April 2016 order, so as to allow her relocate to Florida with the parties' child born in 2015, and granted the father's modification petition so as to award joint legal custody. The Second Department affirmed. The Appellate Division rejected the mother's contention that Family Court improperly restricted her examination of the father as part of her direct case by refusing to permit her to use leading questions. Noting that this is a discretionary determination when an adverse party who is called as a witness may be viewed as hostile, thus permitting leading questions, here, the Second Department held that: "the mother already had the opportunity to cross-examine the father using leading questions when he testified as part of his own direct case"; the father "was not reluctant or evasive in answering questions"; and "the mother, on appeal, identifies no instance in which she was unable to elicit the necessary information without the use of leading questions."

IX. FAMILY OFFENSE

A. Aggravating Circumstances; Duration of Order

In Matter of Anecia S.H. v. Grevelle D.B., 2019 Westlaw 2375099 (1st Dept. June 6, 2019), both parties appealed from an April 2018 Supreme Court IDV Part order which found, after a hearing, that petitioner proved aggravating circumstances and granted her a 5-year order of protection, but determined that the 5 years started to run upon issuance of a March 2017 criminal court order upon sentencing by the same Court. The First Department affirmed,

finding that respondent's actions "of attempting to strangle petitioner, hitting her head against the wall, and threatening to kill her, constituted "an immediate and ongoing danger" and were perpetrated while the parties' child was in close proximity. As to the effective date of the order of protection, the Appellate Division held that the duration of an order of protection is within the court's discretion under FCA 842.

B. Assault 2d and 3d Not Found; Harassment 2d Found

In Matter of Vanessa R. v. Christopher A.E., 2019 Westlaw 2344435 (1st Dept. June 4, 2019), respondent appealed from a May 2017 Family Court order, which found that he committed assault 2d and harassment 2d and issued a one-year order of protection. The First Department modified, on the law, to vacate the finding of assault 2d. The Appellate Division noted that petitioner testified that while on top of her in bed, respondent caused some bruising to her legs, which she treated at home with an ice pack, and found that this did not establish that respondent intended to and did cause petitioner "serious physical injury," nor could the testimony establish an intent to cause physical injury, as would be required to support a finding of assault 3d, as petitioner contended on appeal. The Court further noted that Petitioner testified that respondent said he was "play fighting," from which the Court stated "it would not be rational to infer that respondent intended to cause physical injury." With regard to harassment 2d, the First Department upheld this finding based upon petitioner's testimony that respondent made several threatening phone calls to her and followed her around the neighborhood, which "alarmed" her and "served no legitimate purpose."

C. Harassment 2d - Found – Striking; Not Found – Course of Conduct

In Matter of Rohrback v. Monaco, 2019 Westlaw 2480338 (4th Dept. June 14, 2019), petitioner appealed from an August 2017 Family Court order, which granted respondent's

motion to dismiss her family offense petition alleging that he committed harassment in the second degree as defined by Penal Law 240.26(1) and (3). The Fourth Department modified, on the law, by reinstating so much of the petition as alleged a violation of Penal Law 240.26(1), holding that petitioner's allegation that respondent "pushed [her] so hard into the door that the door ripped off the hinges" in September 2016 and that respondent "slammed [her] onto a table" in December 2016, "adequately pleads an allegation of harassment in the second degree under section 240.26(1)." As to subdivision (3), the petition alleged that respondent engaged in a course of conduct that annoyed and alarmed petitioner, but the Appellate Division found that the petition failed to allege that respondent's alleged course of conduct "serve[d] no legitimate purpose" and was therefore properly dismissed to that extent.

D. Harassment 2d - Found – Text Message

In Matter of Richardson v. Brown, 2019 Westlaw 2440056 (2d Dept. June 12, 2019), petitioner appealed from an August 2018 Family Court order, which dismissed her family offense petition alleging harassment 2d, based on a text message respondent sent her in October 2016. The Second Department modified, on the law and the facts, by granting the petition and remitting to Family Court for issuance of a "refrain from harassment and threats" order of protection. The parties were married in 1999, have 2 minor children and resided on separate floors of the marital residence. The Appellate Division found that: the text message "contained a genuine threat of physical harm"; "it was reasonable for petitioner to take the threat seriously since it was sent during a period of extreme marital discord"; and "respondent's intent to commit harassment in the second degree is properly inferred from the surrounding circumstances."

X. MAINTENANCE

A. Denied - Equitable Distribution as a Factor

In Hofmann v. Hofmann, 2019 Westlaw 2504654 (1st Dept. June 18, 2019), the wife appealed from a July 2018 Supreme Court judgment which, after trial, among other things, awarded her 41% of counsel fees, 25% of certain investments associated with the husband's former employment, and denied maintenance. The First Department upheld the counsel fee award "in view of her substantial distributive award and the evidence that payment of her remaining counsel fees will not affect her ability to meet her living expenses." The Appellate Division modified, on the law and the facts, to award the wife 50% of the funds and investments derived from the husband's former employment, upon the ground that the same constituted compensation and were in part purchased with marital funds. The First Department affirmed the denial of maintenance as "supported by the record, which shows that [the wife's] distributive award – now substantially increased – would generate cash flow sufficient to render her self-supporting."

B. Deviation from Guidelines–Income Tax Consequences

In Wisseman v. Wisseman, 63 Misc3d 819 (Sup. Ct. Dutchess Co., Rosa, J., Mar. 15, 2019), the parties were married in July 2006 and have two children ages 12 and 8. The mother has a paralegal certificate, some work history and otherwise stayed home with the children, and a stipulated annual income of $30,000. The husband works as a highway superintendent and the parties stipulated that his annual income was $70,800. The parties agreed that the presumptive maintenance guidelines amount was $512.54 per month and that the husband would pay maintenance for 2 years, but they could not agree upon the amount the husband would pay, given the non-deductibility of maintenance. The parties further stipulated to

federal tax rates of 22% for the husband and 12% for the wife. Each party argued for a reduction of maintenance by his and her respective tax rate. After a hearing, Supreme Court decided to reduce the presumptive award by 12%, to $451.04 per month, based upon "application of the guidelines as intended by the New York State Legislature prior to the federal change in the relevant tax law, impacted only by a reduction concomitant with the wife's tax bracket and what she would have been obligated to include as taxable income. Until this court is guided by a higher authority or legislative change it finds that such deviation under these circumstances is just and proper."

c. Durational – Affirmed

In Candea v. Candea, 2019 Westlaw 2363775 (2d Dept. June 5, 2019), the parties were married in 1997 and both appealed from a March 2017 Supreme Court judgment which, after a 2016 trial of the wife's March 2015 divorce action, among other things, awarded the wife maintenance of $2,133 per month for 7 years, directed the husband to pay child support of $4,133 per month for 2 children born in 2003 on the parties' income over the CSSA cap, awarded the wife a separate property credit of $51,895 for inherited funds, directed that certain stock be sold and equally divided, without directing an equal sharing of tax liability, and denied the wife's request for $25,000 in counsel fees. The Second Department modified, on the law, by reversing the separate property credit to the wife, holding that when she deposited inherited funds into a joint account, she "created a presumption that the funds were marital," and failed to rebut that presumption by establishing that the deposit was "only as a matter of convenience without the intention of creating a beneficial interest." The Court held that the wife further failed to establish a correlation between the funds so deposited and the subsequent purchase of gold coins and other precious metals. The Appellate Division

otherwise affirmed as to the above-stated issues, finding that Supreme Court considered the maintenance factors in arriving at an appropriate award and that Supreme Court's application of the CSSA to all income over the cap "primarily due to the [husband's] considerable income and the standard of living to which the children were accustomed" was a provident exercise of discretion. The Second Department found that the tax issue raised by the husband was unpreserved and that the wife's claim for counsel fees was properly denied, "considering the equities and circumstances of the case, including the parties' respective financial conditions."

D. Duration Increased

In Beyel v. Beyel, 2019 Westlaw 2608376 (2d Dept. June 26, 2019), the wife appealed from a September 2016 Supreme Court judgment, rendered upon a December 2015 decision after trial of the wife's 2013 divorce action, which awarded her maintenance of only $3,000 per month for 7 years and counsel fees of only $10,000. The Second Department modified, on the facts and in the exercise of discretion, by increasing the duration of maintenance to 10½ years, and upheld the counsel fee award. The Appellate Division noted: the parties were married 27 years; the wife's age at the time of trial (unspecified) and her limited full-time work experience; and the disparity in the parties' incomes and education levels. With respect to counsel fees, the Second Department held that the same was proper, given "the amount of the distributive award [unspecified] and the maintenance award."

XI. PATERNITY

A. Equitable Estoppel – Against Husband

In Matter of Onorina C.T. v. Ricardo R.E., 2019 Westlaw 1925619 (2d Dept. May 1, 2019), the child appealed from a February 2018 Family Court order which, after a hearing, dismissed the mother's petition seeking to adjudicate Ricardo as the father of the child born in

July 2012. The mother was married to Jorge at the time of the child's conception and birth. The mother's petition alleged that "the husband was the petitioner's sex trafficker and that she conceived the child while he was out of the country." The mother alleged that Ricardo, who is named on the child's birth certificate, is the father, and that he has supported the child and raised the child as his own since birth. Ricardo testified that he began an intimate relationship with the mother in 2011 and when she informed him in October 2011 she was pregnant, she came to live with him. Ricardo testified that he was present for the child's birth and has raised the child from birth as his son. The husband testified that he returned to the US in September 2011 and had relations with the mother until November 2011, when she told him she was pregnant with another man's child, and she left to live with Ricardo. Petitioner and Ricardo requested that the husband be estopped from asserting paternity. Family Court found that the mother failed to rebut the presumption of legitimacy and dismissed her petition, without determining the issue of equitable estoppel. The Second Department reversed, on the law, granted the mother's petition and adjudicated Ricardo to be the father of the child. The Appellate Division held: "Even if the presumption of legitimacy applies, the Family Court must proceed to an analysis of the best interests of the child before deciding whether to order a test (citation omitted)." The Second Department agreed with Family Court that the mother "failed to rebut the presumption of legitimacy by clear and convincing evidence" but concluded that Family Court "should not have refused to consider the issue of equitable estoppel raised by the petitioner and Ricardo R.E. in response to the husband's assertion of paternity." The Appellate Division noted that whether equitable estoppel "is being used in the offensive posture to enforce rights or the defensive posture to prevent rights from being enforced, [it] is only to be used to protect the best interests of the child." The Second

Department therefore determined that it is "in the child's best interests to equitably estop the husband from asserting paternity," given that, among other things, "Ricardo R. E. lived with the child since his birth, supported the child financially, was actively involved in his care, and established a loving father-son relationship with the child over the first three years of his life before the husband asserted paternity." With regard to the husband, the Appellate Division found that he "was aware that he could potentially be the child's biological father before the child's birth, was not involved in the child's prenatal care or present at his birth, and had never met or attempted to contact the child after his birth. He was employed, but never paid child support, and provided no financial support." The Court concluded: "Genetic testing is not in the child's best interests (citations omitted). To permit the husband to assume a parental role at this juncture would be unjust and inequitable."

B. Equitable Estoppel Denied – DNA Test Allowed

In Matter of Stephen N. v. Amanda O., 2019 Westlaw 2375460 (3d Dept. June 6, 2019), the mother and petitioner putative father (Stephen) appealed from an August 2017 Family Court order which dismissed Stephen's October 2014 petition (based upon a positive private DNA test) seeking to be adjudicated as the father of a child born in 2003 while the mother was in a relationship (from January 2003 and 3 years thereafter) with William, who signed an acknowledgement of paternity several days after the child's birth. Family Court found that Stephen was equitably estopped from asserting paternity and denied his request for a DNA test. The mother had a single sexual encounter with Stephen in February 2003. In 2006, the mother contacted Stephen because she thought he might be the father, and the mother, child and Stephen resided together from June 2006 through October 2008, at which time Stephen was incarcerated (and will not be released at earliest until 2025). The Third

Department reversed, on the law, and remitted to Family Court for further proceedings, finding that while William satisfied his initial burden to invoke equitable estoppel against Stephen (noting William's acknowledgement of paternity, relationship with the child, payment of child support and exercising his court-ordered visitation following his separation from the mother in 2006), Stephen resided with the mother and child for over 2 years, sent her at least 50 cards and letters since 2008, contacted her by phone, and Stephen's sister testified that the child has been attending events with Stephen's family for over a decade. The mother testified that the child knows William as a father figure but has known Stephen to be her father. The Appellate Division concluded that it was in the child's best interests that DNA testing occur, holding that the "record is clear that the child understands that [William] is her 'legal' father and that there is a significant chance that [Stephen] is her biological father," and even though there are "inherent inequities" in allowing DNA testing given the child's age, the analysis "must turn exclusively on the best interests of the child."

XII. PENDENTE LITE

A. Counsel Fees – To Outgoing Counsel

In Pezzollo v. Pezzollo, 2019 Westlaw 2439866 (2d Dept. June 12, 2019), the wife's outgoing counsel appealed from a July 2016 Supreme Court order made in the wife's September 2014 divorce action, which denied the motions of the wife and her outgoing counsel for counsel fees totaling $78,380 and granted counsel permission to withdraw. The Second Department reversed, on the facts and in the exercise of discretion, to the extent that outgoing counsel was awarded $58,785, finding that the husband failed to rebut the presumption that he was the monied spouse. The parties were married in 2001, have 2 children with whom the wife stayed home, and the husband earned $1.26 million in salary

from his medical practice in 2013, which he has since sold. The wife received an initial award of $25,000 in counsel fees in March 2015.

B. Maintenance Guidelines – Deviation

In Salmon v. de Salmon, 2019 Westlaw 2363269 (2d Dept. June 5, 2019), the wife appealed from an October 2016 Supreme Court order which denied her March 2016 motion for temporary maintenance. The Second Department reversed, on the law and the facts, to the extent of granting defendant $310 per month in temporary maintenance, retroactive to the date of her motion, plus $100 per month toward arrears until paid. The parties were married in September 2010 and there is one unemancipated child who lives with the husband, who commenced the action in July 2015 and thereafter obtained an order of protection against the wife which excluded her from the marital residence. Supreme Court declined to award pendente lite maintenance (October 2010 guidelines) due to the short duration of the marriage and the existence of the order of protection. The Appellate Division held that while Supreme Court properly found that the husband was entitled to a downward deviation from the presumptive amount (not specified) of temporary maintenance, based upon a reduction in his income due to a work-related injury, and the expenses he incurs in caring for the parties' child, the motion court failed to consider the wife's "needs and inability to meet her current financial obligations." The Second Department found that the wife's monthly income was $1,040, as against reasonable expenses of $1,350 and awarded her the monthly deficit of $310 as temporary maintenance, subject to reallocation at trial.

C. Maintenance Guidelines – Deviation – Same Household, Sharing of Expenses

In Warshaw v. Warshaw, 2019 Westlaw 2587092 (1st Dept. June 25, 2019), the husband appealed from an August 2018 Supreme Court order, which awarded the wife

$11,668 per month in temporary maintenance, while requiring her to pay from that sum 50% of the parties' rent (the parties were living together), utilities and household help, plus 100% of her own personal expenses, resulting in a net award to her of $4,307 per month. The First Department affirmed, noting that the presumptive amount on the first $184,000 of the husband's income was $4,600 per month, given that the wife had no income and was not receiving child support, and that the wife had requested $4,375 per month. The Appellate Division noted that while Supreme Court should not have relied upon an income averaging, it appropriately looked beyond the husband's most recent income tax return, including the husband's 70% ownership of a business with his two brothers, and "reasonably considered the possibility that defendant, whose income declined precipitously after plaintiff commenced this action, might wield some control over the timing and amount of his compensation." The Court also rejected the husband's argument that income should be imputed to the wife based upon a master's degree she earned in 2008, finding that she had been out of the workforce for years, and that the employment and salary statistics he cited for new master's graduates "offer little insight into what a 43-year-old parent reentering the work force after or while raising three young children might be expected to earn." The First Department also considered that the youngest child was 2 years old and the parties' nanny worked twice per week.

XIII. PROCEDURE

A. Complaint Amendment Denied

In Sayar v. Sayar, NY Law Journ. July 5, 2019 at 21, col. 5 (Sup. Ct. Nassau Co., Joseph, J., June 20, 2019), the husband's complaint verified February 7, 2018, in his action filed January 29, 2018, alleged that he and the wife were married August 16, 1998 in NYC. The husband's June 6, 2018 Statement of Net Worth provided the same August 1998 date of

marriage. At the June 7, 2018 preliminary conference, the husband first raised an issue about the date of marriage, contending that the same occurred over 7 years later, on December 14, 2005 in NYC. After the conference, the parties conducted discovery and on April 15, 2019, the husband moved pursuant to CPLR 3025(b) for leave to amend his complaint to set forth the date of marriage as December 14, 2005. The parties have 3 children, born in May 1999, February 2002 and August 2004. In opposition to the husband's motion, the wife alleged that the parties had a traditional arranged Muslim marriage and that the ceremony was performed by an Imam, who was licensed to officiate at religious marriage ceremonies in Ontario, Canada, on August 16, 1998. DRL 11 provides that this marriage, performed outside NY by an authorized person, is recognized as valid in NY. The wife supported her motion with a letter from the Iman, a wedding invitation, a wedding picture in which she was wearing a traditional white gown, and most significantly, her citizenship application signed by both parties, under oath on April 24, 2004, which stated the August 1998 marriage date. The Court denied the husband's motion to amend the complaint, given that the wife would be prejudiced by an allegation which shortened the marriage by more than 7 years.

B. Discontinuance Vacated; Sanctions

In Verdi v. Verdi, NY Law Journ. May 6, 2019 (Sup. Ct. Suffolk Co., Joseph, A.J., Apr. 29, 2019, Index No. 291-2018), the parties were married in June 2016, had no children, and plaintiff filed a divorce action on January 19, 2018. A preliminary conference was held on October 15, 2018. A status conference was held on December 7, 2018 and the action was scheduled for trial on February 26, 2019. The preliminary conference stipulation and order stated that Plaintiff would serve a verified complaint "on or before November 1, 2018 and said date shall be the date used to determine the timeliness of a Notice of Discontinuance."

Plaintiff filed a Notice of Voluntary Discontinuance on February 21, 2019, served the same by mail upon Defendant's counsel on the same date, and then also served the same Notice via fax at 4:06 p.m. on Friday, February 22, 2019, which the Court noted was "2 business days before trial." Defendant's counsel appeared on the trial date on February 26, 2019 and advised the Court that Defendant had not yet been served with a Verified Complaint, although the Court file contained a copy of Plaintiff's Complaint and an Affidavit attesting to service thereof upon Defendant's counsel on January 2, 2019. The Court then advised Defendant's counsel that under the circumstances then existing, the CPLR 3217(a)(1) discontinuance was valid. Defendant filed a motion on March 13, 2019, seeking to vacate the notice of voluntary discontinuance, which Supreme Court granted, finding that the preliminary conference stipulation and order operated as a waiver of Plaintiff's right to discontinue by notice, once 20 days passed following November 1, 2018, and further determining that Defendant had shown that "discontinuing the action would cause economic harm to the Defendant as the 'cut off date' for equitable distribution would be extended." Supreme Court: set the action for trial on June 5, 2019; granted the Defendant an extension of time to answer the complaint (CPLR 3012[d]); and awarded Defendant $1,970 in counsel fees and expenses pursuant to 22 NYCRR 130-1.1(a), finding that "the filing of the Notice of Discontinuance by the Plaintiff was only undertaken to delay or prolong the resolution of this litigation."

c. Sanctions - Motions to Dismiss DRL 170(7) Complaint

In Patouhas v. Patouhas, 2019 Westlaw 2202430 and 2202428 (2d Dept. May 22, 2019), in two separate decisions, the Second Department, on its own motion, directed the parties to show cause why sanctions and/or costs, including appellate counsel fees, should not be awarded against the defendant-appellant husband *pro se*, on his appeals from: (1) a June

2016 Supreme Court order, which denied his motion to dismiss pursuant to CPLR 3012(d) for failure to serve a complaint; and (2) a March 2017 order of the same court, which denied his motion to dismiss pursuant to CPLR 3211(a)(2) [lack of subject matter jurisdiction]. The Second Department affirmed on both appeals. The wife served a summons upon the husband on March 1, 2016 stating DRL 170(7) as the ground for divorce and he served a notice of appearance and demand for complaint on March 10, 2016. The wife's attorney sent a letter on April 1, 2016, noting ongoing settlement discussion, and requesting disclosure. The husband moved to dismiss on April 20, 2016 and the wife served her complaint on April 26, 2016. Supreme Court, as above stated, denied the husband's motion to dismiss, noting the short delay and that the wife had a meritorious cause of action. The husband thereafter moved to dismiss for lack of subject matter jurisdiction. The Second Department held that the wife's statement under oath as to the irretrievable breakdown of the marriage "concerns the merits of the divorce action, not the court's competence to adjudicate it."

XIV. REAL PROPERTY

A. Partition and Award for Exclusive Occupancy; Statute of Frauds

In Gendler v. Guendler, 2019 Westlaw 2844243 (2d Dept. July 3, 2019), the former husband (husband) appealed from a June 2017 Supreme Court judgment which, after trial of the former wife's (wife) November 2014 action for partition, awarded her $211,218, consisting of $163,250 for her 50% equity interest (based upon a stipulated buyout pursuant to an appraisal) and $47,968 for the husband's exclusive occupancy commencing February 1, 2013. The Second Department affirmed. The parties were married in June 1997 and purchased the subject home in September 1997. The husband filed for divorce in Russia in November 2012 and obtained a judgment of divorce in December 2012. The parties lived together in the

home until January or February 2013, when upon the wife's return from a trip to Russia, she found the locks changed. The Appellate Division found that the exclusive occupancy award was properly based upon the husband's ouster of the wife from the home. The Court rejected the husband's claim that he should have been credited for $100,000 he paid the wife in May 2011, finding that the payment made 18 months before the commencement of the divorce action, was not "unintelligible or extraordinary without reference to the alleged agreement" that the payment was for the wife's interest in the home, and was therefore barred by the statute of frauds, which prohibits the conveyance of real property without a written contract," citing GOL 5-703(1).

XV. LEGISLATIVE AND COURT RULE ITEMS

A. Extreme Risk Orders of Protection & Firearms

New CPLR Article 63-A is added, CPL §530.14 is amended and Penal Law §265.45 is amended, **effective August 24, 2019**. Article 63-A creates a procedure for requesting and issuing temporary and final extreme risk protection orders and surrendering or removing firearms possessed by a person subject to such orders. CPL §530.14 is amended to provide that, before ordering the return of firearms to a person who had been subject to removal of firearms due to the issuance of an order of protection, a county licensing officer must provide notice and an opportunity to be heard to the District Attorney, the County Attorney, the protected party, and every licensing officer responsible for the issuance of a firearms license to the person. PL §265.45 is amended to include a person subject to an extreme risk possession order to the enumerated persons residing with a firearm owner, which triggers the requirement that the firearm owner's rifles, shotguns and firearms be securely locked in an appropriate safe storage depository or rendered incapable of being fired by use of a gun

locking device appropriate to that weapon. A.2689/S.2451, Laws of 2019, Chapter 19, signed 02/25/2019.

B. Revenge Porn – New Crime and Private Right of Action

Passed Assembly and Senate on February 28, 2019: **If signed**, Penal Law §245.15 is added, CPL §530.11 and FCA §812 are amended, and Civil Rights Law §52-b is added, effective 60 days after signing. New Penal Law §245.15 creates the new crime of "unlawful dissemination or publication of an intimate image," a class A misdemeanor. The amendments to CPL §530.11 and FCA §812 provide the family court and criminal courts with concurrent jurisdiction over proceedings that would constitute unlawful dissemination or publication of an intimate image between spouses or former spouses, parents and children or members of the same family or household, by adding the new crime to the list of family offenses. New Civil Rights Law §52-b creates a private right of action for an individual to pursue damages and injunctive relief against someone who unlawfully disseminates or publishes an intimate image. According to the memorandum in support of the bill: "The private right of action is designed to work in conjunction with the criminal law, and does not require that a criminal conviction or charge be obtained in order to proceed. An individual can also commence a special proceeding to obtain a court order to have an intimate image permanently removed from the internet." A.5981/S.1719C.

C. Statement of Client's Rights and Responsibilities – No Fee

Following the February 15, 2019 enactment of the revised Statement of Client's Rights and Responsibilities set forth in 22 NYCRR §1400.2, by an order dated April 16, 2019, the Appellate Division has amended, **effective June 1, 2019**, the version of the same statement for when the representation is without fee.

Dated: July 9, 2019

At: Albany, NY