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"Matrimonial and Family Law"

Outline, Part II
(March 12, 2018 to September 7, 2018)

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TABLE OF CONTENTS

PAGE

COURT OF APPEALS NOTES 1

I. AGREEMENTS 1

A. Interpretation – College Consultation 1

B. Interpretation – Maintenance Termination – Remarriage 2

C. Prenuptial – Overreaching – Summary Judgment Denied 3

II. CHILD SUPPORT 4

A. CSSA – Cap at $650,000; Nanny Denied; Private School Pro Rata........... 4

B. CSSA – Income – Imputed Income, Family Assistance 6

C. CSSA - Income – Imputed Income – Reduced; Life Insurance – Reduced.. 6

D. CSSA – Income – Maintenance Inclusion 7

E. CSSA – Income – Veteran's Disability Benefits 8

F. CSSA – Rental Income 8

G. College Expenses – Promise to Child as a Factor; SUNY Cap Denied......... 9

H. Life Insurance – Reduced 10

I. Modification – Termination – Child's Conduct 12

J. Modification – 2010 Amendments 13

III. COUNSEL & EXPERT FEES 14

A. After Trial 14

B. After Trial – Denied – Billing Non-Compliance; No Expert Affidavit 20

C. After Trial – Increased 20

D. Appeal 22

E. Enforcement - $250 inadequate 22

F. Enforcement – Custody - $15,000 granted 23

IV. CUSTODY AND VISITATION 23

A. Contempt – Medical Treatment - Denied.. 23

B. Modification – Denied – Despite Acrimonious Parental Relationship 24

C. Modification - Dismissal Reversed 25

D. Modification - Domestic Violence, Residence & School Changes 26

E. Modification – School Disagreement 26

F. Modification – Sole to Father; Mother Changes in Residence & Paramours; Sex Offender Contact; Facebook Posts 27

G. Modification – Modification – To Father; Domestic Violence, Mental Health, Multiple Moves by Mother 29

H. Modification Tri-Custody to Sole; Relocation (NC) Allowed 29

I. Parent Abroad 30

J. Parenting Coordinator – Diet and Food Restrictions 32

K. Relocation – Granted (Dutchess Co. to CT) 33

L. Relocation – Granted (Warren Co. to Schenectady Co.) 33

M. Right to Counsel – Supreme Court 35

N. Standing – Equitable Estoppel 36

O. Temporary – Mid-Hearing – Reversed 37

P. Third Party – Grandparent – Granted 37

Q. Third Party – Grandparent – Visitation Granted; Child in Foster Care 38

R. Third Party – Granted to Non-Biological Father; Counsel Fees 38

S. To Father – Factors 39

T. UCCJEA – NY Jurisdiction; Proceedings in Another State 40

U. Violation – Found 42

V. Visitation – As Agreed – Modification Dismissal Reversed 43

W. Visitation – In NY Only; No Unaccompanied Minor Travel 44

V. ENFORCEMENT 44

A. Child Support – Willful Violation 44

B. Post- Judgment – Carrying Charges 45

C. Visitation – Contempt 45

VI. EQUITABLE DISTRIBUTION 46

A. Civil Union Property – Comity 46

B. Commingled Funds (25%); Medical Practice (0%); Remainder (50%) 47

C. Credit – Principal Reduction; Double Counting – Not Found; Proportions – Business (1/3) 50

D. Debt, Income Taxes & Proportions – Criminal Conviction 54

E. Income Tax Refund 55

F. License – Student Loan Debt; Life Insurance Trustee Designation 55

G. Pensions – Proportions (65%, 45%); Failure to Establish Value 56

H. Proportions – Business (20%) 56

I. Proportions - Business (26%); Separate Debt & Property 56

J. Proportions (60/40); Separate Property Credit 58

K. Refinance Mandated; Separate Property Found, Credit Given 60

L. Separate Property Derived Business – 50% 61

VII. EVIDENCE 63

A. Expert Testimony – Sexual Abuse; Recordings 63

VIII. FAMILY OFFENSE 64

A. Harassment 2d – Found 64

B. Harassment 2d – Found; Order of Protection for Dog 65

C. Harassment 2d – Statements Outside Petition Disallowed 66

D. Occurrences Outside NY; Remoteness in Time 66

IX. MAINTENANCE 67

A. Denied 67

B. Durational – Affirmed 68

C. Duratonal – Increased (Amount); Health Insurance 73

D. Durational – Increased to Non-Durational; Health Insurance 74

E. Durational – Reduced – Length of Pendente Lite Payments 75

F. Durational – Until Receipt of Distributive Award 77

G. Maintenance – Modification – Hearing Granted; Payee Counsel Fees Reversed 80

X. PENDENTE LITE 81

A. Carrying Charges – Reversed as Duplicative 81

B. Counsel & Expert Witness Fees 82

XI. PROCEDURE 83

A. Arbitration – Religious Tribunal Award Confirmed 83

B. Support Magistrate – Duties Upon Willful Violation 84

C. Support Magistrate – Proof of Service of Objections 85

XII. LEGISLATIVE AND COURT RULE ITEMS 86

A. Attorney-Client Privilege 86

B. Court-Appointed Special Advocates 86

C. Joint Appellate Division Rules of Practice 86

D. Judgments of Divorce – Property Transfers 87

E. Judicial Notice – Internet Mapping 88

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These materials cover the period March 12, 2018 through September 7, 2018.

COURT OF APPEALS NOTE

In Keller-Goldman v. Goldman, 2018 Westlaw 2931052 (June 12, 2018), the Court of Appeals affirmed an Appellate Division order (149 AD3d 422 [1st Dept. 2017]), upholding Supreme Court's October 2015 judgment, which placed a cap on the college room and board credit to the husband under the parties' incorporated agreement, "in a manner that ensured adequate support to each unemancipated child, as the parties clearly intended" citing DRL 240(1-b)(h). CSSA child support for the 3 children with the mother was $5,000 per month; the parties deviated downward to $2,500 per month. The emancipation step down child support amount upon the emancipation of the first child was $2,150 per month. The husband was entitled to a room and board credit, and sought a $1,200 per month credit for the eldest child, which would have resulted in child support being reduced to $1,300 per month. Supreme Court capped the room and board credit at $350 per month, to match the step down amount of $2,150 per month.

I. AGREEMENTS

A. Interpretation – College Consultation

In Matter of Wheeler v. Wheeler, 2018 Westlaw 2751467 (4th Dept. June 8, 2018), the parties' agreement provided that they would contribute to their children's college education and would consult with each other and their children concerning the college selection process. A Support Magistrate found the father to be in violation for failing to contribute to his daughter's college costs, and Family Court's October 2016 order sustained his objection. The Fourth Department modified, on the law, by reinstating the Support Magistrate's order, holding that the father's agreement to contribute to his daughter's college expenses was not "conditioned on him being consulted regarding her choice of college" and did not "condition either party's duty to contribute to college expenses upon such consultation."

B. Interpretation – Maintenance Termination – Remarriage

In Burns v. Burns, 2018 Westlaw 3569023 (4th Dept. July 25, 2018), the former wife appealed from a June 2017 Supreme Court order, which denied her motion for a money judgment and to hold the former husband in contempt for ceasing maintenance payable to her pursuant to a written agreement incorporated into a July 2008 judgment, following her December 2015 remarriage. The Fourth Department affirmed. The parties' agreement provided for maintenance in declining amounts between December 2007 and November 2020, but was silent about the effect of her remarriage upon the former husband's obligation. The Appellate Division held: "Thus, we categorically reject the wife's argument that the statutory definition of maintenance embodied in Domestic Relations Law § 236 (B) (1) (a) ['shall terminate upon *** the payee's valid or invalid marriage'] is irrelevant simply because the parties chose to settle the terms of their divorce in a written agreement. To the contrary, the statutory definition of maintenance supplies the interpretive context necessary to understanding the agreement as an integrated whole, and it provides the benchmark against which those contractual provisions are

to be construed. In short, the statutory definition shines a beacon light of clarity unto a term that might otherwise be subject to varying interpretations."

C. Prenuptial – Overreaching – Summary Judgment Denied

In Carter v. Fairchild-Carter, 159 AD3d 1315 (3d Dept. Mar. 29, 2018), the husband appealed from an August 2016 Supreme Court order, which, in his August 2014 divorce action, denied his motion for summary judgment to enforce the parties' 2008 prenuptial agreement. The Third Department affirmed. The parties were both represented by counsel, although the wife claimed that she was presented with the agreement "shortly before the wedding day," and the husband represented to her that revisions were made, such that she would receive half the value of the land and house in which they resided, and half of all marital acquisitions. Notably, the agreement only provided that the wife would get 50% of the value of the house to the extent that it exceeded $800,000. However, the home was assessed at $515,800 as of the date of the prenuptial agreement and appraised at $590,000 as of the date of the commencement of the divorce action. The wife further alleged that she did not have the time to read the revised agreement, or take it back to her lawyer, and just signed it because she felt pressured. The Third Department held that "these facts, if credited, give rise to the inference of overreaching." Justice Rumsey concurred, expressing "concern that the majority's determination that the wife met her burden based upon allegations that she was pressured into signing the prenuptial agreement on the day prior to the wedding without reading it establishes a dramatically lower standard for challenging prenuptial agreements that contravenes our long-standing precedent. I would not find overreaching in this case but for the wife's allegation that the husband's affirmative misrepresentation of the value of a parcel of his separately-owned real property, in which she was to share any appreciation in value that occurred during the marriage, deprived her of the

benefit of the prenuptial agreement."

II. CHILD SUPPORT

A. CSSA – Cap at $650,000; Nanny Denied; Private School Pro Rata

In M.M. v. D.M., 159 AD3d 562 (1st Dept. Mar. 22, 2018), both parties appealed from an August 2017 Supreme Court Judgment, awarding plaintiff wife child support and maintenance, awarding defendant husband a credit of $1 million for his separate property interest in the marital residence, distributing the parties' non-business marital assets 60% to plaintiff and 40% to defendant, awarding plaintiff a share of defendant's business interests valued as of January 2015, awarding credits for various post-commencement expenses, and allocating 65% of plaintiff's counsel fees to defendant. The First Department modified, on the law and the facts, to award defendant a credit of $71,000 for his Lehman Brothers retirement account, to delete the directive that defendant be solely responsible for the children's private school tuition and to direct instead that the parties share the children's private school tuition pro rata, to delete the directive that defendant contribute to the cost of a full-time nanny, and to remand for a determination of the credit owed defendant for documented moving expenses, documented post-commencement contributions to his 401(k) account and for a recalculation of defendant's child support obligation, and his child support arrears, treating plaintiff's durational maintenance as income. The Appellate Division noted that the wife conceded that the husband's Lehman Brothers retirement account, valued at $71,000, is separate property and was erroneously distributed as a marital asset and that he is entitled to a credit in that amount. The First Department held that Supreme Court providently exercised its discretion in distributing the parties' non-business marital assets 60% to the wife and 40% to the husband, based upon the wife's contributions to the husband's career, at the expense of her own career, and the parties' probable future financial

circumstances, in particular, defendant's far greater earning potential and family wealth. The Appellate Division agreed with the husband that the $1 million he received from his father toward the down payment on the marital residence was a gift structured as a "loan" to defendant alone, and was therefore defendant's separate property and that there "was no repayment using marital funds; indeed, there was no expectation of repayment." As to the husband's business interests, the First Department properly chose January 2015 as the valuation date, on the ground that he was forcibly hospitalized around that time and diagnosed with temporal lobe epilepsy, and subsequently had very little involvement in his family's business. The Court noted that while Supreme Court found that the husband's post-commencement contributions to his 401(k) were separate property, it was "not clear whether he was credited for his documented post-commencement contributions to that account," and remanded for a determination of the credit owed to him for those contributions. As to child support, the Appellate Division found that Supreme Court properly imputed income of $1.5 million to the husband and applied a CSSA income cap of $650,000, based upon "the lifestyle enjoyed by the children during the marriage, which included country club membership, theater and other entertainment, and luxury vacations." The First Department further stated: "We also agree with defendant that the Referee erred in ordering him to contribute to the cost of a nanny, since plaintiff does not work, and the youngest child was 12 years old at the time of trial (*see* DRL §240[1-b][c][4])" and that Supreme Court failed to credit defendant for his documented moving expenses. With regard to maintenance, the Appellate Division held that Supreme Court properly awarded the wife maintenance "for six months or until she received her distributive share of the marital assets, on the ground that the cash flow from those assets would be sufficient to support her lifestyle without the need for additional maintenance from defendant. After a 15-year marriage in which

she was primarily a homemaker, plaintiff surely would have been entitled to maintenance of a longer duration — if not for the equitable distribution to her of 60% of the non-business marital assets, which provided her with the means to be self-supporting." As to counsel fees, the First Department upheld the allocation of 65% of the wife's counsel fees to the husband, noting: "The parties' accrued counsel fees exceeded $7,000,000, and were paid mostly out of their liquid marital assets, although defendant was earning a substantial salary until 2015. *** Further, the Referee properly took into account that, although both parties engaged in needless litigation, plaintiff's trial positions were on the whole more successful (citation omitted). We note that even after the award plaintiff remained responsible for more than $1 million in legal fees.""

B. CSSA - Income – Imputed Income, Family Assistance

In Matter of Poulos v. Chachere, 2018 Westlaw 3371514 (2d Dept. July 11, 2018), the father appealed from a September 2017 Family Court order, which denied his objections to a July 2017 Support Magistrate order granting the mother's May 2016 petition for a downward modification of a January 2016 order, which required her to pay $386.07 per week toward the support of the parties' twins. The January 2016 order was made after a hearing and based upon imputed income of $80,000 per year, which was the mother's salary before termination of her employment in 2009. The Magistrate found that the mother had made good faith efforts to find employment for the past 7 years, and that changed circumstances were established in that she was making $22,000 per year. The Magistrate imputed about $30,485 in additional income and reduced the child support obligation to $240.26 per week. The Second Department affirmed Family Court and held that the Magistrate engaged in an appropriate exercise of discretion.

C. CSSA - Income – Imputed Income – Reduced; Life Insurance – Reduced

In O'Brien v. O'Brien, 2018 Westlaw 3371437 (2d Dept. July 11, 2018), the wife

appealed from a September 2015 Supreme Court judgment, rendered upon a June 2015 decision after trial of the husband's 2012 action, which, among other things, directed her to pay child support of $1,382.60 per month for 3 children, directed her to maintain $200,000 of life insurance therefor, and denied her an award of maintenance. The Second Department modified, on the law and the facts, and in the exercise of discretion, by reducing child support to $1,034.60 per month and by reducing the face amount of life insurance to $98,822.32. The parties were married in January 1992, and the wife had a high school diploma and "had worked at a delicatessen, as a medical assistant and as a dental assistant." The wife's mother testified that she had given the wife $1,800 to $2,000 per month since her departure from the marital residence. Supreme Court imputed income to the wife of $66,000, but the Appellate Division reduced that amount to $30,000, based upon the wife's educational background and past earnings, and the monetary gifts to her from her mother. On the issue of maintenance, the Court stated: "Here, after consideration of the statutory factors, the court properly declined to award the defendant maintenance."

D. CSSA – Income – Maintenance Inclusion

In Murray v. Murray, 2018 Westlaw 2751251 (4th Dept. June 8, 2018), the Fourth Department modified, on the law, an April 2016 Supreme Court judgment, which calculated child support in a split custody (1 child with each parent) situation without including in the mother's income the amount of maintenance paid to her, upon the ground that the 2015 amendments to the CSSA and maintenance guidelines were effective prior to the entry of the judgment. The Appellate Division further directed that the father's child support obligation would be modified to an upward amount certain upon the termination of his maintenance to the mother.

E. CSSA – Income – Veteran's Disability Benefits

In Matter of Nieves v. Iacono, 2018 Westlaw 2709829 (2d Dept. June 6, 2018), the father appealed from a March 2017 Family Court order, which denied his objection to so much of a January 2017 Support Magistrate order as included his veterans disability benefits as CSSA income, when granting his June 2016 petition for downward modification of child support. The Second Department affirmed, holding: "federal law does not prohibit the inclusion of veterans disability benefits as income in calculating a veteran's child support obligation. Although veterans benefits are exempt from many claims (*see* 38 USC §5301), 42 USC §659(a) specifically provides that this exemption does not apply to child support obligations." The CSSA provides that veterans benefits are income for child support purposes FCA §413[1][b][5][iii][E].

F. CSSA – Rental Income

In DeSouza v. DeSouza, 163 AD3d 1185 (3d Dept. July 12, 2018), the husband appealed from a December 2016 Supreme Court judgment, which determined child support, custody and equitable distribution. The Third Department affirmed. The parties were married in 2003 and had 3 children born in 2006, 2008 and 2009. The wife commenced the divorce action in November 2012. A temporary order granted equally shared physical custody "on paper," but given the husband's frequent international travel, the trial testimony showed "in practice, the parents' exercise of physical custody pursuant to said order was often inconvenient and subject to a lack of predictability." Supreme Court directed that "while the husband is abroad, the children were to primarily reside with the wife, and that when the husband was in the country, he was free to take custody of the children during his approximately three-week travel cycles, with the wife getting one weekday overnight visitation and the parties sharing alternate weekends." The Third Department noted that the judgment on the issue of custody "sufficiently addresses the unique

circumstances presented by the husband's international employment." The Appellate Division rejected the husband's argument that Supreme Court erred in calculating child support, by failing to consider the rental income derived from 5 rental properties, noting that the most recent tax return showed that the properties operated at a net loss for that year. The Court held that where "a net loss is sustained *** such rental income is properly excluded from the calculation of the parties' total gross income for child support purposes." The husband argued that Supreme Court erred in awarding the wife half of his 75% ownership of a business, upon the ground that the purchase thereof was funded exclusively from separate property gifts from his father, for which gifts Supreme Court credited the husband. The Appellate Division noted the wife's testimony "that she had extensive discussions with the husband regarding the purchase of the same" and that "the husband provided her with various revenue projections and reassured her on numerous occasions that the acquisition of [the business] would ultimately be a lucrative long-term investment." The Third Department concluded: "Given the joint nature of the parties' decision to invest in [the business] and the extent of the wife's nonmonetary contributions in caring for the children during such time, under the circumstances, we find that the husband failed to carry his burden of establishing that his ownership interest in [the business] constituted separate property and, therefore, we cannot say that Supreme Court's award of half of his 75% ownership interest in same constituted an abuse of discretion."

G. College Expenses – Promise to Child as a Factor; SUNY Cap Denied

In Matter of Manfrede v. Harris, 162 AD3d 1035 (2d Dept. June 27, 2018), the father appealed from a November 2017 Family Court order, which denied his objections to an April 2017 Support Magistrate order requiring him to pay 61% of his child's college expenses and arrears thereon, and which declined to impose a SUNY cap. The Second Department affirmed,

citing FCA 413(1)(c)(7), and noting that "the father promised to help the subject child with the cost of attending private college, and the child relied upon that promise in choosing to attend the subject private college."

H. Life Insurance – Reduced

In Behan v. Kornstein, 2018 Westlaw 4223911 (1st Dept. Sept. 6, 2018), the husband appealed from a July 2017 Supreme Court judgment, which: (1) granted the wife exclusive use and occupancy of the marital residence through June 2020 and directed him to pay the mortgage, maintenance, and assessments thereon; (2) awarded the wife 15% of the value of his medical practice; (3) distributed equally the value of the parties' house in Connecticut after awarding the husband a separate property credit, distributed equally the parties' jointly titled bank accounts, distributed 25% of the husband's individually titled brokerage accounts to the wife, distributed equally the marital portion of the parties' retirement accounts, distributed equally the value of the parties' art, jewelry, and certain furnishings purchased during the marriage; (4) directed the husband to maintain his life insurance policy in the amount of $2,000,000 and to name the wife as irrevocable beneficiary; and (5) awarded the wife 70% of her counsel fees. The First Department modified, on the law and the facts, to: (1) direct that the wife's exclusive use and occupancy of the marital residence, and defendant's obligation to pay the mortgage, maintenance, and assessments thereon, shall continue only through December 2018; (2) reduce the amount of the husband's life insurance obligation to $750,000; (3) distribute the wife's retirement accounts given her failure to meet her separate property burden of proof; and (4) vacate the award to the wife of 15% of the value of the husband's medical practice. The parties were married in 2001 and the action was commenced in 2010. With regard to the issue of exclusive occupancy and the husband's payments of carrying charges, the Appellate Division held that the wife "was entitled

to maintenance in the form of defendant's payment of the mortgage, maintenance, and assessments on the apartment" as being "warranted by the facts, namely, that plaintiff and the child had been living in the apartment," citing Domestic Relations Law §236(B)(5)(f), which "empowers the court to determine the use and occupancy of the marital residence 'without regard to the form of ownership of such property.'" The First Department modified, so as to terminate the wife's exclusive use and occupancy of the marital residence, and the husband's obligation to pay the mortgage, maintenance and assessments, as of the end of December 2018. The Court found that the wife, "a now 49-year-old college-educated professional, had an imputed annual income of $80,000 based on her work history, which included a position where she earned approximately $175,000 annually" and noted that that she "was awarded a substantial sum in equitable distribution, and has been receiving maintenance, both temporary and pursuant to the judgment, for approximately eight years, almost as long as the parties' marriage." With respect to equitable distribution the Appellate Division held that Supreme Court "properly distributed the parties' marital assets equally, including joint bank accounts, the marital value of the parties' house in Connecticut, and art, jewelry, and certain furnishings purchased during the marriage. Defendant's contention that plaintiff is entitled to no more than 10% of these marital assets because she made little financial contribution to the marriage has no basis in law or fact. *** Nothing in the record supports defendant's contention that plaintiff is not entitled to 50% of the parties' marital assets." The First Department further determined that Supreme Court "properly awarded plaintiff 25% of the individually titled brokerage accounts that defendant had held before the marriage but subsequently commingled with marital funds. The Court held that the life insurance face amount "far exceeds that necessary to secure defendant's child support obligations" and reduced the amount from $2 million to $750,000, allowing the husband "to

decrease the amount of coverage each year commensurate with the amount of child support paid." The Appellate Division noted that the husband "started his medical practice in 1996, approximately five years before the marriage" but the wife "failed to meet her burden to demonstrate the baseline value of the practice and the extent of its appreciation" and therefore vacated the 15% award to the wife. The First Department found that while Supreme Court "properly ordered that the marital portion of the parties' retirement accounts be distributed equally, it failed to quantify the marital portion of plaintiff's accounts." The Court noted that the wife's net worth statement "lists two IRAs, and their value shortly after the date of commencement, but fails to indicate the date of acquisition for these accounts." The Appellate Division concluded that because the wife "failed to meet her burden of establishing that any part of these IRAs is her separate property, the entirety of the accounts is marital and should be divided equally." The First Department also rejected the husband's contention that his defined benefit plan is separate property, given that his net worth statement "lists a January 2003 date of acquisition for the account, which is after the parties were married. Thus, this account is entirely marital property." Finally, in upholding the award to the wife of approximately 70% of her legal fees, the Appellate Division noted that Supreme Court "took into account defendant's role in driving up legal fees, which included changing attorneys nine times, failing to comply with court orders, and needlessly extending the trial with his belligerent behavior."

I. Modification – Termination – Child's Conduct

In Matter of Jones v. Jones, 160 AD3d 1428 (4th Dept. Apr, 27, 2018), the attorney for the child appealed from a January 2017 Family Court order, which granted the father's petition seeking modification of child support, by terminating his obligation for the eldest of the parties' 3 children (a daughter, age 18 at the time of the hearing), based upon the mother's conduct. The

Fourth Department affirmed, but upon a different ground, noting: "Visitation with the father was subject to the wishes of the daughter (citations omitted) and the mother and daughter both testified unequivocally that the daughter refused to have anything to do with the father by her own choice and for her own reasons." The Appellate Division held that "Family Court nevertheless properly relieved the father of his obligation to support the daughter on the ground that the daughter, by her conduct, forfeited her right to support." The Court concluded: "The father made consistent efforts to establish a relationship with the daughter by participating in counseling, inviting her to family functions, and giving her cards and gifts, but those efforts were rebuffed."

J. Modification – 2010 Amendments

In Gordon-Medley v. Medley, 160 AD3d 1146 (3d Dept. Apr. 12, 2018), the husband appealed from a May 2016 Supreme Court judgment which, among other things, modified a 2003 Family Court child support order pertaining to the parties' child born in 1996. The Third Department affirmed, holding that Supreme Court properly relied upon DRL 236(B)(9)(b)(2), as amended effective October 13, 2010, pursuant to which "[a] court may modify an order of child support where . . . three years have passed since the order was entered, last modified or adjusted," except that "if the child support order incorporated without merging a valid agreement or stipulation of the parties, the amendments regarding the modification of a child support order. . . shall only apply if the incorporated agreement or stipulation was executed on or after this act's effective date." The Appellate Division reasoned that "because the prior child support order was not incorporated into a later agreement, the statutory amendment was applicable. As the wife was entitled under the amendment to a modification of the child support order due to the passage of more than three years, without any requirement that she demonstrate a change in circumstances

(*see* Domestic Relations Law §236[B][9][b][2][ii][A]; [citation omitted]) and the husband does not challenge Supreme Court's calculation of the amount of child support, we will not disturb the child support aspect of the judgment."

In Matter of Gratton v. Gratton, 2018 Westlaw 2751362 (4th Dept. June 8, 2018), the Fourth Department affirmed a March 2017 Family Court Order, which upheld the Support Magistrate's determination that the father failed to establish changed circumstances sufficient to justify a downward modification of his child support obligation, as set forth in an April 2016 agreement incorporated into an August 2016 judgment of divorce. While the father was laid off from his job as a nuclear power plant contractor in May 2016, given that both this change and the resultant more than 15% decrease in his income occurred prior to August 2016, there was no change since the entry of the judgment. The Appellate Division noted further that the father "had no intention of returning to his occupation" and "intended to work on the family farm, despite the fact that it was not profitable for him to do so," which rendered him unable to show that he had made efforts "to secure employment commensurate with his ... education, ability, and experience," as required by FCA 451(3)(b)(ii).

III. COUNSEL & EXPERT FEES

A. After Trial

In M.M. v. D.M., 159 AD3d 562 (1st Dept. Mar. 22, 2018), both parties appealed from an August 2017 Supreme Court Judgment, awarding plaintiff wife child support and maintenance, awarding defendant husband a credit of $1 million for his separate property interest in the marital residence, distributing the parties' non-business marital assets 60% to plaintiff and 40% to defendant, awarding plaintiff a share of defendant's business interests valued as of January 2015, awarding credits for various post-commencement expenses, and allocating 65% of plaintiff's

counsel fees to defendant. The First Department modified, on the law and the facts, to award defendant a credit of $71,000 for his Lehman Brothers retirement account, to delete the directive that defendant be solely responsible for the children's private school tuition and to direct instead that the parties share the children's private school tuition pro rata, to delete the directive that defendant contribute to the cost of a full-time nanny, and to remand for a determination of the credit owed defendant for documented moving expenses, documented post-commencement contributions to his 401(k) account and for a recalculation of defendant's child support obligation, and his child support arrears, treating plaintiff's durational maintenance as income. The Appellate Division noted that the wife conceded that the husband's Lehman Brothers retirement account, valued at $71,000, is separate property and was erroneously distributed as a marital asset and that he is entitled to a credit in that amount. The First Department held that Supreme Court providently exercised its discretion in distributing the parties' non-business marital assets 60% to the wife and 40% to the husband, based upon the wife's contributions to the husband's career, at the expense of her own career, and the parties' probable future financial circumstances, in particular, defendant's far greater earning potential and family wealth. The Appellate Division agreed with the husband that the $1 million he received from his father toward the down payment on the marital residence was a gift structured as a "loan" to defendant alone, and was therefore defendant's separate property and that there "was no repayment using marital funds; indeed, there was no expectation of repayment." As to the husband's business interests, the First Department properly chose January 2015 as the valuation date, on the ground that he was forcibly hospitalized around that time and diagnosed with temporal lobe epilepsy, and subsequently had very little involvement in his family's business. The Court noted that while Supreme Court found that the husband's post-commencement contributions to his 401(k) were

separate property, it was "not clear whether he was credited for his documented post-commencement contributions to that account," and remanded for a determination of the credit owed to him for those contributions. As to child support, the Appellate Division found that Supreme Court properly imputed income of $1.5 million to the husband and applied a CSSA income cap of $650,000, based upon "the lifestyle enjoyed by the children during the marriage, which included country club membership, theater and other entertainment, and luxury vacations." The First Department further stated: "We also agree with defendant that the Referee erred in ordering him to contribute to the cost of a nanny, since plaintiff does not work, and the youngest child was 12 years old at the time of trial (*see* DRL § 240[1-b][c][4])" and that Supreme Court failed to credit defendant for his documented moving expenses. With regard to maintenance, the Appellate Division held that Supreme Court properly awarded the wife maintenance "for six months or until she received her distributive share of the marital assets, on the ground that the cash flow from those assets would be sufficient to support her lifestyle without the need for additional maintenance from defendant. After a 15-year marriage in which she was primarily a homemaker, plaintiff surely would have been entitled to maintenance of a longer duration — if not for the equitable distribution to her of 60% of the non-business marital assets, which provided her with the means to be self-supporting." As to counsel fees, the First Department upheld the allocation of 65% of the wife's counsel fees to the husband, noting: "The parties' accrued counsel fees exceeded $7,000,000, and were paid mostly out of their liquid marital assets, although defendant was earning a substantial salary until 2015. *** Further, the Referee properly took into account that, although both parties engaged in needless litigation, plaintiff's trial positions were on the whole more successful (citation omitted). We note that even after the award plaintiff remained responsible for more than $1 million in legal fees."

In Greenberg v. Greenberg, 2018 Westlaw 3041099 (2d Dept. June 20, 2018), the husband appealed from a February 2015 Supreme Court amended judgment which, among other things, in the wife's August 2009 divorce action: awarded her the remaining marital assets, consisting of the marital residence and an adjacent parcel; held the husband responsible for 100% of certain debt and income taxes; and directed him to pay counsel fees of $75,000. The Second Department modified, on the facts, by excluding from the husband's responsibility to pay taxes, interest, penalties and deficiencies, any personal income tax related debts or penalties incurred by the wife, and otherwise affirmed. The parties were married in 1995 and have 4 children born between 1998 and 2007. The husband owned several businesses, one which was internet-based. Ultimately, following a June 2009 FTC civil action against the husband, which resulted in a $2,000,000 (plus) judgment against him, and the husband's January 2014 federal court conviction for wire fraud, aggravated identity theft, and money laundering, in connection with unauthorized credit card charges to customers, he was sentenced in October 2014 to 7 years in prison and directed to pay restitution of $1,125,023. The Appellate Division held that it was proper for Supreme Court to hold the husband responsible for any marital debt, including the FTC judgment, and for all income tax related debt resulting as a direct consequence of his actions, but not for the wife's own failure to file tax returns for her personal income or to pay taxes thereon, of which she had reason to be aware by virtue of IRS notices she received. Under the circumstances of the case, the Second Department affirmed so much of the amended judgment as awarded the wife the two properties, which had no value, but might generate income, and the counsel fee award, based upon the husband's "evasive and dilatory actions during the pendency of the action."

In Behan v. Kornstein, 2018 Westlaw 4223911 (1st Dept. Sept. 6, 2018), the husband

appealed from a July 2017 Supreme Court judgment, which: (1) granted the wife exclusive use and occupancy of the marital residence through June 2020 and directed him to pay the mortgage, maintenance, and assessments thereon; (2) awarded the wife 15% of the value of his medical practice; (3) distributed equally the value of the parties' house in Connecticut after awarding the husband a separate property credit, distributed equally the parties' jointly titled bank accounts, distributed 25% of the husband's individually titled brokerage accounts to the wife, distributed equally the marital portion of the parties' retirement accounts, distributed equally the value of the parties' art, jewelry, and certain furnishings purchased during the marriage; (4) directed the husband to maintain his life insurance policy in the amount of $2,000,000 and to name the wife as irrevocable beneficiary; and (5) awarded the wife 70% of her counsel fees. The First Department modified, on the law and the facts, to: (1) direct that the wife's exclusive use and occupancy of the marital residence, and defendant's obligation to pay the mortgage, maintenance, and assessments thereon, shall continue only through December 2018; (2) reduce the amount of the husband's life insurance obligation to $750,000; (3) distribute the wife's retirement accounts given her failure to meet her separate property burden of proof; and (4) vacate the award to the wife of 15% of the value of the husband's medical practice. The parties were married in 2001 and the action was commenced in 2010. With regard to the issue of exclusive occupancy and the husband's payments of carrying charges, the Appellate Division held that the wife "was entitled to maintenance in the form of defendant's payment of the mortgage, maintenance, and assessments on the apartment" as being "warranted by the facts, namely, that plaintiff and the child had been living in the apartment," citing Domestic Relations Law §236(B)(5)(f), which "empowers the court to determine the use and occupancy of the marital residence 'without regard to the form of ownership of such property.'" The First Department modified, so as to terminate

the wife's exclusive use and occupancy of the marital residence, and the husband's obligation to pay the mortgage, maintenance and assessments, as of the end of December 2018. The Court found that the wife, "a now 49-year-old college-educated professional, had an imputed annual income of $80,000 based on her work history, which included a position where she earned approximately $175,000 annually" and noted that that she "was awarded a substantial sum in equitable distribution, and has been receiving maintenance, both temporary and pursuant to the judgment, for approximately eight years, almost as long as the parties' marriage." With respect to equitable distribution the Appellate Division held that Supreme Court "properly distributed the parties' marital assets equally, including joint bank accounts, the marital value of the parties' house in Connecticut, and art, jewelry, and certain furnishings purchased during the marriage. Defendant's contention that plaintiff is entitled to no more than 10% of these marital assets because she made little financial contribution to the marriage has no basis in law or fact. *** Nothing in the record supports defendant's contention that plaintiff is not entitled to 50% of the parties' marital assets." The First Department further determined that Supreme Court "properly awarded plaintiff 25% of the individually titled brokerage accounts that defendant had held before the marriage but subsequently commingled with marital funds. The Court held that the life insurance face amount "far exceeds that necessary to secure defendant's child support obligations" and reduced the amount from $2 million to $750,000, allowing the husband "to decrease the amount of coverage each year commensurate with the amount of child support paid." The Appellate Division noted that the husband "started his medical practice in 1996, approximately five years before the marriage" but the wife "failed to meet her burden to demonstrate the baseline value of the practice and the extent of its appreciation" and therefore vacated the 15% award to the wife. The First Department found that while Supreme Court

"properly ordered that the marital portion of the parties' retirement accounts be distributed equally, it failed to quantify the marital portion of plaintiff's accounts." The Court noted that the wife's net worth statement "lists two IRAs, and their value shortly after the date of commencement, but fails to indicate the date of acquisition for these accounts." The Appellate Division concluded that because the wife "failed to meet her burden of establishing that any part of these IRAs is her separate property, the entirety of the accounts is marital and should be divided equally." The First Department also rejected the husband's contention that his defined benefit plan is separate property, given that his net worth statement "lists a January 2003 date of acquisition for the account, which is after the parties were married. Thus, this account is entirely marital property." Finally, in upholding the award to the wife of approximately 70% of her legal fees, the Appellate Division noted that Supreme Court "took into account defendant's role in driving up legal fees, which included changing attorneys nine times, failing to comply with court orders, and needlessly extending the trial with his belligerent behavior."

B. After Trial – Denied – Billing Non-Compliance; No Expert Affidavit

In Greco v. Greco, 2018 Westlaw 2225194 (2d Dept. May 16, 2018), the husband appealed from a March 2015 Supreme Court order, which granted the wife's post-trial motion for counsel fees to attorney 1 ($70,000), attorney 2 ($37,500) and $12,700 in expert fees. The Second Department modified, on the law and in the exercise of discretion, by reversing the awards to attorney 1 and the expert. The Appellate Division found that attorney 1 did not substantially comply with the requirement of billing every 60 days [22 NYCRR 1400.2, 1400.3(9)], and that the experts did not submit affidavits [Ahern v. Ahern, 94 AD2d 53, 58].

C. After Trial - Increased

In Sheehan v. Sheehan, 2018 Westlaw 2123737 (2d Dept. May 9, 2018), both parties

appealed from a March 2016 Supreme Court judgment after trial, which, among other things, awarded the wife 26% ($199,837) of the appreciated value ($768,603) of the husband's business, distributed the appreciated net cash value of the husband's separate property life insurance policies, awarded the wife maintenance of $2,100 for 3 years, awarded $25,000 in counsel fees to the wife, and failed to award the wife a credit for funds used by the husband to pay his separate debt. The Second Department modified, on the law and on the facts, by (1) deleting the award to the wife of a portion of the appreciated net cash value of the husband's two life insurance policies, and (2) increasing the wife's counsel fee award to $40,000, and otherwise affirmed. The parties were married in July 2000, and have two children. The husband owned a business (gas station and auto repair center), in which the wife worked part-time as a bookkeeper while also being the primary caregiver for the children. The wife filed the divorce action in August 2012. Give the wife's "direct contributions to the business, as well as her indirect contributions as a homemaker and primary caregiver for the parties' children in this long-term marriage," the Appellate Division found that "the court's award of 26%, or $199,836.65, was a provident exercise of discretion." With respect to the husband's life insurance policies, the Second Department found that it was undisputed that they were obtained prior to the marriage and reasoned: "While it would have been appropriate to distribute the appreciated cash value of the policies if the defendant had made contributions to them with marital funds (citations omitted), the evidence establishes that the premiums were not paid with marital funds. Therefore, the Supreme Court should not have awarded the plaintiff a portion of the appreciated net cash value of these policies ***." The Appellate Division held that Supreme Court "providently denied the plaintiff's request for a credit for an equitable share of funds used by the defendant to pay his separate debt during the marriage," because "the credible evidence

established that the payments the defendant made toward his separate debt during the marriage were made with separate funds." The Second Department rejected both parties' challenges to the maintenance determination, noting that Supreme Court "limited the duration of the award to a reasonable time to allow the plaintiff to fulfill her plan to obtain her Associate's Degree and training that will enable her to be self-supporting and regain self-sufficiency." With regard to counsel fees, the Court concluded: "Considering the parties' relative circumstances and other relevant factors, the award of attorney's fees to the plaintiff in the sum of $25,000 was inadequate."

D. Appeal

In Greco v. Greco, 73 NYS3d 765 (2d Dept. May 16, 2018), the wife appealed from an April 2016 Supreme Court order, which granted her motion for counsel fees for her appeal from the financial aspects of a judgment of divorce, to the extent of $12,000. The Second Department affirmed, stating: "Under the circumstances, we find no basis to disturb the award."

E. Enforcement - $250 inadequate

In Matter of Monique B. v. Anthony S., 2018 Westlaw 3232613 (1st Dept. July 3, 2018), the mother appealed from an April 2016 Family Court order, which, upon reargument, granted her application for counsel fees to the extent of $250. The First Department modified, on the law and the facts, and remanded for a determination of reasonable counsel fees. The Appellate Division held "that inasmuch as respondent was found to have willfully violated a child support order the issuance of attorney fees was proper under Family Court Act §§438(b) and 454(3)," and that the Court should have considered "the parties' ability to pay, the nature and extent of services rendered, the complexity of the issues involved, and the reasonable of the fees under all of the circumstances."

F. Enforcement – Custody - $15,000 Granted

In Boukas v. Boukas, 2018 Westlaw 3451549 (2d Dept. July 18, 2018), the mother appealed from a December 2015 Supreme Court order, which denied her request for counsel fees in connection with a post-judgment motion seeking to find the father in contempt of the vacation and parental access schedule set forth in the parties' March 2014 judgment, which incorporated a September 2013 stipulation. The parties settled all issues in the enforcement proceeding except counsel fees, which was referred to the court for determination. The Second Department modified, on the law, by granting the mother's motion for counsel fees by awarding her $15,000. The Appellate Division found that the mother "was entitled to reasonable counsel fees in connection with this matter, as the plaintiff's conduct in violation of the stipulation of settlement caused these fees to be incurred (citations omitted). An award of counsel fees in the sum of $15,000 is supported by the record."

IV. CUSTODY

A. Contempt – Medical Treatment – Denied

In Matter of Spicer v. Spicer, 162 AD3d 886 (2d Dept. June 20, 2018), the mother appealed from a July 2017 Family Court order which, without a hearing, dismissed her petition seeking to hold the father in contempt of a February 2012 order which provided for joint legal custody, with primary custody to the father, upon the ground that the father took the child to a hospital for a psychiatric evaluation, and did not inform her of the development until the next day. The Second Department affirmed, holding that the order "contains no mechanism for the parties' joint decision-making process and does not set forth any time frame during which they must communicate with each other about the child's medical issues." The Appellate Division concluded that the father violated no "clearly expressed unequivocal mandate" and that Family

Court properly dismissed the petition.

B. Modification – Denied – Despite Acrimonious Parental Relationship

In Matter of Porter-Spaulding v. Spaulding, 2018 Westlaw 3650559 (3d Dept. Aug. 2, 2018), the Attorney for the Child appealed from an October 2016 Family Court order which, after a hearing, dismissed the mother's cross-petition to modify an October 2015 judgment of divorce, which stipulated that she have joint legal custody and primary physical custody of the parties' then 7 year old child, and, among other things, that the father had the child with him from Tuesday evening through Thursday morning each week. The father filed a petition seeking sole custody in 2016 and the mother's cross-petition sought to end overnights with the father on school nights. Family Court granted the mother's motion to dismiss the father's petition, held a *Lincoln* hearing and, concluding that the child's testimony had been coached, ordered a psychological evaluation of the child to be conducted by the court's appointed forensic evaluator. Ultimately, Family Court denied the relief sought in the cross petition, but directed, among other things, that "neither parent shall make disparaging remarks about the other." The Third Department modified, only to the extent of correcting Family Court's order, which had erroneously provided for a "continuation" of joint physical custody and reinstating the provisions of the judgment of divorce in accordance with Family Court's intent, which was not to alter the custodial schedule and only add the directive regarding disparaging remarks. The Appellate Division found: "The evidence revealed that the father's and the mother's households are very different. The mother and the child live alone in the former marital home and the mother provides a structured environment with an early bedtime. The father lives in a two-bedroom apartment attached to the home where his parents live with their 16-year-old grandson, the father's nephew. *** Although the child has her own bedroom, she sometimes has trouble falling

asleep due to noise from other family members. *** The evidence also established that the father and the mother had an acrimonious relationship that adversely affected the child. *** The attorney for the child agreed with the court-appointed psychologist that the child is aware of the conflict between her parents and that it causes her stress and anxiety. They both noted that the child is troubled by the father's negative comments about the mother and that she is strongly influenced by her mother. While advocating to end the child's overnight visitation with the father on school nights, the attorney for the child nevertheless expressed concern that a reduction in the father's parenting time and the concomitant increase in the time that the child spends with the mother would result in alienation from the father. The psychologist made no finding of alienation and concluded that his evaluation did not support modification of the custody arrangement." The Third Department stated: "We conclude that the evidence does not support a finding that the conditions at the father's home during the midweek visitations had a significant detrimental effect on the child's welfare; rather, we find that the parents' acrimonious relationship is the primary factor negatively affecting the child. We further note that there is evidence that eliminating the father's midweek visitations would negatively impact the relationship between the father and the child, to the detriment of both. Upon consideration of the child's best interests, Family Court properly decided that it was not changing the visitation schedule — the only relief sought by the mother — thereby intending to leave the existing order unaffected except for the additional provision prohibiting disparaging remarks."

C. Modification – Dismissal Reversed

In Matter of Kriegar v. McCarthy, 2018 Westlaw2752015 (4th Dept. June 8, 2018), the Fourth Department reversed, on the law, an August 2017 Family Court order, which dismissed the mother's petition seeking modification of a prior order of joint legal custody, so as to award

her sole legal custody. The Appellate Division held that the mother "adequately alleged a change in circumstances warranting a modification of the prior order, i.e., that the father has repeatedly and consistently neglected to exercise his right to full visitation and has endangered the children by exposing them to individuals who engaged in drug use." The Fourth Department reinstated the petition and remitted to Family Court for a hearing.

D. Modification - Domestic Violence, Residence & School Changes

In Matter of Greene v. Kranock, 160 AD3d 1476 (4th Dept. Apr. 27, 2018), the mother appealed from a November 2016 Family Court order, which modified a prior order by granting the father primary physical placement of the subject child. The Fourth Department affirmed, holding that "there was a change in circumstances based on the undisputed evidence at the hearing of domestic violence in the mother's household (citations omitted), the mother's frequent changes of residence (citations omitted), and the child's repeated changes of school (citations omitted)."

E. Modification – School Disagreement

In Hudson v. Hudson, 2018 Westlaw 3297526 (2d Dept. July 5, 2018), the father appealed from a February 2017 Supreme Court order, which, without a hearing, denied his cross motion to modify joint custody so as to award him sole legal and physical custody, and granted the mother's September 2016 motion to enforce the education provision contained in the stipulation incorporated into the parties' June 2014 judgment. The stipulation provided that the child "shall go to school within the jurisdiction of the [mother's] residence based on physical custody, provided she complies with the [stipulated] mileage conditions." The mother complied with the mileage conditions and the child attended a pre-K program at a private school in Warwick, NY. The mother lived in Vernon, NJ and wanted the child to attend kindergarten

there, while the father wanted the child to continue at the private school in Warwick. As a result of the disagreement, the child attended kindergarten at both schools for a period of time. Supreme Court found the education stipulation provision to be "clear and unambiguous." The Second Department reversed, on the law, and remitted for a hearing and a new determination on both motions, holding that "there is ambiguity in the parties' stipulation *** concerning where the child would attend school, and it does not clearly evidence the parties' intent that she attend the local public school." The Appellate Division reasoned that Supreme Court "should have rendered its determination based upon the child's best interests," and, further, that joint custody "should not be continued where the parties are unable to cooperate with each other with respect to their parental obligations such that joint custody is more harmful than beneficial to the child."

F. Modification – Sole to Father; Mother Changes in Residence, Paramours, Sex Offender Contact; Facebook Posts

In Matter of Brent O. v. Lisa P., 2018 Westlaw 2048983 (3d Dept. May 3, 2018), the mother appealed from a January 2017 Family Court order, which, after a hearing, granted the father's November 2015 petition (and supplemental petitions) to modify a November 2013 stipulated order, which had conferred sole legal and primary physical custody of the parties' daughter born in 2005 to the mother, with visitation in North Carolina to the father, so as to grant him sole custody. Family Court also granted an order of protection prohibiting contact between the child and certain maternal relatives. The father subsequently moved to Oklahoma. There was no dispute that changed circumstances warranted modification. The Appellate Division affirmed and found "that the child has spent nearly her entire life in the care of her mother and that the two enjoy a close relationship," but that Family Court's "grave concern for the child's well-being and stability while with the mother is well-founded and supported by the evidence." The Third

Department noted: "The mother's own testimony established that, since the entry of the prior custody order, she has changed residences several times and moved from one relationship to another with relative alacrity, inviting several of these individuals to spend the night, or longer, at her home. At times, the mother's routine involved shuttling the child back and forth between her residence and that of her on-again, off-again paramour, regardless of whether the two were in a 'relationship' and with no apparent consideration as to the disruption this may cause the child. Of particular concern is the mother's conduct in permitting the child to be present at family gatherings with a family member she knew to be a convicted sex offender, as well as her decision to expose the child to a convicted murderer. Further, as the mother acknowledged, the child had been subjected to sexual abuse while under her care. The mother's Facebook page, which could be viewed by the public, contained provocative pictures of herself, a number of sexually explicit 'picture quotes' and lewd remarks and expletives that she admitted she would not want her children to see. When questioned as to whether she would cease using Facebook if ordered to do so by the court, the mother indicated that she would but that it would be a 'hardship.' Charitably stated, the mother's choices in this regard reflect a deficiency of reasonable parental judgment and a lack of insight as to the adverse impact that her conduct has upon the child." The Appellate Division cited testimony "that the child was failing core classes at school, yet the mother could not name one of the child's teachers" and evidence that "the mother engaged in a course of conduct designed to alienate the child from the father and to interfere with the father-daughter relationship.". On at least one occasion, the mother changed residences with the child without informing the father or providing him with their new phone number, again in violation of the prior order. The Third Department found that "the evidence overwhelmingly establishes that he is far more willing and able to provide a stable and nurturing environment for

the child. The father resides in a single-family home in Oklahoma with his wife of 10 years, who is gainfully employed as an executive for an airline company. Having retired from the United States Army in 2009, the father is able to care for the child whenever she is not in school. He has consistently exercised the parenting time afforded to him under the 2013 order, and has traveled to New York on multiple occasions to avail himself of additional visits with the child." On the implicit issue of relocation, the Appellate Division noted: "Although an award of custody to the father would necessarily result in the child's relocation to Oklahoma, upon balancing the *Tropea* factors (citation omitted), we are satisfied that the father met his 'burden of establishing, by a preponderance of the credible evidence, that the proposed relocation would be in the child's best interests.'"

G. Modification –to Father – Domestic Violence, Mental Health, Multiple Moves

In Matter of Smith v. Lopez, 2018 Westlaw 3321585 (4th Dept. July 6, 2018), the mother appealed from a February 1, 2017 Family Court order, which modified a prior order so as to award primary physical custody of the subject child to the father. The Fourth Department affirmed, holding that the father met his burden of showing changed circumstances which included "that the mother relocated her and the child's residence several times within a relatively short time frame (citations omitted), and that the mother had a mental health condition that was not adequately treated." The Appellate Division noted further that "the mother previously alleged that her paramour, who had ongoing substance abuse issues, had engaged in domestic violence toward her in the presence of the child, and she refused to stipulate during this custody proceeding that he would not be left in charge of, or alone with, the subject child."

H. Modification – Tri-Custody to Sole; Relocation (NC) Permitted

In Matter of Nadine T. v. Lastenia T., 2018 Westlaw 2139938 (1st Dept. May 10, 2018),

Lastenia T. appealed from an April 2017 Family Court order which, after a hearing, granted Nadine T.'s petition to modify a 2007 order, which had granted joint "tri-custody" to the parties and the birth mother, so as to award sole custody to Nadine and permitted her to relocate to North Carolina with the now 15 year old child. The First Department affirmed, noting that it was Nadine "who has solely provided the child with a safe, stable and loving home and tended to all of his educational, medical and therapeutic needs," and that after the relationship between Nadine and Lastenia ended, "Lastenia made no contact with the child for months at a time and made minimal efforts to participate in his upbringing." The Appellate Division held that with regard to the birth mother, "the record supports the finding that extraordinary circumstances existed so as to award custody to petitioner." The birth mother "handed over physical custody of the child to petitioner and Lastenia in 2003, when he was three months old, and, thereafter maintained very little contact with him." Further, the birth mother "has also taken no financial responsibility, or any other role in the child's care," which constitutes "an extended disruption of the birth mother's custody," such that Nadine has standing to litigate the child's best interests. With respect to relocation, the First Department found that Nadine "demonstrated that her economic situation would be improved by the move as she would be able to continue to work as a home health aide, earning more per hour, and would also be able to work more hours because her mother and sister would be able to care for the child while she was at work."

I. Parent Abroad

In DeSouza v. DeSouza, 163 AD3d 1185 (3d Dept. July 12, 2018), the husband appealed from a December 2016 Supreme Court judgment, which determined child support, custody and equitable distribution. The Third Department affirmed. The parties were married in 2003 and had 3 children born in 2006, 2008 and 2009. The wife commenced the divorce action in November

2012. A temporary order granted equally shared physical custody "on paper," but given the husband's frequent international travel, the trial testimony showed "in practice, the parents' exercise of physical custody pursuant to said order was often inconvenient and subject to a lack of predictability." Supreme Court directed that "while the husband is abroad, the children were to primarily reside with the wife, and that when the husband was in the country, he was free to take custody of the children during his approximately three-week travel cycles, with the wife getting one weekday overnight visitation and the parties sharing alternate weekends." The Third Department noted that the judgment on the issue of custody "sufficiently addresses the unique circumstances presented by the husband's international employment." The Appellate Division rejected the husband's argument that Supreme Court erred in calculating child support, by failing to consider the rental income derived from 5 rental properties, noting that the most recent tax return showed that the properties operated at a net loss for that year. The Court held that where "a net loss is sustained *** such rental income is properly excluded from the calculation of the parties' total gross income for child support purposes." The husband argued that Supreme Court erred in awarding the wife half of his 75% ownership of a business, upon the ground that the purchase thereof was funded exclusively from separate property gifts from his father, for which gifts Supreme Court credited the husband. The Appellate Division noted the wife's testimony "that she had extensive discussions with the husband regarding the purchase of the same" and that "the husband provided her with various revenue projections and reassured her on numerous occasions that the acquisition of [the business] would ultimately be a lucrative long-term investment." The Third Department concluded: "Given the joint nature of the parties' decision to invest in [the business] and the extent of the wife's nonmonetary contributions in caring for the children during such time, under the circumstances, we find that the husband failed to carry his

burden of establishing that his ownership interest in [the business] constituted separate property and, therefore, we cannot say that Supreme Court's award of half of his 75% ownership interest in same constituted an abuse of discretion."

J. Parenting Coordinator – Diet and Food Restrictions

In Kesavan v. Kesavan, 2018 Westlaw 2727363 (1st Dept. June 7, 2018), the mother appealed from a March 2017 Supreme Court order which, after a trial, denied her motion seeking, among other things, to: implement the parenting coordinator's recommendation that each party be free to feed the subject child as he or she chooses during his or her parenting time; and amend the parenting agreement to give her final decision-making authority with respect to the child; and ordered that neither party shall feed or permit any other person to feed fish, meat or poultry to the child without the other party's consent. The First Department modified, on the law and the facts, to grant the mother's motion to implement the parenting coordinator's recommendation, and to vacate so much of the order that prohibits either party from feeding or permitting any other person to feed the child fish, meat, or poultry without the other's consent. The parties' 24-page parenting agreement provided that they would jointly determine all major matters with respect to the child, including "religious choices," but did not otherwise mention the child's religious upbringing and makes no reference at all to dietary requirements. The Appellate Division determined: "Although the parenting coordinator found that the child's diet was a day-to-day choice within the discretion of each party, the trial court explicitly determined that the child's diet was a religious choice, and dictated the child's diet by effectively prohibiting the parties from feeding her meat, poultry or fish. This was an abuse of discretion. (Citation omitted)." To the extent defendant promised plaintiff, in contemplation of marriage, that she would raise any children they had as vegetarians, the promise is not binding (citation omitted),

particularly in view of the parenting agreement, which omits any such understanding. Nor is there support in the record for a finding that a vegetarian diet is in the child's best interests."

K. Relocation - Granted (Dutchess Co. to CT)

In Matter of Matsen v. Matsen, 161 AD3d 1157 (2d Dept. May 30, 2018), the mother appealed from a June 2017 Family Court order which, after a hearing, denied her petition to relocate with the parties' now 7 and 5 year-old children to Ridgefield, Connecticut, and granted the father's petition to modify the June 2016 judgment of divorce (which contained a 40 mile radius clause from Millbrook) so as to award him sole legal and physical custody. The Second Department modified, on the law, by granting the mother's petition for relocation and denying the father's petition for modification, and remitted to establish a schedule for the father. The Appellate Division found that the mother's sole motivation was not to ease her fiance's commute, and that she showed educational and social opportunities for the children in Ridgefield, the inability of her fiancé to move his business from Norwalk, CT, and the feasibility of access for the father following such relocation. Further, the Second Department found that access to the children could be facilitated by the father's flexible work schedule and the mother's plan to work only part-time upon relocation to Connecticut.

L. Relocation – Granted (Warren Co. to Schenectady Co.)

In Matter of Hammer v. Hammer, 163 AD3d 1208 (3d Dept. July 12, 2018), the father appealed from a May 2017 Family Court order which, following a hearing, granted the mother permission to relocate with the parties' then 8-year-old child beyond the 30 mile radius provided by a November 2015 judgment of divorce, from Warren County to Schenectady County, a distance of 47 miles. Family Court increased the time with the father and directed that transportation be provided by the mother. The parties had joint legal custody and the mother had

primary physical custody. The mother wanted to reside with her boyfriend and to enroll the child in a private school that would better address ADD. The Appellate Division affirmed, holding: "We find that there is sufficient evidence in the record to support Family Court's determination that the move is in the child's best interests. *** The mother had worked as a jeweler at her father's jewelry store for more than 20 years; however, the father testified that he planned to retire and close the store within days, leaving the mother unemployed and without health insurance. The mother testified that the loss of her long-time job made relocation necessary because she had not been able to locate a position with comparable pay and benefits that would enable her to meet the expenses of continuing to own her home in Queensbury. *** The mother further contended that merging her household and finances with those of her long-term boyfriend would ameliorate the impact of the loss of her long-term job by providing her and the child with financial stability, including health insurance, and a stable home. In that regard, the mother's boyfriend testified that his income was stable and sufficient to cover the child's private school tuition while also providing the mother with the options of being a stay-at-home parent or of working only part time." The Appellate Division concluded: "The record is clear that the proposed relocation, which was necessitated by the mother's changed financial circumstances, was in the child's best interests because it would enhance the economic stability of the mother and the child and also provide the child with a satisfactory educational environment that offers additional resources to address his ADD. Moreover, the court mitigated the negative impacts associated with the relocation by increasing the father's parenting time and requiring that transportation be provided by the mother, thus preserving the father's ability to maintain a meaningful and active relationship with the child."

M. Right to Counsel – Supreme Court

In DiBella v. DiBella, 2018 Westlaw 2048993 (3d Dept. May 3, 2018), the mother appealed from a January 2016 Supreme Court judgment, which, in the mother's 2013 divorce action, granted sole legal custody of the parties' 2 children (born in 2006 and 2008) to the father, modifying a December 2011 Family Court consent order providing for joint legal custody and equally shared physical custody, an arrangement to which the parties had previously stipulated in a July 2010 Family Court order. The grounds for divorce were not contested, and there being no other requests for ancillary relief, the issues of custody, visitation and child support came on for trial over 8 nonconsecutive days from May 2014 to September 2015. The mother had counsel for the first 4 trial dates in May, June and July 2014, and she discharged her counsel on the 5th day in October 2014. Supreme Court set the 6th and 7th days for May 27 and June 3, 2015. On May 27, 2015, the mother appeared and explained she had retained new counsel, but he was unable to attend that day and requested the court to "extend" or "hold off" proceeding with the continuation of the trial until June 3, 2015. The Appellate Division found: "Supreme Court denied the mother's request for an adjournment, indicating that no notice of appearance had been filed by the mother's replacement counsel and that it could not rely solely upon her statement that she may be represented by counsel going forward. Supreme Court then proceeded with the trial, informing the mother that, under the circumstances, she was going to have to proceed pro se." The mother contended on appeal, among other things, that she was deprived of her statutory right to counsel (FCA 262[a]) when Supreme Court compelled her to proceed with the continuation of trial without counsel. The Third Department reversed, on the law, holding: "In the absence of the requisite statutory advisement of her right to counsel (*see* Family Ct Act §262 [a] [v]) or a valid waiver of such right (citation omitted), we find that the mother was deprived of her

fundamental right to counsel (*see* Family Ct Act §§261, 262 [a] [v]; Judiciary Law §35[8]; other citations omitted)." The Appellate Division remitted the action to Supreme Court for a new trial on the issues of custody, visitation and child support.

N. Standing – Equitable Estoppel

In Matter of K.G. v. C.H., 2018 Westlaw 3118937 (1st Dept. June 26, 2018), Petitioner KG appealed from an April 2017 Supreme Court judgment [55 Misc3d 723] which, after trial, denied her petition for joint custody and dismissed the proceeding for lack of standing. KG and CH agreed in 2007 to adopt and raise a child together. Their romantic relationship ended in 2010 and was formalized in a May 2010 written agreement. In March 2011, the adoption agency identified a 15 month old child as a "match" for CH, and CH finalized the adoption on her own in January 2012. The First Department held that Supreme Court's consideration of whether the parties' 2007 agreement and plan to jointly adopt a child "was still in place at the operative time," namely, in March 2011 when the child was identified by the agency, is not inconsistent with Matter of Brooke S.B. v. Elizabeth A.C.C., 28 NY3d 1 (2016). The Appellate Division rejected KG's argument that "once the existence of the 2007 agreement was established, the trial court should not have inquired further," holding: "We do not believe that even the most expansive definition of who is a 'parent' supports this sweeping interpretation." Supreme Court denied CH's motion to dismiss KG's case after she rested, and, as found by the First Department, "the court expressly stated [at a subsequent court appearance] that it would not be ruling substantively on the equitable estoppel issue because it was not raised in KG's papers; it was not pleaded." KG then successfully moved for an order precluding CH from presenting evidence opposing equitable estoppel. Given that the record was incomplete on the issue of equitable estoppel, the Appellate Division held that the matter "cannot be decided without CH having the

opportunity to be heard and on an otherwise patently incomplete record." The First Department determined that the record was "incomplete in other respects as well," which precluded the Court from "reaching the merits of the parties' respective substantive claims on the issue of equitable estoppel ***." The Appellate Division noted Supreme Court's denial of "repeated requests by KG's attorney for the appointment of an attorney for the child, a forensic evaluation and/or a *Lincoln* hearing." Therefore, the First Department modified the judgment, on the law and the facts, and remanded for further proceedings.

O. Temporary – Mid-Hearing – Reversed

In Matter of Ledbetter v. Singer, 162 AD3d 1031 (2d Dept. June 27, 2018), the mother appealed, by permission, from an August 2017 Family Court order which granted the father's motion for temporary custody. The Second Department, having stayed Family Court's order in October 2017 pending appeal, reversed, on the law and the facts, denied the father's motion, and remitted to Family Court "for the completion, with all convenient speed, of the hearing on custody and a determination of the father's petition for sole custody ***." The Appellate Division held that Family Court erred, given that the mother "had not completed presenting her evidence and there were many controverted issues."

P. Third Party – Grandparent – Granted

In Matter of Mastronardi v. Milano-Granito, 159 AD3d 907 (2d Dept. Mar. 21, 2018), the mother and children appealed from a January 2016 Family Court order which, after a hearing, granted the visitation petition of the paternal grandparents, following the death of the father. The Second Department affirmed, holding that "Family Court properly determined that visitation between the paternal grandparents and the children was in the children's best interests" and that "the estrangement between the paternal grandparents and the children resulted from the

animosity between the mother and the paternal grandparents, and the record supported the forensic evaluator's determination that the paternal grandparents' conduct was not the cause of the animosity."

Q. Third Party - Grandparent – Visitation Granted; Child in Foster Care

In Matter of Weiss v. Weiss, 2018 Westlaw 2224871 (2d Dept. May 16, 2018), the maternal grandmother appealed from a December 2016 Family Court order, which, upon remittitur from the Appellate Division in August 2016, dismissed her petitions for custody and visitation with a child who has lived with foster parents for virtually her entire life, upon the ground of lack of standing. The mother's parental rights had been terminated and the child had been freed for adoption. The Second Department held that a biological grandparent has standing to seek custody and visitation, even after parental rights have been terminated and the child has been freed for adoption. While the Appellate Division agreed that it was not appropriate to award custody to the grandmother, given that the grandmother "developed a relationship with the child early in her life and thereafter made repeated efforts to continue that relationship," supervised visitation was in the child's best interests. The Second Department modified, on the law, on the facts and in the exercise of discretion, and remitted for further proceedings before a different Family Court Judge to determine appropriate visitation.

R. Third Party – Granted to Non-Biological Father; Counsel Fees

In Matter of Renee' P.F. v. Frank G., 161 AD3d 1163 (2d Dept. May 30, 2018), the biological father (Frank) of now 8 year old twins, born to the sister (Renee') of the non-biological father (Joseph) under a surrogacy contract, appealed from, among other things, a February 2017 Family Court order, which, after a hearing following the Second Department's order (142 AD3d 928 [2d Dept. Sept. 6, 2016]) determining that Joseph had standing to seek

custody, granted custody to Joseph. The Appellate Division affirmed, holding that Family Court's order was in the children's best interests, where Frank refused to allow Joseph to have contact with the children as of May 2014 and then relocated with the children to Florida without informing Joseph. The Court also affirmed separate orders directing Frank to pay Joseph counsel fees of $25,000 and $15,000 in counsel fees to Renee'.

S. To Father – Factors

In Matter of Leonidez A. v. Sira L.R., 2018 Westlaw 2974539 (1st Dept. June 14, 2018), the First Department affirmed an August 2017 Family Court order, which, after a hearing, awarded sole legal and physical custody of the parties' son to the father. The Appellate Division found that Family Court "properly determined that the child's welfare and happiness would be best served in the father's care (citation omitted), particularly given that the father has provided the child with unwavering stability (citation omitted). Since the child was very young, he has spent the entirety of every weekend with the father and the paternal extended family, whereas, when with the mother during the week, in New York, the child spent much of his time with a babysitter, even when the mother was not working. By contrast, the father has been more of a hands-on parent, who spent as much time as he could with the child, and relied on family or caregivers as little as possible (citation omitted). The father has been active in the child's education, as well as in enriching him with extracurricular activities and excursions (citations omitted). Moreover, the father has greater financial stability, and the child has thrived in his care (citations omitted). Further, the father recognized and supported the child's need to maintain a relationship with the mother and his half-siblings and ensured that the child spent holidays with them while the child was in his care in New York and also visited them in Florida (citation omitted). The mother, on the other hand, has shown a disregard for the child's relationship with

the father (citation omitted), having, among other things, absconded with the child to Florida without the father's knowledge or consent."

T. UCCJEA – NY Jurisdiction; Proceedings in Another State

In Matter of Beyer v. Hoffman, 2018 Westlaw 2075877 (4th Dept. May 4, 2018), the father appealed from an August 2016 Family Court order, which dismissed his petition seeking custody of the parties' twin daughters, upon the ground that Pennsylvania is the home state of the children and the mother had commenced a custody proceeding in Pennsylvania. The Fourth Department reversed, on the law, reinstated the petition, and remitted to Family Court for further proceedings. The children were born on June 5, 2015 and lived with both parties in New York until December 29, 2015, when the parties moved with the children to State College, Pennsylvania. In April 2016 the children and the mother moved to York, Pennsylvania without the father. The father returned to New York and filed for custody on June 6, 2016. The mother commenced a custody proceeding in Pennsylvania on August 9, 2016. The Appellate Division determined that "Family Court had jurisdiction to make an initial custody determination at the time the father commenced the instant proceeding (*see* Domestic Relations Law §§75-a[7]; 76 [1] [a]; other citation omitted) and Pennsylvania had such jurisdiction at the time the mother commenced the proceeding in that state." The Fourth Department agreed "that Family Court erred in declining to exercise jurisdiction and dismissing the proceeding without following the procedures required by the UCCJEA (citation omitted)." Specifically, Family Court failed "either to allow the parties to participate in the communication (citations omitted) or to give the parties 'the opportunity to present facts and legal arguments before a decision on jurisdiction [was] made' (citations omitted)." The Appellate Division held that Family Court "did not articulate its consideration of each of the factors [DRL §76-f(2)(a)-(h)] relevant to the . . .

petition . . . and we are unable to glean the necessary information from the record, [and] the court's [implicit] finding that New York was an inconvenient forum to resolve the [custody] petition is not supported by a sound and substantial basis in the record." The Fourth Department noted that "the events subsequent to the entry of the order we are reversing may be relevant to and can be considered on remittal."

In Matter of Colistra v. Colistra, 2018 Westlaw 2725772 (3d Dept. June 7, 2018), the father appealed from a May 2017 Family Court order, which denied his motion to dismiss the mother's petition for sole custody upon the ground of lack of jurisdiction under the UCCJEA. The parties are the parents of a child born in Pennsylvania in June 2016, where they lived until February 2017, when the mother relocated with the child to Tompkins County, allegedly to escape domestic violence. The father filed for custody in Pennsylvania, and the mother submitted objections on the basis that the Pennsylvania court was an inconvenient forum and moved for a stay pending the New York proceedings. Family Court conducted a telephone conference with the Pennsylvania court pursuant to Domestic Relations Law §76-e (2), in which the courts agreed that, although Pennsylvania was the home state, Domestic Relations Law §75-a [7], New York was the more convenient forum. The Pennsylvania court relinquished jurisdiction to New York and dismissed the father's custody proceeding, and the father appealed from those orders in Pennsylvania. Family Court denied the father's motion to dismiss and exercised jurisdiction pursuant to Domestic Relations Law §76(1)(b). In February 2018, after the father's appeal in New York had been perfected, the Pennsylvania appellate court determined that the Pennsylvania trial court had not given the father the requisite opportunity to present evidence and argument in conjunction with the telephone conference, reversed the orders by which the Pennsylvania court had declined jurisdiction, and remanded the matter for a new jurisdictional

determination in which the parties are allowed to submit evidence. The First Department held: "As a result of the reversal of the Pennsylvania orders that declined jurisdiction, the predicate upon which Family Court based its exercise of jurisdiction no longer exists. *** The new Pennsylvania jurisdictional determination, and any determination that Family Court may make thereafter, will determine the parties' rights and interests, which can no longer be affected by any determination this Court could make as to whether the earlier New York jurisdictional order was properly issued. Thus, the appeal is moot."

U. Violation – Found

In Matter of Mauro v. Costello, 2018 Westlaw 2750961 (4th Dept. June 8, 2018), the father appealed from a January 2017 Family Court order, which dismissed his petition alleging violations of a prior consent order pertaining to communication and visitation. The Fourth Department modified, on the law, and granted the violation petition. The Appellate Division found: "In this matter, the terms of the consent order were unequivocal and the mother repeatedly violated the terms, particularly with respect to communication and visitation. The father struggled to maintain telephone contact with the child, because the mother's phone number frequently changed and she failed to notify the father of those changes. Indeed, at times the mother prevented the father from speaking with the child for weeks. Moreover, the consent order mandated that the father was to have Skype contact with the child one time per week, and the mother failed to comply with that directive. Thus, the father established by clear and convincing evidence that the mother violated the consent order (see El-Dehdan v El-Dehdan, 26 NY3d 19, 29 [2015]), and the mother is therefore advised to abide by both her visitation and communication obligations."

V. Visitation – As Agreed – Modification Dismissal Reversed

In Matter of Kelley v. Fifield, 159 AD3d 1612 (4th Dept. Mar. 23, 2018), the father appealed from a September 2016 Family Court order which, *sua sponte* and without a hearing, dismissed the father's petition for modification of a prior order, which had granted him supervised visitation "as the parties can mutually agree. "The father alleged changed circumstances, including that: the mother had not allowed him any contact in 3 years; the mother had alienated the child from him; and he had been incarcerated and was seeking correspondence and supervised visitation to reconnect with the child. The Fourth Department reversed, on the law, reinstated the petition and remitted for further proceedings. The Appellate Division held: "Where, as here, a prior order provides for visitation as the parties may mutually agree, a party who is unable to obtain visitation pursuant to that order 'may file a petition seeking to enforce or modify the order' (citations omitted). We agree with the father that the court erred in dismissing the modification petition without a hearing inasmuch as the father made 'a sufficient evidentiary showing of a change in circumstances to require a hearing' (citation omitted). *** [W]e conclude that the father adequately alleged a change of circumstances insofar as the visitation arrangement based upon mutual agreement was no longer tenable given that the mother purportedly denied the father any contact with the child (citation omitted). In addition, we note that, although the father is now incarcerated, there is a rebuttable presumption that visitation is in the child's best interests."

W. Visitation – In NY Only; No Unaccompanied Minor Travel

In Matter of Annalyn DCC v. Timothy R., 159 AD3d 560 (1st Dept. Mar. 22, 2018), the father appealed from a July 2017 Family Court order, which denied his request for modification of a prior order, granted the mother's request for modification and directed that the father's

visitation be in New York State. The First Department affirmed, holding that Family Court "properly found that the father failed to demonstrate a change in circumstances to warrant, among other things, allowing the parties' six-year-old child to travel as an unaccompanied minor to the United Kingdom for parental access time" and that "the court properly ordered that the father's visitation with the child take place within the state of New York as in the child's best interest."

V. ENFORCEMENT

A. Child Support – Willful Violation

In Matter of Olivari v. Bianco, 2018 Westlaw 2224926 (2d Dept. May 16, 2018), the father appealed from a December 2016 Family Court order of commitment, which confirmed a September 2016 Support Magistrate order (made after a hearing and finding a willful violation of a 2015 order of child support), and remanded him to jail for 90 days for failure to pay a $15,000 purge amount. The Second Department affirmed, finding that the father failed to establish his defense of inability to pay [FCA 455(5)], noting: "there was evidence at the hearing that the father chose to become indebted on a mortgage on a property in Florida and to pay his present wife's health and automobile insurance and rent, rather than paying the required child support. Thus, the evidence showed that the father diverted his income to these other expenses, including travel to Florida in connection with the property there, rather than comply with the order of support (citation omitted), and used personal expenses as business deductions, making his income appear lower (citation omitted). Furthermore, the father, a licensed attorney and insurance agent, failed to show any attempt to secure employment with a law firm or insurance agency."

B. Post-Judgment – Carrying Charges

In Maddaloni v. Maddaloni, 2018 Westlaw 3450179 (2d Dept. July 18, 2018), the husband appealed from a May 2015 Supreme Court order, which denied his motion to direct the wife to pay 50% of the carrying costs of the marital residence and to credit him for any payments made on her behalf since March 2014. The Second Department affirmed. The Appellate Division found that May 2014 judgment of divorce "directed that the marital residence be immediately placed on the market for sale, but was silent with respect to the parties' responsibilities for payment of the carrying charges of the marital residence after the entry of judgment, but prior to its sale. After the judgment of divorce was entered, the defendant refused to cooperate in effectuating the sale of the marital residence, the parties remained living in the marital residence, and the defendant voluntarily paid the related carrying costs. Under these circumstances, we agree with the Supreme Court's denial of the defendant's motion to direct the plaintiff to pay 50% of the carrying costs of the marital residence and to credit the defendant for any payments made on the plaintiff's behalf since March 2014 (citation omitted)."

C. Visitation - Contempt

In Matter of Mendoza-Pautrat v. Razdan, 160 AD3d 963 (2d Dept. Apr. 25, 2018), the mother appealed from a July 2016 Family Court order which, after a hearing, dismissed so much of her petition as sought to hold the father in civil contempt for alleged violations of October 2014 custody and visitation orders (which awarded sole custody of 4 children to the mother and granted visitation to the father), upon the ground that said violations were not willful. The Second Department reversed, on the law, on the facts, and in the exercise of discretion, granted the petition to impose civil contempt sanctions against the father, and remitted to Family Court, to adjudicate the father in civil contempt and to impose an appropriate civil contempt sanction in

the nature of a fine. The mother alleged that the father: "improperly withdrew three of the children from school early on the last day of classes in June 2015, and thereafter spent one week on vacation with the children"; "failed to timely provide her with notice of his planned summer vacation time with the children"; "failed to allow her daily phone contact with the children during the vacation"; and "failed to complete certain training for parents of a child with autism, again in violation of the October 2014 orders." The Appellate Division held: "In order for contempt sanctions to be imposed pursuant to Judiciary Law §753(A), 'willfulness' need not be shown (citations omitted)." The Second Department found that the "record established that the father violated unequivocal mandates of the Family Court, of which he was aware," as alleged in the mother's petition, and that Family Court "should have held the father in civil contempt of court pursuant to Judiciary Law §753(A)."

VI. EQUITABLE DISTRIBUTION

A. Civil Union Property – Comity

In O'Reilly-Morshead v. O'Reilly-Morshead, 2018 Westlaw 3567116 (4th Dept. July 25, 2018), defendant appealed from an April 2017 Supreme Court order, which denied so much of her motion as sought a determination that property between the date of the parties' Vermont civil union on June 9, 2003 and the date of their marriage in Canada on June 9, 2006, is subject to equitable distribution. The Fourth Department reversed, on the law, and granted that portion of defendant's motion. The Appellate Division held: "Thus, we conclude that the court properly determined that a civil union is not equivalent to a marriage for the purposes of the equitable distribution of property, and thus properly denied defendant's request for equitable distribution pursuant to Domestic Relations Law §236(B)(5)(c) of the property acquired during the civil union but prior to the marriage. *** [w]e conclude that comity does require the recognition of

property rights arising from a civil union in Vermont. One of the consequences of the parties' civil union in Vermont was that they would receive "all the same benefits, protections, and responsibilities under law . . . as are granted to spouses in a civil marriage" (Vt Stat Ann, tit 15, §1204[a]), including rights with respect to "divorce . . . and property division" (§ 1204[d]; *see DeLeonardis v Page*, 188 Vt 94, 101, 998 A2d 1072, 1076 [2010]). That rule is consistent with the public policy of New York, inasmuch as the laws of Vermont and New York both "predicate[] [property rights] on the objective evidence of a formal legal relationship," i.e., legal union between the parties (*Debra H.*, 14 NY3d at 606). In other words, under the laws of both Vermont and New York, property acquired during a legal union of two people—in Vermont a civil union or marriage, and in New York, a marriage—is subject to equitable distribution under the governing statutes of the state. The relevant New York and Vermont statutes both provide similar factors for the court to consider when determining the equitable distribution of the property (*compare* Domestic Relations Law §236[B][5][c], [d], *with* Vt Stat Ann, tit 15, §751[b]). Thus, we conclude that, under the principles of comity, the property acquired during the civil union and prior to the marriage is subject to equitable distribution, and such property will therefore be equitably distributed after trial, along with the property acquired during the marriage."

B. Commingled Funds (25%); Medical Practice (0%); Remainder of Assets (50%)

In <u>Behan v. Kornstein</u>, 2018 Westlaw 4223911 (1st Dept. Sept. 6, 2018), the husband appealed from a July 2017 Supreme Court judgment, which: (1) granted the wife exclusive use and occupancy of the marital residence through June 2020 and directed him to pay the mortgage, maintenance, and assessments thereon; (2) awarded the wife 15% of the value of his medical practice; (3) distributed equally the value of the parties' house in Connecticut after awarding the

husband a separate property credit, distributed equally the parties' jointly titled bank accounts, distributed 25% of the husband's individually titled brokerage accounts to the wife, distributed equally the marital portion of the parties' retirement accounts, distributed equally the value of the parties' art, jewelry, and certain furnishings purchased during the marriage; (4) directed the husband to maintain his life insurance policy in the amount of $2,000,000 and to name the wife as irrevocable beneficiary; and (5) awarded the wife 70% of her counsel fees. The First Department modified, on the law and the facts, to: (1) direct that the wife's exclusive use and occupancy of the marital residence, and defendant's obligation to pay the mortgage, maintenance, and assessments thereon, shall continue only through December 2018; (2) reduce the amount of the husband's life insurance obligation to $750,000; (3) distribute the wife's retirement accounts given her failure to meet her separate property burden of proof; and (4) vacate the award to the wife of 15% of the value of the husband's medical practice. The parties were married in 2001 and the action was commenced in 2010. With regard to the issue of exclusive occupancy and the husband's payments of carrying charges, the Appellate Division held that the wife "was entitled to maintenance in the form of defendant's payment of the mortgage, maintenance, and assessments on the apartment" as being "warranted by the facts, namely, that plaintiff and the child had been living in the apartment," citing Domestic Relations Law §236(B)(5)(f), which "empowers the court to determine the use and occupancy of the marital residence 'without regard to the form of ownership of such property.'" The First Department modified, so as to terminate the wife's exclusive use and occupancy of the marital residence, and the husband's obligation to pay the mortgage, maintenance and assessments, as of the end of December 2018. The Court found that the wife, "a now 49-year-old college-educated professional, had an imputed annual income of $80,000 based on her work history, which included a position where she earned

approximately $175,000 annually" and noted that that she "was awarded a substantial sum in equitable distribution, and has been receiving maintenance, both temporary and pursuant to the judgment, for approximately eight years, almost as long as the parties' marriage." With respect to equitable distribution the Appellate Division held that Supreme Court "properly distributed the parties' marital assets equally, including joint bank accounts, the marital value of the parties' house in Connecticut, and art, jewelry, and certain furnishings purchased during the marriage. Defendant's contention that plaintiff is entitled to no more than 10% of these marital assets because she made little financial contribution to the marriage has no basis in law or fact. *** Nothing in the record supports defendant's contention that plaintiff is not entitled to 50% of the parties' marital assets." The First Department further determined that Supreme Court "properly awarded plaintiff 25% of the individually titled brokerage accounts that defendant had held before the marriage but subsequently commingled with marital funds. The Court held that the life insurance face amount "far exceeds that necessary to secure defendant's child support obligations" and reduced the amount from $2 million to $750,000, allowing the husband "to decrease the amount of coverage each year commensurate with the amount of child support paid." The Appellate Division noted that the husband "started his medical practice in 1996, approximately five years before the marriage" but the wife "failed to meet her burden to demonstrate the baseline value of the practice and the extent of its appreciation" and therefore vacated the 15% award to the wife. The First Department found that while Supreme Court "properly ordered that the marital portion of the parties' retirement accounts be distributed equally, it failed to quantify the marital portion of plaintiff's accounts." The Court noted that the wife's net worth statement "lists two IRAs, and their value shortly after the date of commencement, but fails to indicate the date of acquisition for these accounts." The Appellate

Division concluded that because the wife "failed to meet her burden of establishing that any part of these IRAs is her separate property, the entirety of the accounts is marital and should be divided equally." The First Department also rejected the husband's contention that his defined benefit plan is separate property, given that his net worth statement "lists a January 2003 date of acquisition for the account, which is after the parties were married. Thus, this account is entirely marital property." Finally, in upholding the award to the wife of approximately 70% of her legal fees, the Appellate Division noted that Supreme Court "took into account defendant's role in driving up legal fees, which included changing attorneys nine times, failing to comply with court orders, and needlessly extending the trial with his belligerent behavior."

C. Credit – Principal Reduction; Double Counting – Not Found; Proportions – Business (1/3)

In Westbrook v. Westbrook, 2018 Westlaw 4100828 (2d Dept. Aug. 29, 2018), the husband appealed from an April 2015 Supreme Court judgment, upon a December 2014 decision, which: (1) awarded the wife maintenance of $2,000 per month from January 1, 2015 through June 1, 2019; (2) awarded her $100,333.33, representing 1/3 of the value the husband's business, Dunrite (chimney cleaning and masonry repair), to be paid at the rate of $1,000 per month; (3) failed to award him a credit for payments he made to reduce the principal balance of a first mortgage and the principal balance of a home equity line of credit (HELOC) on the marital residence; and (4) directed the sale of the residence, but failed to direct that the parties are equally responsible for the entire remaining balance of the mortgage and the home equity line of credit. The Second Department affirmed as to maintenance and the distributive award for the business, and modified, on the facts and in the exercise of discretion, by: (1) adding a provision awarding the husband a credit against the proceeds of the sale of the marital residence for 50% of

the payments made by him from December 1, 2009 through the pendency of the action, to reduce the principal balance of the first mortgage and the principal balance of the home equity line of credit on the marital residence; and (2) adding a provision directing that the parties are equally responsible for the balance of the home equity line of credit on the marital residence until entry of the judgment of divorce; and remitted to Supreme Court to determine the amount the husband expended from December 1, 2009 through the pendency of the action, to reduce the principal balance of the first mortgage and the principal balance of the interest only home equity line of credit on the marital residence. The parties were married in July 1998 and had two children. In 2001, the husband started his business and the wife commenced the divorce action in April 2008. Supreme Court's August 2008 order directed the husband to pay temporary child support of $150 per week, plus a majority of the carrying charges on the marital residence, which included the first mortgage and HELOC. In November 2009, the parties stipulated that the husband would have exclusive use and occupancy of the marital residence effective December 1, 2009, and that child support be increased to $350 per week. The wife then successfully moved for more temporary child support and a May 2010 order directed the husband to pay $700 per week. The Appellate Division upheld the amount and duration of maintenance as having properly considered "the standard of living of the parties during the marriage, the income and property of the parties, the distribution of marital property, the duration of the marriage, the health of the parties, the present and future earning capacity of both parties, the ability of the party seeking maintenance to become self-supporting, and the reduced or lost lifetime earning capacity of the party seeking maintenance" and, further, that "[t]he overriding purpose of a maintenance award is to give the spouse economic independence, and it should be awarded for a duration that would provide the recipient with enough time to be self-supporting." The Second Department affirmed

the 1/3 award of the business value to the wife, based upon the wife's "testimony that for the first few years after the husband began operating Dunrite, she contributed towards the business by helping with the scheduling of employees, assisting with some of the billing, answering the work phone during the day, and reviewing invoices at the end of the day." The Court further considered that "in the first two years after the business was started, *** the [the husband] operated the business out of the marital residence" and the wife "was primarily responsible for taking care of the parties' children and the household." The Second Department rejected the husband's argument regarding double counting, finding that "Supreme Court did not engage in impermissible double counting by distributing to the plaintiff a share of the value of the defendant's interest in Dunrite and awarding maintenance to the plaintiff based upon income that the defendant earned from Dunrite, namely, the normalized earnings reported by the expert (citations omitted). The maintenance was based upon the reasonable compensation that was excluded from the excess earning calculations. Dunrite is a tangible, income-producing asset as opposed to an intangible asset with no value other than the income it produces. The 'excess earnings approach' valuation method used by the plaintiff's expert to determine the fair market value of Dunrite does not change its essential nature as a separate tangible asset (citations omitted). Dunrite employed four individuals other than the defendant, owned four vehicles, and held approximately $50,000 in cash, $29,000 in inventory, and $55,000 in property and equipment. Therefore, it was not completely indistinguishable from the income stream upon which the defendant's maintenance obligation was based." As to the issue of credit for the mortgage and the HELOC, the Appellate Division concluded: "The Supreme Court properly declined to grant the defendant a credit against the proceeds of the sale of the marital residence for payments he made to reduce the principal balance of the first mortgage and the principal

balance of the HELOC during the period from the commencement of the action through November 30, 2009. Although the defendant was directed to pay a majority of the carrying charges on the marital residence during the pendency of the action, the court also directed the defendant in the pendente lite order dated August 12, 2008, to pay a relatively small sum of temporary child support to the plaintiff. However, after the parties executed the stipulation dated November 24, 2009, which increased the amount of the defendant's temporary child support obligation commencing on December 1, 2009, and the court thereafter further increased the defendant's temporary child support obligation to $700 per week, the defendant was no longer, in effect, receiving a discount on his temporary child support obligation in recognition of the carrying charges that he was paying. As a result, the court improvidently exercised its discretion in failing to award the defendant a credit against the proceeds of the sale of the marital residence for payments he made to reduce the principal balance of the first mortgage and the principal balance of the HELOC beginning on December 1, 2009, through the pendency of the divorce proceeding (citations omitted). Since these expenses should have been allocated on a 50-50 basis, the court should have awarded the defendant a credit against the proceeds of the sale of the marital residence for 50% of the amount that he expended from December 1, 2009, through the pendency of the divorce action to reduce the principal balance of the first mortgage and the principal balance of the HELOC. The Supreme Court providently exercised its discretion in directing in the decision after trial that the defendant was to be solely responsible for the balance of the first mortgage after the court issued its decision, if he continued to reside in the marital residence (citations omitted). The court providently exercised its discretion in directing that the defendant was to be solely responsible for the remaining balance of the interest only HELOC after the court issued its decision, if he continued to reside in the marital residence (citations

omitted). However, because both the plaintiff and the defendant derived benefit from a portion of the funds from the HELOC during the marriage in that the funds were used to invest in securities, it is appropriate for the plaintiff to share in repayment of the principal balance of the HELOC until entry of the judgment of divorce."

D. Debt, Income Taxes and Proportions – Criminal Conviction

In Greenberg v. Greenberg, 2018 Westlaw 3041099 (2d Dept. June 20, 2018), the husband appealed from a February 2015 Supreme Court amended judgment which, among other things, in the wife's August 2009 divorce action: awarded her the remaining marital assets, consisting of the marital residence and an adjacent parcel; held the husband responsible for 100% of certain debt and income taxes; and directed him to pay counsel fees of $75,000. The Second Department modified, on the facts, by excluding from the husband's responsibility to pay taxes, interest, penalties and deficiencies, any personal income tax related debts or penalties incurred by the wife, and otherwise affirmed. The parties were married in 1995 and have 4 children born between 1998 and 2007. The husband owned several businesses, one which was internet-based. Ultimately, following a June 2009 FTC civil action against the husband, which resulted in a $2,000,000 (plus) judgment against him, and the husband's January 2014 federal court conviction for wire fraud, aggravated identity theft, and money laundering, in connection with unauthorized credit card charges to customers, he was sentenced in October 2014 to 7 years in prison and directed to pay restitution of $1,125,023. The Appellate Division held that it was proper for the Supreme Court to hold the husband responsible for any marital debt, including the FTC judgment, and for all income tax related debt resulting as a direct consequence of his actions, but not for the wife's own failure to file tax returns for her personal income or to pay taxes thereon, of which she had reason to be aware by virtue of IRS notices she received. Under

the circumstances of the case, the Second Department affirmed so much of the amended judgment as awarded the wife the two properties, which had no value, but might generate income, and the counsel fees award, based upon the husband's "evasive and dilatory actions during the pendency of the action."

E. Income Tax Refund

In Kaous v. Kaous, 79 NYS3d 547 (2d Dept. Aug. 22, 2018), the wife appealed from so much of a March 2016 Supreme Court judgment rendered after the trial of her May 2011 divorce action, as failed to equitably distribute an income tax refund the husband deposited into his individual bank account prior to the commencement of the action. The Second Department affirmed. The parties were married in 2003 and have three children. The Appellate Division held that "Supreme Court providently exercised its discretion with regard to the equitable distribution of the income tax refund, as the plaintiff failed to establish that the funds, which the plaintiff claimed were withdrawn from the defendant's bank account, were not used for the benefit of the family."

F. License – Student Loan Debt; Life Insurance Trustee Designation

In Stubbs v. Facey, 159 AD3d 849 (2d Dept. Mar. 14, 2018), the wife appealed from a May 2015 Supreme Court judgment, which directed her to maintain a life insurance policy naming the parties' child as beneficiary and the husband as trustee of the policy funds, and awarded her only $294,400 as her share of the husband's enhanced earning capacity from his medical license. The parties were married in August 2001 and had one child, born in 2004. The Second Department affirmed, holding that "Supreme Court properly directed the plaintiff to maintain a life insurance policy naming the parties' child as beneficiary and the defendant as trustee of the insurance policy funds." With regard to the medical license, the Appellate Division

determined that "Supreme Court properly took into consideration the marital portion of the defendant's student loan debt in determining his enhanced earning capacity."

G. Pensions – Proportions (65%, 45%), Failure to Establish Value

In McCormack v. McCormack, 2018 Westlaw 3296674 (2d Dept. July 5, 2018), the husband appealed from a March 2016 Supreme Court judgment rendered after trial, which awarded the wife 65% of his tax-deferred annuity, 45% of his NYC Dept. of Sanitation pension, and denied him a share of the wife's pension. The Second Department affirmed, noting that the husband "was deliberately evasive in his testimony (citation omitted), and that he diverted marital assets to support a second family for almost 10 years (citations omitted)," and that the equal division under the Majauskas formula of the pension resulted in an ultimate 45% share to the wife. As to the wife's pension, the Appellate Division found that he "failed to establish the value of the pension."

H. Proportions – Business (20%)

In James v. James, 2018 Westlaw 3371606 (2d Dept. July 11, 2018), the husband appealed from a February 2013 Supreme Court judgment, upon a May 2012 decision after trial, which, among other things, awarded the wife a 20% interest in two of his businesses, New Deal Daycare and Lormic Transportation. The Second Department affirmed on this issue, noting that the parties were married in 1985 and the wife was employed as a teacher, and stating only: "The Supreme Court did not err in awarding the plaintiff a 20% interest in New Deal and Lormic."

I. Proportions - Business (26%); Separate Debt & Property

In Sheehan v. Sheehan, 2018 Westlaw 2123737 (2d Dept. May 9, 2018), both parties appealed from a March 2016 Supreme Court judgment after trial, which, among other things, awarded the wife 26% ($199,837) of the appreciated value ($768,603) of the husband's business,

distributed the appreciated net cash value of the husband's separate property life insurance policies, awarded the wife maintenance of $2,100 for 3 years, awarded $25,000 in counsel fees to the wife, and failed to award the wife a credit for funds used by the husband to pay his separate debt. The Second Department modified, on the law and on the facts, by (1) deleting the award to the wife of a portion of the appreciated net cash value of the husband's two life insurance policies, and (2) increasing the wife's counsel fee award to $40,000, and otherwise affirmed. The parties were married in July 2000, and have two children. The husband owned a business (gas station and auto repair center), in which the wife worked part-time as a bookkeeper while also being the primary caregiver for the children. The wife filed the divorce action in August 2012. Given the wife's "direct contributions to the business, as well as her indirect contributions as a homemaker and primary caregiver for the parties' children in this long-term marriage," the Appellate Division found that "the court's award of 26%, or $199,836.65, was a provident exercise of discretion." With respect to the husband's life insurance policies, the Second Department found that it was undisputed that they were obtained prior to the marriage and reasoned: "While it would have been appropriate to distribute the appreciated cash value of the policies if the defendant had made contributions to them with marital funds (citations omitted), the evidence establishes that the premiums were not paid with marital funds. Therefore, the Supreme Court should not have awarded the plaintiff a portion of the appreciated net cash value of these policies ***." The Appellate Division held that Supreme Court "providently denied the plaintiff's request for a credit for an equitable share of funds used by the defendant to pay his separate debt during the marriage," because "the credible evidence established that the payments the defendant made toward his separate debt during the marriage were made with separate funds." The Second Department rejected both parties' challenges to the

maintenance determination, noting that Supreme Court "limited the duration of the award to a reasonable time to allow the plaintiff to fulfill her plan to obtain her Associate's Degree and training that will enable her to be self-supporting and regain self-sufficiency." With regard to counsel fees, the Court concluded: "Considering the parties' relative circumstances and other relevant factors, the award of attorney's fees to the plaintiff in the sum of $25,000 was inadequate."

J. Proportions - (60/40); Separate Property Credit

In M.M. v. D.M., 159 AD3d 562 (1st Dept. Mar. 22, 2018), both parties appealed from an August 2017 Supreme Court Judgment, awarding plaintiff wife child support and maintenance, awarding defendant husband a credit of $1 million for his separate property interest in the marital residence, distributing the parties' non-business marital assets 60% to plaintiff and 40% to defendant, awarding plaintiff a share of defendant's business interests valued as of January 2015, awarding credits for various post-commencement expenses, and allocating 65% of plaintiff's counsel fees to defendant. The First Department modified, on the law and the facts, to award defendant a credit of $71,000 for his Lehman Brothers retirement account, to delete the directive that defendant be solely responsible for the children's private school tuition and to direct instead that the parties share the children's private school tuition pro rata, to delete the directive that defendant contribute to the cost of a full-time nanny, and to remand for a determination of the credit owed defendant for documented moving expenses, documented post-commencement contributions to his 401(k) account and for a recalculation of defendant's child support obligation, and his child support arrears, treating plaintiff's durational maintenance as income. The Appellate Division noted that the wife conceded that the husband's Lehman Brothers retirement account, valued at $71,000, is separate property and was erroneously distributed as a

marital asset and that he is entitled to a credit in that amount. The First Department held that Supreme Court providently exercised its discretion in distributing the parties' non-business marital assets 60% to the wife and 40% to the husband, based upon the wife's contributions to the husband's career, at the expense of her own career, and the parties' probable future financial circumstances, in particular, defendant's far greater earning potential and family wealth. The Appellate Division agreed with the husband that the $1 million he received from his father toward the down payment on the marital residence was a gift structured as a "loan" to defendant alone, and was therefore defendant's separate property and that there "was no repayment using marital funds; indeed, there was no expectation of repayment." As to the husband's business interests, the First Department properly chose January 2015 as the valuation date, on the ground that he was forcibly hospitalized around that time and diagnosed with temporal lobe epilepsy, and subsequently had very little involvement in his family's business. The Court noted that while Supreme Court found that the husband's post-commencement contributions to his 401(k) were separate property, it was "not clear whether he was credited for his documented post-commencement contributions to that account," and remanded for a determination of the credit owed to him for those contributions. As to child support, the Appellate Division found that Supreme Court properly imputed income of $1.5 million to the husband and applied a CSSA income cap of $650,000, based upon "the lifestyle enjoyed by the children during the marriage, which included country club membership, theater and other entertainment, and luxury vacations." The First Department further stated: "We also agree with defendant that the Referee erred in ordering him to contribute to the cost of a nanny, since plaintiff does not work, and the youngest child was 12 years old at the time of trial (*see* DRL § 240[1-b][c][4])" and that Supreme Court failed to credit defendant for his documented moving expenses. With regard to

maintenance, the Appellate Division held that Supreme Court properly awarded the wife maintenance "for six months or until she received her distributive share of the marital assets, on the ground that the cash flow from those assets would be sufficient to support her lifestyle without the need for additional maintenance from defendant. After a 15-year marriage in which she was primarily a homemaker, plaintiff surely would have been entitled to maintenance of a longer duration — if not for the equitable distribution to her of 60% of the non-business marital assets, which provided her with the means to be self-supporting." As to counsel fees, the First Department upheld the allocation of 65% of the wife's counsel fees to the husband, noting: "The parties' accrued counsel fees exceeded $7,000,000, and were paid mostly out of their liquid marital assets, although defendant was earning a substantial salary until 2015. *** Further, the Referee properly took into account that, although both parties engaged in needless litigation, plaintiff's trial positions were on the whole more successful (citation omitted). We note that even after the award plaintiff remained responsible for more than $1 million in legal fees."

K. Refinance Mandated; Separate Property Found, Credit Given

In Giannuzzi v. Kearney, 160 AD3d 1079 (3d Dept. Apr. 5, 2018), both parties appealed from a May 2016 Supreme Court judgment which directed equitable distribution in wife's 2013 divorce action. The parties were married in 1998 and had no children. The wife inherited over $1 million in IBM stock before the marriage and kept the same in accounts in her name throughout the marriage. The wife was a teacher, and the husband eventually became a financial planner and managed the wife's stock holdings. The parties acquired a primary residence in Broome County and seven Florida properties. Supreme Court determined that the wife's IBM stock was her separate property, awarded the former marital residence to the wife, awarded the commercial property and the property in Florida where he resided to the husband, and awarded the wife a

credit of $115,000 for her contribution of separate property to the purchase and improvement of the Florida property awarded to the husband. The judgment also directed the sale of the six remaining Florida properties, with the net proceeds to be distributed 60% to the wife and 40% to the husband. The Appellate Division rejected the husband's contention that Supreme Court should have found the IBM stock to be marital property under various theories of transmutation: (a) because the parties filed joint income tax returns reporting income derived from the IBM stock; (b) the parties utilized dividends received from the IBM stock to maintain the marital standard of living; and (c) the IBM stock was pledged as collateral to secure the loan used to purchase several of the Florida properties. The Third Department held: "Here, the wife's assertion that the IBM stock was her separate property was not contrary to any position that she had taken by reporting income derived from her IBM stock on the parties' joint income tax returns as dividends and capital gains (citation omitted). [Ed. note: read the decision for the remainder of the detailed legal analysis adverse to the husband's theories]. The Court concluded that "Supreme Court erred by making no provision for the release of her personal liability for the mortgage loan on that property," and directed the husband to refinance the mortgage or obtain a release of the wife's liability within 90 days. Failing those alternatives, the Third Department directed that the property be sold and the net proceeds be first applied toward any balance remaining due on the wife's $115,000 separate property credit.

L. Separate Property Derived Business – 50%

In DeSouza v. DeSouza, 163 AD3d 1185 (3d Dept. July 12, 2018), the husband appealed from a December 2016 Supreme Court judgment, which determined child support, custody and equitable distribution. The Third Department affirmed. The parties were married in 2003 and had 3 children born in 2006, 2008 and 2009. The wife commenced the divorce action in November

2012. A temporary order granted equally shared physical custody "on paper," but given the husband's frequent international travel, the trial testimony showed "in practice, the parents' exercise of physical custody pursuant to said order was often inconvenient and subject to a lack of predictability." Supreme Court directed that "while the husband is abroad, the children were to primarily reside with the wife, and that when the husband was in the country, he was free to take custody of the children during his approximately three-week travel cycles, with the wife getting one weekday overnight visitation and the parties sharing alternate weekends." The Third Department noted that the judgment on the issue of custody "sufficiently addresses the unique circumstances presented by the husband's international employment." The Appellate Division rejected the husband's argument that Supreme Court erred in calculating child support, by failing to consider the rental income derived from 5 rental properties, noting that the most recent tax return showed that the properties operated at a net loss for that year. The Court held that where "a net loss is sustained *** such rental income is properly excluded from the calculation of the parties' total gross income for child support purposes." The husband argued that Supreme Court erred in awarding the wife half of his 75% ownership of a business, upon the ground that the purchase thereof was funded exclusively from separate property gifts from his father, for which gifts Supreme Court credited the husband. The Appellate Division noted the wife's testimony "that she had extensive discussions with the husband regarding the purchase of the same" and that "the husband provided her with various revenue projections and reassured her on numerous occasions that the acquisition of [the business] would ultimately be a lucrative long-term investment." The Third Department concluded: "Given the joint nature of the parties' decision to invest in [the business] and the extent of the wife's nonmonetary contributions in caring for the children during such time, under the circumstances, we find that the husband failed to carry his

burden of establishing that his ownership interest in [the business] constituted separate property and, therefore, we cannot say that Supreme Court's award of half of his 75% ownership interest in same constituted an abuse of discretion."

VII. EVIDENCE

A. Expert Testimony – Sexual Abuse; Recordings

In Matter of Donald G. v. Hope H., 160 AD3d 1061 (3d Dept. April 5, 2018), the mother appealed from a July 2016 Family Court order, which, after a hearing, modified a 2015 consent order, pursuant to which the parties shared joint legal and physical custody of their child born in 2011, by granting sole legal and physical custody to the father with supervised visitation to the mother. The father alleged that the child had been sexually abused, and that the mother had coached the child to claim that the father was the perpetrator. Family Court determined that the mother had coached the child to make sexual abuse allegations against the father and had repeatedly prevented the father from seeing the child during his scheduled time. The Third Department affirmed, rejecting the mother's contention that Family Court erred by "allowing the child's treating sexual abuse counselor, who was qualified as an expert in sexual abuse treatment, to opine upon the respective fitness of each parent as custodians." The Appellate Division noted that the counselor "had a Master's degree in social work, had over 23 years of experience as a psychotherapist and 'hundreds of hours of training' as a trauma specialist, had been specializing in the treatment of sexually abused children for about 10 years, and had been providing sexual abuse counseling at the child advocacy center where the child was treated for about five years." The counselor testified that she had conducted 17 treatment sessions with the child for the purpose of an "extended assessment" to determine whether an injury that the child had suffered had been caused by sexual abuse or by an accident. The mother participated in nine of these

sessions and the father participated in two sessions. The Third Department noted further: "*** the counselor opined that the child had been sexually abused. She further opined that, although she could not determine who had abused the child, the father was not the perpetrator, and that the mother had coached the child to claim that the father had abused her. The counselor based her opinion regarding the coaching partially upon statements made by the child." As to the mother's argument that Family Court erred in receiving into evidence three audio recordings of various comments she made, the Appellate Division held that the claim was "waived as to two of the recordings — one of which was admitted for impeachment purposes, and one of which was admitted as factual evidence — as it was not preserved by an appropriate objection," but stated that if "the contention had been preserved, we would have found that it lacked merit, as the mother identified the voice on each recording as her own and acknowledged that the recordings fairly represented statements that she had made." Family Court overruled the objection to the third recording on foundational grounds, and admitted the same for impeachment purposes, noting the mother had identified her voice and the conversation with the father. The Third Department noted that Family Court's adverse credibility findings made no reference to the third recording.

VIII. FAMILY OFFENSE

A. Harassment 2d - Found

In Matter of Doris M. v. Yarenis P., 2018 Westlaw 2139369 (1st Dept. May 10, 2018), Yarenis appealed from a June 2017 Family Court Order of protection, which, upon a fact-finding determination that she committed harassment in the first and second degree, directed that she stay away from the parties' shared apartment until June 30, 2018. The First Department modified, on the law, to vacate the finding of harassment in the first degree. The Appellate

Division held that Family Court erred in determining that Yarenis' "actions of leaving water to boil over on the stove, burning the pots, allowing the bathtub to overflow on several occasions and screaming in the middle of the night while playing her music in a loud manner, constituted the family offense of harassment in the first degree, because there were no facts alleged in the family offense petition supporting such a finding." However, the First Department determined that Yarenis committed harassment in the second degree when she "summoned the police to the apartment and attempted to have [Doris] arrested about three times that day," which actions "served no legitimate purpose and only alarmed or seriously annoyed" Doris. The Court rejected Yarenis' argument that a less drastic remedy was in order, given Doris' testimony that she was afraid in her own home, because Yarenis "continued leaving the stove on unattended in violation of the May 8, 2017 and June 1, 2017 temporary orders of protection."

B. Harassment 2d – Found; Order of Protection for Dog

In Matter of Jisselle F. v. Jose T., 162 AD3d 572 (1st Dept. June 26, 2018), respondent father-in-law appealed from an October 2016 Family Court order which, after a hearing, found that he had committed a family offense and directed him to stay away from his daughter-in-law and her dog for 1 year. The First Department affirmed, holding that although Family Court did not specify the degree of harassment, a fair preponderance of the evidence and the Referee's credibility findings supported a finding of harassment in the second degree [PL 240.26(3)]. The Appellate Division found: "The record shows that respondent, who was petitioner's father-in-law, had been staying in petitioner's apartment, in which petitioner and her husband (respondent's son) lived with their dog, for an extended period of time. When the living situation became too strained, petitioner's husband asked respondent to vacate the apartment. Respondent, however, proceeded to threaten petitioner physically and inappropriately propositioned her, broke personal

items in the apartment, walked around naked, and hit and attempted to poison petitioner's dog. During this time, respondent maintained that the apartment was his, notwithstanding that petitioner's husband had resided there for six years and his was the only name on the lease. Indeed, respondent was unable to produce a lease for the apartment with his name on it, and his explanation for his failure to do so was not believable. By his own admission, although he ostensibly had vacated the apartment, he returned to the apartment to shower, nap and change when petitioner and her husband were not home, despite the fact that petitioner's husband had never given him a key. Petitioner testified that as a result of respondent's conduct, she felt threatened and feared for her safety."

C. Harassment 2d – Statements Outside Petition Disallowed

In Matter of Almaguer v Almaguer, 159 AD3d 897 (2d Dept. Mar. 21, 2018), the husband appealed from a May 2017 Family Court order of protection, made following a hearing upon a finding that he committed harassment in the second degree, and which directed him to stay away from the marital residence for 2 years. The Second Department reversed, on the law, and remitted to Family Court for a new hearing and determination, and reinstated the temporary order of protection. The wife alleged that the husband threatened to kill her if she filed for divorce. The Appellate Division held: "Family Court erred in considering and relying upon statements made by the husband during a preliminary conference and in proceedings prior to the hearing. Statements made during a preliminary conference are not admissible at a fact-finding hearing (*see* Family Ct Act §824). Moreover, the court may not rely upon evidence of an incident not charged in the petition in sustaining a charge of harassment."

D. Occurrences Outside NY; Remoteness in Time

In Matter of Rushane P. v. Boris L.R., 73 NYS3d 425 (1st Dept. May 10, 2018),

petitioner appealed from an August 2017 Family Court order, which dismissed the family offense petition with prejudice. The First Department reversed, on the law, and reinstated the petition, holding that "Family Court erred in dismissing the petition, which alleged family offenses that occurred in New York, Pennsylvania, and Jamaica, on the ground that the only incident alleged to have occurred in New York happened in 2014, three years before the filing of the petition." The Appellate Division noted that subject matter jurisdiction is not "limited by geography" and Family Court may render findings of fact regarding acts which occur outside its jurisdiction. The Court further reiterated the amendment to FCA §812(1), which provides that "a court shall not ... dismiss a petition[] solely on the basis that the acts or events alleged are not relatively contemporaneous with the date of the petition."

IX. MAINTENANCE

A. Denied

In O'Brien v. O'Brien, 2018 Westlaw 3371437 (2d Dept. July 11, 2018), the wife appealed from a September 2015 Supreme Court judgment, rendered upon a June 2015 decision after trial of the husband's 2012 action, which, among other things, directed her to pay child support of $1,382.60 per month for 3 children, directed her to maintain $200,000 of life insurance therefor, and denied her an award of maintenance. The Second Department modified, on the law and the facts, and in the exercise of discretion, by reducing child support to $1,034.60 per month and by reducing the face amount of life insurance to $98,822.32. The parties were married in January 1992, and the wife had a high school diploma and "had worked at a delicatessen, as a medical assistant and as a dental assistant." The wife's mother testified that she had given the wife $1,800 to $2,000 per month since her departure from the marital residence. Supreme Court imputed income to the wife of $66,000, but the Appellate Division reduced that

amount to $30,000, based upon the wife's educational background and past earnings, and the monetary gifts to her from her mother. On the issue of maintenance, the Court stated: "Here, after consideration of the statutory factors, the court properly declined to award the defendant maintenance."

B. Durational - Affirmed

In Sheehan v. Sheehan, 2018 Westlaw 2123737 (2d Dept. May 9, 2018), both parties appealed from a March 2016 Supreme Court judgment after trial, which, among other things, awarded the wife 26% ($199,837) of the appreciated value ($768,603) of the husband's business, distributed the appreciated net cash value of the husband's separate property life insurance policies, awarded the wife maintenance of $2,100 for 3 years, awarded $25,000 in counsel fees to the wife, and failed to award the wife a credit for funds used by the husband to pay his separate debt. The Second Department modified, on the law and on the facts, by (1) deleting the award to the wife of a portion of the appreciated net cash value of the husband's two life insurance policies, and (2) increasing the wife's counsel fee award to $40,000, and otherwise affirmed. The parties were married in July 2000, and have two children. The husband owned a business (gas station and auto repair center), in which the wife worked part-time as a bookkeeper while also being the primary caregiver for the children. The wife filed the divorce action in August 2012. Give the wife's "direct contributions to the business, as well as her indirect contributions as a homemaker and primary caregiver for the parties' children in this long-term marriage," the Appellate Division found that "the court's award of 26%, or $199,836.65, was a provident exercise of discretion." With respect to the husband's life insurance policies, the Second Department found that it was undisputed that they were obtained prior to the marriage and reasoned: "While it would have been appropriate to distribute the appreciated cash value of

the policies if the defendant had made contributions to them with marital funds (citations omitted), the evidence establishes that the premiums were not paid with marital funds. Therefore, the Supreme Court should not have awarded the plaintiff a portion of the appreciated net cash value of these policies ***." The Appellate Division held that Supreme Court "providently denied the plaintiff's request for a credit for an equitable share of funds used by the defendant to pay his separate debt during the marriage," because "the credible evidence established that the payments the defendant made toward his separate debt during the marriage were made with separate funds." The Second Department rejected both parties' challenges to the maintenance determination, noting that Supreme Court "limited the duration of the award to a reasonable time to allow the plaintiff to fulfill her plan to obtain her Associate's Degree and training that will enable her to be self-supporting and regain self-sufficiency." With regard to counsel fees, the Court concluded: "Considering the parties' relative circumstances and other relevant factors, the award of attorney's fees to the plaintiff in the sum of $25,000 was inadequate."

In Santangelo v. Santangelo, 2018 Westlaw 3291917 (July 5, 2018), the wife appealed from an October 2014 Supreme Court judgment, rendered upon a July 2014 decision after trial of the husband's 2011 divorce action, which awarded her maintenance of $3,000 per month for 4 years. The parties were married in 1993 and had 2 children. The husband was an attorney and the wife was a college graduate who had a real estate license and only sporadically worked outside the home. The Second Department affirmed the award as a provident exercise of its discretion.

In Westbrook v. Westbrook, 2018 Westlaw 4100828 (2d Dept. Aug. 29, 2018), the husband appealed from an April 2015 Supreme Court judgment, upon a December 2014 decision, which (1) awarded the wife maintenance of $2,000 per month from January 1, 2015

through June 1, 2019; (2) awarded her $100,333.33, representing 1/3 of the value the husband's business, to be paid at the rate of $1,000 per month; (3) failed to award him a credit against for payments he made to reduce the principal balance of a first mortgage and the principal balance of a home equity line of credit (HELOC) on the marital residence; and (4) directed the sale of the residence, but failed to direct that the parties are equally responsible for the entire remaining balance of the mortgage and the home equity line of credit. The Second Department affirmed as to maintenance and the distributive award for the business, and modified, on the facts and in the exercise of discretion, (1) by adding thereto a provision awarding the husband a credit against the proceeds of the sale of the marital residence for 50% of the payments made by him beginning on December 1, 2009, through the pendency of the action to reduce the principal balance of the first mortgage and the principal balance of the home equity line of credit on the marital residence, and (2) by adding thereto a provision directing that the parties are equally responsible for the balance of the home equity line of credit on the marital residence until entry of the judgment of divorce; and remitted to Supreme Court to determined the amount the husband expended beginning on December 1, 2009, through the pendency of the action to reduce the principal balance of the first mortgage and the principal balance of the interest only home equity line of credit on the marital residence. The parties were married in July 1998 and had two children. In 2001, the husband started a business called Dunrite Chimney Corp., which did chimney cleaning and masonry repair. The wife commenced the divorce action in April 2008, and Supreme Court's August 2008 order directed the husband to pay temporary child support of $150 per week, plus a majority of the carrying charges on the marital residence, which included the first mortgage and HELOC. In November 2009, the parties stipulated that the husband would have exclusive use and occupancy of the marital residence effective December 1, 2009, and that child support be increased to $350

per week. The wife then successfully moved for more temporary child support and a May 2010 order directed the husband to pay $700 per week. The Appellate Division upheld the amount and duration of maintenance as having properly considered "the standard of living of the parties during the marriage, the income and property of the parties, the distribution of marital property, the duration of the marriage, the health of the parties, the present and future earning capacity of both parties, the ability of the party seeking maintenance to become self-supporting, and the reduced or lost lifetime earning capacity of the party seeking maintenance" and, further, that "[t]he overriding purpose of a maintenance award is to give the spouse economic independence, and it should be awarded for a duration that would provide the recipient with enough time to be self-supporting." The Second Department affirmed the 1/3 award of the business value to the wife, based upon the wife's "testimony that for the first few years after the husband began operating Dunrite, she contributed towards the business by helping with the scheduling of employees, assisting with some of the billing, answering the work phone during the day, and reviewing invoices at the end of the day." The Court further considered that "in the first two years after the business was started, *** the [the husband] operated the business out of the marital residence" and the wife "was primarily responsible for taking care of the parties' children and the household." The Second Department rejected the husband's argument regarding double counting, finding that "Supreme Court did not engage in impermissible double counting by distributing to the plaintiff a share of the value of the defendant's interest in Dunrite and awarding maintenance to the plaintiff based upon income that the defendant earned from Dunrite, namely, the normalized earnings reported by the expert (citations omitted). The maintenance was based upon the reasonable compensation that was excluded from the excess earning calculations. Dunrite is a tangible, income-producing asset as opposed to an intangible

asset with no value other than the income it produces. The 'excess earnings approach' valuation method used by the plaintiff's expert to determine the fair market value of Dunrite does not change its essential nature as a separate tangible asset (citations omitted). Dunrite employed four individuals other than the defendant, owned four vehicles, and held approximately $50,000 in cash, $29,000 in inventory, and $55,000 in property and equipment. Therefore, it was not completely indistinguishable from the income stream upon which the defendant's maintenance obligation was based." As to the issue of credit for the mortgage and the HELOC, the Appellate Division concluded: "The Supreme Court properly declined to grant the defendant a credit against the proceeds of the sale of the marital residence for payments he made to reduce the principal balance of the first mortgage and the principal balance of the HELOC during the period from the commencement of the action through November 30, 2009. Although the defendant was directed to pay a majority of the carrying charges on the marital residence during the pendency of the action, the court also directed the defendant in the pendente lite order dated August 12, 2008, to pay a relatively small sum of temporary child support to the plaintiff. However, after the parties executed the stipulation dated November 24, 2009, which increased the amount of the defendant's temporary child support obligation commencing on December 1, 2009, and the court thereafter further increased the defendant's temporary child support obligation to $700 per week, the defendant was no longer, in effect, receiving a discount on his temporary child support obligation in recognition of the carrying charges that he was paying. As a result, the court improvidently exercised its discretion in failing to award the defendant a credit against the proceeds of the sale of the marital residence for payments he made to reduce the principal balance of the first mortgage and the principal balance of the HELOC beginning on December 1, 2009, through the pendency of the divorce proceeding (citations omitted). Since these expenses

should have been allocated on a 50-50 basis, the court should have awarded the defendant a credit against the proceeds of the sale of the marital residence for 50% of the amount that he expended from December 1, 2009, through the pendency of the divorce action to reduce the principal balance of the first mortgage and the principal balance of the HELOC. The Supreme Court providently exercised its discretion in directing in the decision after trial that the defendant was to be solely responsible for the balance of the first mortgage after the court issued its decision, if he continued to reside in the marital residence (citations omitted). The court providently exercised its discretion in directing that the defendant was to be solely responsible for the remaining balance of the interest only HELOC after the court issued its decision, if he continued to reside in the marital residence (citations omitted). However, because both the plaintiff and the defendant derived benefit from a portion of the funds from the HELOC during the marriage in that the funds were used to invest in securities, it is appropriate for the plaintiff to share in repayment of the principal balance of the HELOC until entry of the judgment of divorce."

C. Durational – Increased (Amount); Health Insurance

In Papakonstantis v. Papakonstantis, 2018 Westlaw 3448334 (2d Dept. July 18, 2018), the wife appealed from, among other things, a December 2015 Supreme Court judgment, which, in her 2012 action for divorce, awarded her maintenance of $1,000 per month for 1 year and $750 per month for 5 years. The Second Department modified, on the facts and in the exercise of discretion, by increasing maintenance to $3,000 per month for 6 years. The parties were married in November 1990, and had 3 children, 2 of whom are emancipated. The wife, age 46 at the time of trial, was the primary caregiver for the children and a homemaker and the husband owned several businesses. The Appellate Division held that "Supreme Court's award of maintenance to

the plaintiff was insufficient and therefore should be modified (citations omitted). *** Further, the Supreme Court should have directed the defendant to maintain health insurance for the plaintiff until the expiration of the period of maintenance or until the plaintiff is able to obtain health insurance through employment, whichever comes first."

D. Durational - Increased to Non-Durational; Health Insurance

In Greco v. Greco, 2018 Westlaw 2225174 (2d Dept. May 16, 2018), the wife appealed from an April 2015 Supreme Court judgment, which among other things, awarded her maintenance of $4,500 per month for 3 years, and failed to direct the husband to pay for her health insurance. The parties were married in 1999 and have 2 children. The husband commenced the divorce action in May 2010. The Second Department modified, on the law, on the facts and in the exercise of discretion, by: (1) awarding the wife $4,500 per month in maintenance until the earliest of the following events: the wife 's remarriage or cohabitation, the death of either party, or until the wife begins to draw Social Security benefits or reaches the age of 67 or such age that she would qualify for full Social Security benefits, at which time the maintenance award will be reduced to $2,000 per month; and (2) directing the husband to pay her health insurance premiums until the earliest of such time as the defendant is eligible for Medicaid or Medicare, or she obtains health insurance through employment or remarriage or cohabitation. The Appellate Division held: "Here, the amount of maintenance awarded by the Supreme Court was consistent with the purpose and function of a maintenance award considering, among other things, the equitable distribution award and the absence of child-rearing responsibilities because the plaintiff was awarded full custody of the children. However, taking into consideration all the relevant factors, including the fact that the defendant is suffering from a psychiatric condition and was unable, for the foreseeable future, to be self-supporting, it

was an improvident exercise of the court's discretion to limit the maintenance award to a period of three years." The Court found that "Supreme Court improvidently exercised its discretion in failing to direct the plaintiff to pay the defendant's health insurance premiums."

E. Durational – Reduced - Length of Pendente Lite Payments

In Behan v. Kornstein, 2018 Westlaw 4223911 (1st Dept. Sept. 6, 2018), the husband appealed from a July 2017 Supreme Court judgment, which: (1) granted the wife exclusive use and occupancy of the marital residence through June 2020 and directed him to pay the mortgage, maintenance, and assessments thereon; (2) awarded the wife 15% of the value of his medical practice; (3) distributed equally the value of the parties' house in Connecticut after awarding the husband a separate property credit, distributed equally the parties' jointly titled bank accounts, distributed 25% of the husband's individually titled brokerage accounts to the wife, distributed equally the marital portion of the parties' retirement accounts, distributed equally the value of the parties' art, jewelry, and certain furnishings purchased during the marriage; (4) directed the husband to maintain his life insurance policy in the amount of $2,000,000 and to name the wife as irrevocable beneficiary; and (5) awarded the wife 70% of her counsel fees. The First Department modified, on the law and the facts, to: (1) direct that the wife's exclusive use and occupancy of the marital residence, and defendant's obligation to pay the mortgage, maintenance, and assessments thereon, shall continue only through December 2018; (2) reduce the amount of the husband's life insurance obligation to $750,000; (3) distribute the wife's retirement accounts given her failure to meet her separate property burden of proof; and (4) vacate the award to the wife of 15% of the value of the husband's medical practice. The parties were married in 2001 and the action was commenced in 2010. With regard to the issue of exclusive occupancy and the husband's payments of carrying charges, the Appellate Division held that the wife "was entitled

to maintenance in the form of defendant's payment of the mortgage, maintenance, and assessments on the apartment" as being "warranted by the facts, namely, that plaintiff and the child had been living in the apartment," citing Domestic Relations Law §236(B)(5)(f), which "empowers the court to determine the use and occupancy of the marital residence 'without regard to the form of ownership of such property.'" The First Department modified, so as to terminate the wife's exclusive use and occupancy of the marital residence, and the husband's obligation to pay the mortgage, maintenance and assessments, as of the end of December 2018. The Court found that the wife, "a now 49-year-old college-educated professional, had an imputed annual income of $80,000 based on her work history, which included a position where she earned approximately $175,000 annually" and noted that that she "was awarded a substantial sum in equitable distribution, and has been receiving maintenance, both temporary and pursuant to the judgment, for approximately eight years, almost as long as the parties' marriage." With respect to equitable distribution the Appellate Division held that Supreme Court "properly distributed the parties' marital assets equally, including joint bank accounts, the marital value of the parties' house in Connecticut, and art, jewelry, and certain furnishings purchased during the marriage. Defendant's contention that plaintiff is entitled to no more than 10% of these marital assets because she made little financial contribution to the marriage has no basis in law or fact. *** Nothing in the record supports defendant's contention that plaintiff is not entitled to 50% of the parties' marital assets." The First Department further determined that Supreme Court "properly awarded plaintiff 25% of the individually titled brokerage accounts that defendant had held before the marriage but subsequently commingled with marital funds. The Court held that the life insurance face amount "far exceeds that necessary to secure defendant's child support obligations" and reduced the amount from $2 million to $750,000, allowing the husband "to

decrease the amount of coverage each year commensurate with the amount of child support paid." The Appellate Division noted that the husband "started his medical practice in 1996, approximately five years before the marriage" but the wife "failed to meet her burden to demonstrate the baseline value of the practice and the extent of its appreciation" and therefore vacated the 15% award to the wife. The First Department found that while Supreme Court "properly ordered that the marital portion of the parties' retirement accounts be distributed equally, it failed to quantify the marital portion of plaintiff's accounts." The Court noted that the wife's net worth statement "lists two IRAs, and their value shortly after the date of commencement, but fails to indicate the date of acquisition for these accounts." The Appellate Division concluded that because the wife "failed to meet her burden of establishing that any part of these IRAs is her separate property, the entirety of the accounts is marital and should be divided equally." The First Department also rejected the husband's contention that his defined benefit plan is separate property, given that his net worth statement "lists a January 2003 date of acquisition for the account, which is after the parties were married. Thus, this account is entirely marital property." Finally, in upholding the award to the wife of approximately 70% of her legal fees, the Appellate Division noted that Supreme Court "took into account defendant's role in driving up legal fees, which included changing attorneys nine times, failing to comply with court orders, and needlessly extending the trial with his belligerent behavior."

F. Durational – Until Receipt of Distributive Award

In M.M. v. D.M., 159 AD3d 562 (1st Dept. Mar. 22, 2018), both parties appealed from an August 2017 Supreme Court Judgment, awarding plaintiff wife child support and maintenance, awarding defendant husband a credit of $1 million for his separate property interest in the marital residence, distributing the parties' non-business marital assets 60% to plaintiff and 40% to

defendant, awarding plaintiff a share of defendant's business interests valued as of January 2015, awarding credits for various post-commencement expenses, and allocating 65% of plaintiff's counsel fees to defendant. The First Department modified, on the law and the facts, to award defendant a credit of $71,000 for his Lehman Brothers retirement account, to delete the directive that defendant be solely responsible for the children's private school tuition and to direct instead that the parties share the children's private school tuition pro rata, to delete the directive that defendant contribute to the cost of a full-time nanny, and to remand for a determination of the credit owed defendant for documented moving expenses, documented post-commencement contributions to his 401(k) account and for a recalculation of defendant's child support obligation, and his child support arrears, treating plaintiff's durational maintenance as income. The Appellate Division noted that the wife conceded that the husband's Lehman Brothers retirement account, valued at $71,000, is separate property and was erroneously distributed as a marital asset and that he is entitled to a credit in that amount. The First Department held that Supreme Court providently exercised its discretion in distributing the parties' non-business marital assets 60% to the wife and 40% to the husband, based upon the wife's contributions to the husband's career, at the expense of her own career, and the parties' probable future financial circumstances, in particular, defendant's far greater earning potential and family wealth. The Appellate Division agreed with the husband that the $1 million he received from his father toward the down payment on the marital residence was a gift structured as a "loan" to defendant alone, and was therefore defendant's separate property and that there "was no repayment using marital funds; indeed, there was no expectation of repayment." As to the husband's business interests, the First Department properly chose January 2015 as the valuation date, on the ground that he was forcibly hospitalized around that time and diagnosed with temporal lobe epilepsy,

and subsequently had very little involvement in his family's business. The Court noted that while Supreme Court found that the husband's post-commencement contributions to his 401(k) were separate property, it was "not clear whether he was credited for his documented post-commencement contributions to that account," and remanded for a determination of the credit owed to him for those contributions. As to child support, the Appellate Division found that Supreme Court properly imputed income of $1.5 million to the husband and applied a CSSA income cap of $650,000, based upon "the lifestyle enjoyed by the children during the marriage, which included country club membership, theater and other entertainment, and luxury vacations." The First Department further stated: "We also agree with defendant that the Referee erred in ordering him to contribute to the cost of a nanny, since plaintiff does not work, and the youngest child was 12 years old at the time of trial (*see* DRL § 240[1-b][c][4])" and that Supreme Court failed to credit defendant for his documented moving expenses. With regard to maintenance, the Appellate Division held that Supreme Court properly awarded the wife maintenance "for six months or until she received her distributive share of the marital assets, on the ground that the cash flow from those assets would be sufficient to support her lifestyle without the need for additional maintenance from defendant. After a 15-year marriage in which she was primarily a homemaker, plaintiff surely would have been entitled to maintenance of a longer duration — if not for the equitable distribution to her of 60% of the non-business marital assets, which provided her with the means to be self-supporting." As to counsel fees, the First Department upheld the allocation of 65% of the wife's counsel fees to the husband, noting: "The parties' accrued counsel fees exceeded $7,000,000, and were paid mostly out of their liquid marital assets, although defendant was earning a substantial salary until 2015. *** Further, the Referee properly took into account that, although both parties engaged in needless litigation,

plaintiff's trial positions were on the whole more successful (citation omitted). We note that even after the award plaintiff remained responsible for more than $1 million in legal fees."

G. Modification – Hearing Granted; Payee Counsel Fees Reversed

In Isichenko v. Isichenko, 2018 Westlaw 2124041 (2d Dept. May 9, 2018), the former husband (husband) appealed from a December 2015 Supreme Court order, which, without a hearing, denied his motion for, among other things, a downward modification of maintenance awarded in a July 2011 judgment of divorce, and granted the former wife's (wife) cross motion for costs in the form of attorney's fees of $15,000, upon the ground that the husband's motion "lacked a basis in law or fact." The Second Department modified, on the law, by (1) deleting the denial of the husband's motion for downward modification of maintenance, and (2) denying the wife's cross motion, and remitted to Supreme Court for further proceedings. The husband alleged, as changed circumstances: a loss of employment, which significantly reduced his annual income; and a substantial increase in the wife's income and net asset value. Supreme Court found that the husband's alleged income reduction "did not constitute a change of circumstances sufficient to warrant a downward modification of his maintenance *** obligation, and that a change in the [wife's] income could not be a basis for a reduction." Holding that Supreme Court erred by denying the husband's motion for maintenance modification without a hearing, the Appellate Division found that the husband "demonstrated, prima facie, that his gross annual income has been substantially reduced from the $750,000 in income that was imputed to him for the purpose of the spousal maintenance award in the parties' divorce judgment. Moreover, the plaintiff's statements that he was only able to obtain employment at a salary that is significantly lower than the salary he was earning shortly before the parties' divorce were supported by the sworn submissions of job recruiters, colleagues, and a vocational expert. This evidence

established a genuine issue of fact as to whether the reduction in his income was based on a decline in his opportunities for employment, thereby presenting a substantial change in circumstances meriting a downward modification of his maintenance payments (citations omitted)." As to the $15,000 counsel fee award, the Second Department found that "Supreme Court's granting of the defendant's cross motion for an award of costs against the plaintiff in the form of attorney's fees was improper, since the plaintiff's motion was not so lacking in merit as to justify such an award."

X. PENDENTE LITE

A. Carrying Charges – Reversed as Duplicative

In Blake v. Blake, 2018 Westlaw 4223914 (1st Dept. Sept. 6, 2018), the husband appealed from a March 2017 Supreme Court order, which directed him to pay monthly spousal maintenance and basic child support retroactive to November 16, 2015, 78% of all school-related, child care, and extracurricular activity expenses for the parties' children, 78% of the carrying expenses on the marital residence, 78% of expenses related to the use of the wife's vehicle, and interim counsel and expert fees. The First Department modified, on the law, to delete the awards of carrying expenses on the marital residence and expenses related to the use of the wife's vehicle. The Appellate Division held that the husband "failed to establish that modification of the pendente lite maintenance and basic child support awards before trial is warranted." The Court found that Supreme Court "acted within its discretion in departing from Child Support Standards Act guidelines for purposes of calculating defendant's pendente lite child support obligations (citation omitted) and in considering the parties' resources and the family's pre-commencement standard of living (citation omitted)." The First Department concluded that Supreme Court "erred by, without explanation, ordering defendant to pay

carrying costs on the marital residence and vehicle expenses, in addition to the temporary maintenance and child support awarded, since these amounts are encompassed in the maintenance and child support awards."

B. Counsel & Expert Witness Fees

In Trafelet v. Trafelet, 2018 Westlaw 2974211 (1st Dept. June 14, 2018), the husband appealed from June and July 2017 Supreme Court orders, which granted the wife's motion for interim counsel and expert fees in the amount of $3,500,000. The First Department affirmed, rejecting the husband's argument that Supreme Court failed to set forth the reasons for its decision, as required by 22 NYCRR §202.16(k)(7), and finding that Supreme Court "explained that the case involves 'expansive issues,' which include the validity of a $150 million trust and the alleged commingling of marital and non-marital assets within the trust, as well as equitable distribution issues that, given the scope and size of the assets in the marital estate, will necessarily entail legal, accounting, and property valuation expertise." The Appellate Division noted that Supreme Court "had presided over a seven-day pendente lite hearing, and its conclusions reflect its understanding of 'the circumstances of the case and of the respective parties,'" as required by Domestic Relations Law §237[a]. The Court stated further: "The record contains an exhaustive affidavit by plaintiff's forensic accountant addressing the complexity of the financial issues and indicating that a significant portion of plaintiff's fees were incurred in responding to or defending against litigation initiated by defendant, including the litigation over trust issues addressed on a prior appeal (*Trafelet v Trafelet*, 150 AD3d 483 [1st Dept 2017]). There is no basis in this record for finding those fees excessive or duplicative (citations omitted). The record also fails to substantiate defendant's contention that the award will only reward plaintiff for extreme litigiousness. Rather, it establishes that he has initiated at least as much of

the litigation as she has initiated. In addition, because the fees are subject to reallocation at trial, there is little incentive for either party to engage in frivolous litigation. Nor has defendant shown that the award covered fees incurred in furtherance of any 'meritless' litigation strategy on plaintiff's part."

XI. PROCEDURE

A. Arbitration – Religious Tribunal Confirmed

In Zar v. Yaghoobzar, 2018 Westlaw 2028166 (2d Dept. May 2, 2018) , the husband appealed from a July 2016 Supreme Court order, which denied his CPLR 7510 petition to confirm an August 2015 award of a Rabbinical Court, and for a judgment thereon pursuant to CPLR 7514, and which granted the wife's motion to vacate the award and to strike the husband's affirmative defense (the arbitration award) in her March 2015 divorce action, and directed both parties to file and exchange affidavits of net worth and retainer statements and to appear for a preliminary conference. The Second Department reversed, on the law, granted the husband's petition to confirm the arbitration award and for a judgment thereon, denied the wife's motion to vacate the award and strike the husband's affirmative defense, and remitted to Supreme Court for entry of an appropriate judgment. The parties were married in 1968 and have two adult children. The wife discontinued her April 2013 divorce action in August 2013, after the parties agreed to submit to binding arbitration before the Beit Din Tzedek Bircat Mordechai (hereinafter the Beit Din), "any matter relating to the dissolution of their marriage and divorce," including "any issues of division of property." Both parties participated in the arbitration. Supreme Court's July 2016 order determined that the Beit Din's award was "irrational, violative of public policy, and unconscionable on its face." The Court rejected the wife's contention that she was "coerced by the husband to sign the agreement to arbitrate and that she could not understand the agreement

because of her limited comprehension of English," because in the context of a proceeding to confirm an award, only "a party who neither participated in the arbitration nor was served with a notice of intention to arbitrate" could raise such grounds under CPLR 7511[b][2][ii]. The Appellate Division noted: "Judicial review of an arbitration award is extremely limited," citing CPLR 7510 and 7511, and found that given the record, "Supreme Court lacked any basis upon which to conclude that the award was irrational." The Second Department held that Supreme Court erred by finding that "the award was per se violative of public policy because the arbitrator failed to apply Domestic Relations Law §236(B)," upon the ground that "public policy does not generally preclude spouses from charting their own course with respect to financial matters affecting only themselves." The Appellate Division concluded that "Supreme Court's determination that the Beit Din's award was unconscionable on its face *** is not a statutory ground upon which an arbitration award may be reviewed, let alone set aside (*see* CPLR 7511)."

B. Support Magistrate – Duties Upon Willful Violation

In Matter of Carmen R. v. Luis I., 2018 Westlaw 1720655 (1st Dept. Apr. 10, 2018), the mother appealed from a June 2017 Family Court order, which denied her objections to a March 2017 Support Magistrate order, finding that the father willfully violated a prior child support order, but deferred the issue of incarceration to a post-dispositional hearing. The First Department reversed, on the law, sustained the mother's objections, and remanded to the Support Magistrate for a final order of disposition. The Appellate Division held that "the Support Magistrate acted outside the bounds of his authority when, after issuing a written fact-finding order in which he determined that the father had willfully violated a child support order, he deferred the issue of a recommendation as to the father's incarceration to a 'post-dispositional hearing.'" The Court noted that this course of action "contravened Family Court Rule

§205.43(g)(3), which states that, upon a finding of willful violation, the findings of fact shall include 'a recommendation whether the sanction of incarceration is recommended,' and Rule §205.43(f), which requires that the written findings be issued within five court days after completion of the hearing." The First Department found that "the Support Magistrate improperly set the matter down for 'post-dispositional review' to commence on May 1, 2017, 54 days later. That hearing lasted several months. *** The Family Court then compounded the Support Magistrate's error of law by denying the mother's objections as premature [finding the order was not final], leaving her with no recourse to effectively challenge the further delay that ensued." The Appellate Division concluded: "Accordingly, the Family Court should have considered the mother's objections, and, upon doing so, should have exercised its authority to remand the matter to the Support Magistrate for an immediate recommendation as to incarceration, or to make, with or without holding a new hearing, its own findings of fact and order based on the record (Family Court Act §439[e])."

C. Support Magistrate – Proof Of Service of Objections

In Matter of Cynthia B.C. v. Peter J.C., 72 NYS3d 827 (1st Dept. May 3, 2018), the mother appealed from a May 2016 Family Court order, which denied her objections to a Support Magistrate's order. The First Department dismissed the appeal as taken from a nonappealable paper. Family Court denied the mother's objection because she did not file proof of service of a copy of her objection on the father, as required by FCA §439[e]. The Appellate Division held that this defect "is a failure to fulfill a condition precedent to filing timely written objections to the Support Magistrate's order, and consequently, a waiver of [the] right to appellate review."

XII. LEGISLATIVE AND COURT RULE ITEMS

A. Attorney-Client Privilege

Judiciary Law §498 is amended, **effective August 24, 2018**, to provide that communications between a client and a lawyer referral service are subject to attorney-client privilege. Laws of 2018, Chapter 235, A09029/S05845.

B. Court-Appointed Special Advocates

Passed both houses; awaiting signature. If signed, Judiciary Law §212(2) would be amended, 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.

C. Joint Practice Rules of the Appellate Division

New 22 NYCRR Part 1250 has been added, **effective September 17, 2018**, in an attempt to make many aspects of appellate practice uniform among the four departments. The new rules are 30 pages, single spaced, and careful study is in order, as a summary cannot do justice to the nuances. The new rules apply to all notices of appeal filed on and after the effective date and all appeals pending as of that date, unless the court by order upon a showing of prejudice or impracticality directs otherwise. A few highlights: motions in all courts are returnable on Mondays at 10 a.m., unless otherwise ordered, or unless Monday is a holiday; moving papers are to be filed "at least one week before the return date" and answering papers must be filed by 4 p.m. the day before the return date; records on appeal of more than 1 volume are uniformly limited to 2 inches in thickness; briefs require email addresses on the covers; page limits (3d and 4th Depts.) are gone and now conform to the 1st and 2d Dept. limits of 14,000 words for principal

briefs and 7,000 words for reply briefs; new to 3d Dept. practice is a requirement for a table of cases cited, which was required by the other three departments and is now uniform; font type and size are now uniformly regulated – if times roman is used, then the brief must be 14 point with footnotes in 12 point; if courier is used, the point sizes are 12 and 10; a significant change is a 6 month time to perfect rule in all departments, as opposed to the 9 month rule which had been the standard in all depts. except the 2d. But, there are extension by stipulation and "application by letter" rules that are liberal, and may result, in effect, with 9 months to perfect, given what appear to be standard "initial" 60 day and "final" 30 day extensions. Longer extensions will require motions. Each department's existing set of rules is repealed as of September 17, 2018, but each department has already published a set of briefer, new rules, as things will not be exactly uniform among the departments. For example, the term calendar with deadlines will still govern in the 1st Dept., and the 4th Dept. will remain as the only Appellate Division without an active case management or pre-argument conference/settlement program. And the mandated colors of brief covers in the 4th Dept. will remain. Also be sure to check the e-filing rules at 22 NYCRR Part 1245, and the websites of each department for the types of cases that require e-filing in that department. The new rules are also being applied to appeals pending as of the effective date; therefore, the new shorter times to perfect in the 1st, 3rd and 4th Departments can thus result in automatic dismissals, so be aware of this and seek extensions where appropriate.

D. Judgments of Divorce – Property Transfers

22 NYCRR 202.50(b) has been amended, **effective May 31, 2018** (AO/191/18) by adding a new subdivision (4), which provides that "every judgment of divorce, whether contested or uncontested, shall include language substantially in accordance with the following decretal paragraph:"

ORDERED AND ADJUDGED that pursuant to pursuant to the __ *parties' Settlement Agreement dated*_________________ **OR** __ *the court's decision after trial,* all parties shall duly execute all documents necessary to formally transfer title to real estate or co-op shares to the __ *Plaintiff* **OR** __ *Defendant* as set forth in the __ *parties' Settlement Agreement* **OR** __ *the court's decision after trial*, including, without limitation, an appropriate deed or other conveyance of title, and all other forms necessary to record such deed or other title documents (including the satisfaction or refinance of any mortgage if necessary) to convey ownership of the marital residence located at ________________________, no later than ________________________; **OR** __ *Not applicable;* and it is further

The same administrative order promulgates revised forms and instructions for the Uncontested Divorce Packet.

The forms are at this link:

http://www.courts.state.ny.us/divorce/divorce_withchildrenunder21.shtml#ucdforms

The Judgment of Divorce is Form UD-11 (available in pdf and WordPerfect) and the new language above is at field 30 at the top of page 10 of the pdf.

E. Judicial Notice – Internet Mapping

Passed both houses; awaiting signature. If signed, CPLR Rule 4511 would be 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.

Dated: September 9, 2018

At: Albany, NY