NYSBA Family Law Section, Matrimonial Update, March 2018

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Court of Appeals Notes

In Forman v. Henkin, 2018 Westlaw 828101 (Feb. 13, 2018), a personal injury action, wherein plaintiff alleged that she was injured when she fell from a horse owned by defendant, suffering spinal and traumatic brain injuries resulting in cognitive deficits, memory loss, difficulties with written and oral communication, and social isolation, the Court of Appeals was "asked to resolve a dispute concerning disclosure of materials from plaintiff's Facebook account." Defendant asserted that "the Facebook material sought was relevant to the scope of plaintiff's injuries and her credibility. In support of the motion, defendant noted that plaintiff alleged that she was quite active before the accident and had posted photographs on Facebook reflective of that fact, thus affording a basis to conclude her Facebook account would contain evidence relating to her activities. Specifically, defendant cited the claims that plaintiff can no longer cook, travel, participate in sports, horseback ride, go to the movies, attend the theater, or go boating, contending that photographs and messages she posted on Facebook would likely be material to these allegations and her claim that the accident negatively impacted her ability to read,

write, word-find, reason and use a computer.” Supreme Court directed plaintiff to produce all photographs of herself privately posted on Facebook prior to the accident that she intends to introduce at trial, all photographs of herself privately posted on Facebook after the accident that do not depict nudity or romantic encounters, and an authorization for Facebook records showing each time plaintiff posted a private message after the accident and the number of characters or words in the messages. Supreme Court did not order disclosure of the content of any of plaintiff's written Facebook posts, whether authored before or after the accident. Only Plaintiff appealed to the Appellate Division, which modified, with two justices dissenting, by limiting disclosure to photographs posted on Facebook that plaintiff intended to introduce at trial (whether pre- or post-accident) and eliminating the authorization permitting defendant to obtain data relating to post-accident messages, and otherwise affirmed. The Court of Appeals reversed and reinstated Supreme Court's order. The Court of Appeals held that “the Appellate Division erred in modifying Supreme Court's order to further restrict disclosure of plaintiff's Facebook account, limiting discovery to only those photographs plaintiff intended to introduce at trial. With respect to the items Supreme Court ordered to be disclosed (the only portion of the discovery request we may consider), defendant more than met his

threshold burden of showing that plaintiff's Facebook account was reasonably likely to yield relevant evidence. At her deposition, plaintiff indicated that, during the period prior to the accident, she posted ‘a lot’ of photographs showing her active lifestyle. Likewise, given plaintiff's acknowledged tendency to post photographs representative of her activities on Facebook, there was a basis to infer that photographs she posted after the accident might be reflective of her post-accident activities and/or limitations. The request for these photographs was reasonably calculated to yield evidence relevant to plaintiff's assertion that she could no longer engage in the activities she enjoyed before the accident and that she had become reclusive. It happens in this case that the order was naturally limited in temporal scope because plaintiff deactivated her Facebook account six months after the accident and Supreme Court further exercised its discretion to exclude photographs showing nudity or romantic encounters, if any, presumably to avoid undue embarrassment or invasion of privacy.”

Child Support – Modification: No Family Court Jurisdiction; Enforcement - Agreement – Visitation: Contempt and Counsel Fees Denied

In Matter of DeGennaro v. DeGennaro, 2018 Westlaw 846147 (2d Dept. Feb. 14, 2018), the father appealed from a February 2017 Family Court order, which granted the mother’s motion to

dismiss his petition for contempt for visitation violations and for downward modification of child support, and the mother appealed from so much of the same order which denied her request for counsel fees. The parties' March 2016 stipulation, which was incorporated into a July 2016 judgment of divorce, provided that: the father would have visitation "at any time he and the child mutually agreed"; the mother waived child support in exchange for a share of the father's retirement accounts; and the prevailing party was entitled to counsel fees for enforcement of the stipulation. The Second Department affirmed, noting that as to visitation, the father failed to establish that the mother willfully violated a clear and unequivocal order of the court. As to the father's request for downward modification, the Appellate Division held that Family Court lacked authority to modify the stipulated waiver of child support. As to the counsel fee issue, the Court held that Family Court's denial was proper, given that the mother, in responding to the father's motion, "was not seeking to enforce any rights under the stipulation."

Custody - Modification – Religious Upbringing; Wishes of Child (10 y/o)

In Matter of Baalla v. Baalla, 2018 Westlaw 846199 (2d Dept. Feb. 14, 2018), the father appealed from a June 2016 Family Court order, which, after a hearing, granted the mother's

petition to modify the parties' stipulation, incorporated into a 2009 divorce judgment, and which had provided for joint legal custody and primary physical custody to her, of the parties' child born in 2006. Family Court modified, by awarding the mother sole legal custody, and granting the father liberal visitation, including all major Muslim holidays. The father was Muslim, and the mother converted to Islam. After the parties' separation, the mother returned to Christianity. The stipulation provided that the parties "would consult with each other regarding the child's religious training," but did specify in which religious tradition the child would be raised. At age 7½, the child told the mother that the father was pressuring her to adopt Muslim practices, and had threatened to abscond with her to his native Morocco, if she failed to follow Muslim practices and customs. The Second Department affirmed, holding: "Here, the parties' inability to agree on the child's religious training, *** constituted a change in circumstances," as did "the change in the child's relationship with the father based on the child's fear of his displeasure if she were not a 'true Muslim,' and her belief that he threatened to abscond with her to Morocco." The Court concluded: "The child was 10 years old at the time of the hearing and, accordingly, the Family Court properly considered her wishes, weighed in light of her age and maturity (citation omitted)."

Child Support - Modification – 2010 Amendments

In Matter of Diaz v. Smatkitboriharn, 2018 Westlaw 988951 (2d Dept. Feb. 21, 2018), the father appealed from a November 2016 Family Court order, which denied his objections to an August 2016 Support Magistrate order, rendered after a hearing and which granted the mother's August 2015 petition for upward modification of child support. The Second Department affirmed. The parties have 3 children and entered into a March 2011 stipulation, which was incorporated into an October 2011 judgment of divorce and required the father to pay $200 per month in child support. The Appellate Division stated that since the parties' stipulation "was executed after the effective date of the 2010 amendments to Family Court Act §451, in order to establish an entitlement to an upward modification, the mother had the burden of demonstrating a substantial change in circumstances," which may include "the increased needs of the children, the increased cost of living insofar as it results in greater expenses for the children, a loss of income or assets by a parent or a substantial improvement in the financial condition of a parent, and the current and prior lifestyles of the children (citations omitted)." The Court noted that "the mother presented uncontroverted testimony and other evidence as to specific expenses related to the care of the children, including specific increased expenses related to the children's

extracurricular activities. In addition, she submitted her 2015 income tax return, which, together with her testimony and financial disclosure affidavit, revealed that even with the father's $200 child support contribution, the mother was financially unable to meet the needs of the children."

Custody - Third Party – Guardian by Will v. Life Partner

In Matter of Garnys v. Westergaard, 2018 Westlaw 988944 (2d Dept. Feb. 21, 2018), petitioner, the mother's life partner, appealed from a March 2017 Family Court order, which granted the motion of respondents, the child's maternal aunt and uncle, to dismiss her June 2016 petition, seeking visitation with the mother's child born in 2005, for lack of standing pursuant to DRL 70. In May 2015, the child's biological mother died of cancer; she was not married at the time and a second parent is not listed on the birth certificate. The mother executed a will designating respondents as the child's guardians, and they petitioned in January 2016 to be so appointed. The Second Department affirmed, stating: "The Legislature has clearly limited the right to seek visitation to noncustodial parents, grandparents, and siblings (*see* Domestic Relations Law §§70, 71, 72; citation omitted). The petitioner argues that she should be considered a 'parent' under Domestic Relations Law §70 because she moved in with the mother shortly before the child's birth, she played a role in the daily upbringing of the child from his

birth until the mother became ill, and she and the mother considered each other ‘life partners,’ even though they never married or registered as domestic partners.” Petitioner contended that she has standing to seek visitation “because the mother consented to the creation of a parent-like relationship between her and the child after conception.” The Appellate Division found that “petitioner failed to demonstrate that the mother consented to anything more than the petitioner assisting her with child-rearing responsibilities.” The Court concluded: “Most importantly, after the mother was diagnosed with terminal cancer, she executed a will providing that the respondents be appointed the child's guardians.”

Custody - Visitation – Modification – Directing no Corporal Punishment

In Matter of Fiacco v. Fiacco, 2018 Westlaw 1002891 (3d Dept. Feb. 22, 2018), the father appealed from an October 2016 Family Court order, which, following fact finding and Lincoln hearings, partially granted the mother’s December 2015 petition to modify the visitation provisions of a 2013 judgment of divorce, pertaining to 3 children born in 2001, 2003 and 2007. The mother sought to have the father's visitation supervised, alleging that he used excessive corporal punishment on the children. Family Court directed the father to refrain from using corporal punishment or any other form of "intimidating

punishment" to discipline the children. The Third Department affirmed, finding that “ample evidence was presented *** regarding the father's use of inappropriate methods of discipline on the children,” including a December 2015 incident, when “the younger daughter refused to wash dishes or otherwise assist the family with household chores” and “the father instructed the child – who was barefoot – to stand outside and thereafter attempted to throw a pot of water at her feet.” The Appellate Division noted that at another time, “the father struck this same child in the head and shoulder in an effort to discipline her,” and that “the father freely acknowledged using ‘scare tactics’ – such as yelling, slapping and other physical contact – as a form of discipline, ***.” The Third Department cited Family Court’s express finding that the father’s testimony was "evasive, wholly self-serving and lacking credibility" and that Court’s conclusion “that the father lacked insight as to the impact that his threatening demeanor and punishment tactics have on the children.”

Custody - Visitation – Third Party – Grandparent

In Matter of Tinucci v. Voltra, 2018 Westlaw 670063 (4th Dept. Feb. 2, 2018), the maternal grandmother appealed from a December 2016 Family Court order which, after a hearing, dismissed her petition for modification of an April 2003 order granting her “as agreed” visitation, and granted the father’s

petition to modify the same order by terminating her visitation. The Fourth Department affirmed, noting that following the mother's death, the grandmother had limited visitation for 2 years, and then no contact for the next 10 years. The Appellate Division concluded that Family Court properly determined that a change of circumstances had occurred which supported a termination of the grandmother's visitation.

Enforcement – Child Support – Willful Violation – Disability

In Matter of Hwang v. Tam, 2018 Westlaw 668940 (4th Dept. Feb. 2, 2018), the father appealed from a December 2016 Family Court order, which confirmed a Support Magistrate's determination that he willfully violated a child support order and sentenced him to 6 months in jail if the arrears were not satisfied within a stated period of time. The Fourth Department affirmed, noting that the father "failed to offer any medical evidence to substantiate his claim that his disability prevented him from making any of the required payments." The Court concluded that the father's receipt of Social Security benefits "does not preclude a finding that he was capable of working where *** his claimed inability to work was not supported by the requisite medical evidence."

Enforcement - Support – Willful Violation – Retirement Not Medically Mandated

In Matter of Rita FH v. Jesse MH, 2018 Westlaw 1003287 (1st

Dept. Feb. 22, 2018), the former husband appealed from a January 2016 Family Court order, which denied his objections to an October 2015 Support Magistrate order which found, after a hearing, that he had willfully violated a support order and dismissed his petition for downward modification. The former wife cross appealed from the same order, to the extent that it rejected her request that the husband be incarcerated or directed to post an undertaking. The First Department affirmed, finding that "the testimony of respondent's physician was inconsistent and, at times, contradictory regarding his treatment of respondent. In fact, the physician admitted that respondent's cardiac condition was stable at the time he recommended that respondent cease work" and that "respondent suffered from 'mild to moderate aortic insufficiency,' and such condition did not require a restriction of his activities." As to the modification petition, the Appellate Division held that "in light of the willfulness finding against respondent, the court acted within its discretion in denying his cross petition seeking a downward modification of his support obligation since he failed to establish that the reduction was unavoidable and not volitional" and noted "respondent's prolonged history of evading his support obligations and defrauding petitioner." With regard to the cross appeal, the First Department found that Family Court "providently exercised its discretion in declining

to incarcerate respondent (citations omitted) or to direct him to post an undertaking. The parties are in their mid-70s, and, *** the Support Magistrate's decision to garnish respondent's income was an appropriate remedy."

Equitable Distribution - Proportions – Business (25%); Separate Property Credit Denied; Maintenance – Durational – Payor's Inheritance as Factor

In Culen v. Culen, 157 AD3d 926 (2d Dept. Jan. 31, 2018), the parties were married in August 1982 and the wife commenced the action in January 2009. The husband appealed from a May 2014 Supreme Court judgment, which awarded the wife 25% ($105,250) of the value of the husband's diving services business, denied the husband a $77,500 separate property credit for the marital residence, and awarded the wife 5 years of maintenance at $2,200 per month and 3 years at $1,000 per month. The Second Department affirmed, upholding the 25% award of the business, and determined that Supreme Court did not err in considering the inheritance that the husband was to receive from his aunt as one factor in awarding maintenance, also finding that the amount and duration was an appropriate exercise of discretion. With regard to the separate property credit, the Appellate Division held that the husband's "self-serving trial testimony that his aunt gave him a check in the sum of $50,000, that his uncle gave him the sum of $10,000, and that he used

those funds toward the down payment, was unsupported by documentary evidence, and insufficient to establish his entitlement to a separate property credit."

Family Offense – Harassment 2d - Found

In Matter of Washington v. Washington, 2018 Westlaw 845756 (2d Dept. Feb. 14, 2018), the husband appealed from a February 2017 Family Court order which, after a hearing, found that he committed harassment in the second degree, when on two occasions in December 2016 and January 2017, he used "abusive and intimidating language directed at [his wife]" which "frightened her and served no legitimate purpose." The Second Department affirmed, holding that the husband's intent to commit the offense was "properly inferred from [his] threatening conduct" and that Family Court's credibility determinations were supported by the record.

Paternity - Artificial Insemination; Equitable Estoppel; Presumption of Legitimacy

In Matter of Joseph O. v. Danielle B., 2018 Westlaw 988920 (2d Dept. Feb. 21, 2018), respondents Danielle B. and Joynell B., who were married in Connecticut in July 2009, appealed by permission from a January 2017 Family Court order, which denied their motion to dismiss Joseph O.'s June 2016 petitions for visitation with and paternity of their child, born to Danielle in April 2012 by artificial insemination. (Petitioner's

September 2015 petitions seeking the same relief were dismissed for failure to join Joynell). The Second Department reversed, on the law and the facts, and granted the motion to dismiss the visitation and paternity petitions. In February 2011, the parties entered into a "Three-Party Donor Contract," wherein they agreed that “the petitioner would provide the respondents with a semen sample for the purposes of artificial insemination, that he would have no parental rights or responsibilities in relation to any resulting children, and that he would not request or compel any guardianship or custody of, or visitation with, any child born from the artificial insemination procedure.” Respondents were both named as parents on the child’s birth certificate. The Appellate Division held that Family Court “properly concluded that the irrebuttable presumption of parentage afforded by Domestic Relations Law §73 is not applicable to the circumstances of this case, since the artificial insemination done here was not performed by a person duly authorized to practice medicine (*see* Domestic Relations Law §73[1]).” The Second Department determined that “respondents correctly contend that because the child was conceived and born to the respondents during their marriage, there is a presumption that the child is the legitimate child of both respondents,” citing DRL §24[1] and Family Court Act §417. The Court stated that while the presumption of legitimacy may be rebutted, “[w]e

need not decide here what proof might rebut the presumption of legitimacy in this case (*cf. Matter of Christopher YY. v Jessica ZZ.,* 2018 Westlaw 522068), as we find that the respondents were entitled to dismissal of the paternity petition on the ground of equitable estoppel." As to the issue of equitable estoppel, the Second Department concluded: "Here, it is undisputed that all of the parties intended that the petitioner would not be a parent to the child, even if they did contemplate some amount of contact after birth. The petitioner was not present at the child's birth, and was not named on her birth certificate. Despite the fact that he was undeniably aware of the child's birth and his possible claim to paternity, the petitioner waited more than three years to assert his claim of parentage. During that time, the child has lived with and been cared for exclusively by the respondents, each of whom has developed a loving parental relationship with her. Although the petitioner asserts that he has had some contact with the child, he does not claim that he has developed a parental relationship with the child or that she recognizes him as a father. Significantly, the petitioner acknowledges that he does not actually seek a parental role, only that he wants a legal right to visitation with the child. Under these circumstances, we find that a hearing was unnecessary, and it is in the child's best interests to dismiss the paternity petition on the ground of equitable

estoppel.”