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Child Support - Enforcement – Hearing Needed; Preclusion Order Vacated

In Matter of Michael R. v. Amanda R., 2019 Westlaw 4264401 (1st Dept. Sept. 10, 2019), the mother appealed from a March 2018 Family Court order, which, upon the father's November 2014 petition for child support enforcement, denied her objections to Support Magistrate orders which granted the father's May 2017 motion for preclusion, found her in willful violation and entered a money judgment against her. The First Department reversed, on the law, and remanded for further proceedings. The parties are divorced and have 3 children, a son age 24 and twin daughters age 21. The enforcement petition came on for trial before the Support Magistrate in February 2016 and the father entered into evidence, without objection, his summary of claimed arrears, without testimony or other evidence to support the amounts indicated therein. The mother testified as to her income, employment and payment of child support, and entered into evidence her 2012-2014 tax returns, letter of employment, documentation of unemployment benefits and her financial disclosure affidavit. The Court adjourned the proceedings during the mother's testimony and never took any further testimony. The

Appellate Division noted that the father's May 2017 preclusion motion had been preceded by a July 2016 motion to compel, but the father never sought nor received permission pursuant to CPLR 3102(d) to conduct disclosure following commencement of the trial in February 2016. Therefore, the preclusion order could not stand. Since the money judgment was based upon the hearsay summary, without supporting testimony, it also could not be upheld, nor could it form the basis for a finding of willful violation.

Child Support - Enforcement – Willful Violation Reversed

In Matter of Eddy v. Eddy, 2019 Westlaw 4675918 (3d Dept. Sept. 26, 2019), the father appealed from a December 2017 Family Court order, which, upon the mother's 2016 petition, held him in willful violation of a child support order pertaining to the parties' child born in 1996. The father admitted the willful violation and a consent order directed him to pay the arrears and sentenced him to 60 days in jail, which sentence was suspended conditioned upon his compliance. In 2017, DSS requested an order of commitment when the father did not pay as agreed. The father filed a petition for modification based upon medical issues. By the time of the hearing upon the modification petition, the child had become emancipated and the father sought an adjustment so that he could delay payment on the arrears until he returned to work; the hearing on the order of

commitment was adjourned pending the father's sale of real property, but when that hearing resumed, the father had no contract to sell the property and no other means to pay the arrears. The hearing was again adjourned to allow the father to undergo surgery, with Family Court's instruction that the father return on the adjourned date with $12,468 in certified funds. The father did not appear on the adjourned date and Family Court issued a warrant and an order of commitment directing that the father be confined for 60 days. The Third Department reversed, on the law, and remitted to Family Court for a hearing, holding that "Family Court erred in revoking the suspension of [the father's] jail sentence without first affording him the opportunity to present evidence on his inability to pay the arrears," citing FCA 433(a).

Child Support - Modification – Cessation of Maintenance; Loss of Employment

In Matter of Mondschein v. Mondschein, 175 AD3d 688 (2d Dept. Aug. 28, 2019), the mother appealed from an August 2018 Family Court order denying her objections to a March 2018 Support Magistrate order, which, after a hearing, granted her August 2017 downward modification petition (amended in November 2017) only to the extent of reducing her basic child support obligation pursuant to a March 2015 consent order from $1,750 per month to $1,720 per month. The Second Department reversed,

on the law and the facts, vacated the Support Magistrate order and remitted to Family Court for a new determination. The parties were divorced in April 2011 and have 3 daughters, 2 of whom are unemancipated (born in 2003 and 2006). The Appellate Division held that Family Court erred by finding that the mother was not entitled to a downward modification of child support as a result of the cessation of spousal maintenance in August 2017 and her loss of employment in October 2017, and noted that the mother testified as to the foregoing, her efforts to obtain a new position and her receipt of unemployment benefits, all of which the father did not refute.

Custody - Modification – Dismissal Reversed; Children's Wishes

In Matter of Morales v. Goicochea, 2019 Westlaw 4281882 (2d Dept. Sept. 11, 2019), the children appealed from a January 2018 Family Court order which granted the father's motion, made at the close of the mother's case, to dismiss her June 2016 petition to modify a January 2015 order, which provided for joint legal custody and equally shared physical custody in alternate weeks of two children ages 11 and 12 at the time of the order appealed from. The testimony established that the parties had orally agreed to modify the schedule to a 2-week alternation, and that the children's alleged preference was to live primarily with the mother, as apparently confirmed by Family Court's in camera examination. The First Department

reversed, on the law, and remitted for a continued hearing upon the mother's modification petition, holding that the parties' agreement that the schedule needed to be adjusted, together with "other evidence in the record that the weekly shifting between parental homes was sufficient to warrant a full inquiry into what arrangement was in the children's best interests." The Appellate Division noted that "while not dispositive, the express wishes of older and more mature children can support the finding of a change in circumstances."

Custody-Modification–Joint to Sole–Mental Health & Prescription Misuse; Violation – Right of First Refusal

In Matter of Ryan XX v. Sarah YY, 2019 Westlaw 4308050 (3d Dept. Sept. 12, 2019), the mother appealed from two November 2017 Family Court orders which: (1) granted the father's June 2017 petition to modify a January 2017 consent order (joint legal custody, primary to mother) so as to award the father sole legal and physical custody of the parties' child born in 2016; and (2) determined that she was in willful violation of the January 2017 order pertaining to, among other things, a right of first refusal. The Third Department affirmed the orders appealed from, with the exception of reversing Family Court's findings regarding 2 of the 3 stated willful violations, upholding the violation finding as to the right of first refusal. The Appellate Division found that there existed sufficiently changed

circumstances given that both parties conceded they were unable to effectively communicate regarding the child. The Third Department cited Family Court's finding that the father had full-time employment, owned his own home and had financial support and child care assistance from his family, which enabled him to provide a more stable home environment for the child. In contrast, the mother had not exercised all of the custodial time allotted to her under the January 2017 order, resulting in the child having spent "extensive time in the care of the father and paternal grandmother." The Appellate Division further noted Family Court's findings that "the mother suffered from mental health issues that impaired her judgment, she had misused prescription medications and she failed to complete a court-ordered alcohol and substance abuse evaluation."

Custody - Third Party – Extraordinary Circumstances

In Matter of Charles KK v. Jennifer KK, 175 AD3d 828 (3d Dept. Aug. 29, 2019), the husband and child's half sister (sister) appealed from October 2018 and January 2019 Family Court orders which, without a hearing, dismissed their respective petitions for custody of a child born in 2012 to the mother (who died in September 2018) during her marriage to the husband (from whom she was separated since 2003), while she was in a relationship with the father from approximately 2004 to 2015. The sister appealed from a separate January 2019 order

which summarily granted the father's petition for custody. In 2015, the father was convicted of assault 3d against the mother and he moved to California where he still resides; the mother and the child were granted an order of protection until March 2020. Family Court ordered genetic testing and the January 2019 results indicated a 99.99% probability of the father's paternity. The father moved for summary judgment, which the sister opposed. The attorney for the child had moved in November 2018 for a forensic evaluation, given the history of violence between the father and the mother and the child's loss of the mother. At a January 11, 2019 court appearance, Family Court declined to consider the sister's opposition to the father's motion, her support of the AFC's motion and her petition for custody, all filed the previous day, because the same "had not yet been administratively processed by the court," and without a hearing, awarded custody to the father and entered an order of filiation. Family Court dismissed the sister's petition based upon its failure to comply with the UCCJEA "as the father resides outside the state." The Third Department reversed, on the law, and remitted to Family Court for further proceedings before a different judge. The Appellate Division held that Family Court should have adjourned the proceedings on January 11, 2019 "for, at a minimum, consideration of the relevant, and readily accessible filings" and noted that Family Court "chose

to ignore the sister's papers despite its awareness of the minimal recent contact between the father and the child, allegations of the father's historic substance abuse and violence against the mother and the fact that an order of protection remains in effect against the father in favor of the child, among other concerns." With respect to what the Third Department characterized as Family Court's "ex post facto UCCJEA rationale," it noted that the same "[left] us largely to speculate as to its rationale" and that "the appropriate remedy would be to stay the proceeding until such information is furnished (see Domestic Relations Law §76-h[2]), not dismiss the petition outright." The Appellate Division concluded that Family Court erred by summarily dismissing the husband's custody petition "for his failure to name any living party as a respondent, while also explaining to the husband, who was proceeding pro se, that a custody petition was unnecessary at that time because he was the child's presumptive father," which led him to withdraw his paternity petition. The Court noted in conclusion that the husband would not have known until January 4, 2019, when the father filed his custody petition based upon the DNA results, "who to name as a respondent in such petition."

Custody - Visitation – As Agreed – Upheld; Evidence – Child Life Specialist

In Matter of Edwin R. v. Maria G., 2019 Westlaw 4606848 (1st

Dept. Sept. 26, 2019), the mother appealed from a November 2018 Family Court order which granted the father sole legal and physical custody of the subject children and directed that the mother's visitation continue as mutually agreed upon by the parties. The First Department affirmed, holding that there was a sound and substantial basis in the record (unspecified) for the custody award to the father, and that the mother "failed to present evidence to support her argument that the order continuing visitation based on the mutual agreement of the parties is improper because the parties cannot work together." The Appellate Division found that Family Court "properly declined to permit [the mother's] child life specialist to testify in her 'professional capacity' about how [the mother] had changed while participating in a supportive housing program because the witness was not an expert and could not opine on [the mother's] parental fitness" and that she "had agreed that the witness would limit her testimony to her relationship with [the mother] and the services [she] received, and [the mother] was permitted to testify about her own progress while residing in supportive housing."

Custody - Visitation – Child's Wishes; Supervised Therapeutic

In Matter of Sean B. v. Erica C., 2019 Westlaw 4607127 (1st Dept. Sept. 24, 2019), the mother appealed from a November 2018 Family Court order which granted sole legal and physical custody

of the parties' child to the father, with semimonthly supervised therapeutic visitation to the mother. The First Department affirmed, finding that Family Court "appropriately considered the wishes of the teenage child to remain in the sole custody of his father and have limited or no contact with his mother." The Appellate Division held that the visitation award was supported by the record, noting that Family Court "took judicial notice of an order finding that the mother had neglected the child by use of excessive corporal punishment and considered testimony indicating that she was 'having a negative impact on the child's emotional wellbeing.'"

Custody - Visitation – Delegation Reversed; Hearing Needed

In Matter of Mondschein v. Mondschein, 175 AD3d 686 (2d Dept. Aug. 28, 2019), the mother appealed from a June 2018 Family Court order which, without a hearing and based upon separate in camera interviews with each child, directed that she contact the subject children, born in 2003 and 2006, to arrange for summer access. The Second Department reversed, on the law and the facts, and remitted to Family Court for a full evidentiary hearing on the mother's petition and a forensic evaluation, if warranted, and a new determination thereafter. As relevant, the mother's access had been modified to therapeutic visits, which had ceased in 2016. The Appellate Division held that Family Court erred by delegating its

authority to determine visitation to either a parent or a child, noting that here, Family Court's order "effectively conditions the mother's parental access on the children's wishes."

Disclosure - Letters Rogatory

In Maria Alexis A. v. Rene'-Pierre A., 64 Misc3d 1234(A), NY Law Journ. Sept. 9, 2019 at 17, col. 6 (Sup. Ct. N.Y. Co., Sattler, J., Aug. 30, 2019), the parties were married in October 1993 and the wife commenced the action for divorce in April 2017. The wife conducted 3 days of depositions of the husband, deposed several non-parties and an attorney representing the husband in his capacity as co-trustee of a 2001 trust. The wife moved for the issuance of letters rogatory to the French courts in order to depose the husband's brother, a co-trustee of the same trust and who resides in France. Supreme Court denied the motion, finding that the wife seeks to "compel the deposition of a third party living outside the United States about post-commencement activity in connection with [the husband's] separate property" and that the husband has "already disclosed the material and necessary information for [the wife] to assess her claim that [the husband] might have additional access to separate property through the 2001 Trust." Supreme Court concluded that to the extent that the wife seeks information from the husband's brother that she could not obtain or has not already obtained from the husband, the wife "fails to set forth

a reliable basis for what amounts to, at best, mere suspicions."

Divorce - Venue

In J.G. v. R.G., 64 Misc3d 1229(A), NY Law Journ. Aug. 26, 2019 at 17, col. 5 (Sup. Ct. Nassau Co., Dane, J., Aug. 15, 2019), the parties were married in 2016 and had one child born in 2018. The parties resided in Queens County throughout the marriage. The wife asserts that on June 22, 2019, the husband told her to move to her parents' home in Nassau County because he wanted a divorce. The wife alleges that following a July 4, 2019 incident, resulting in her calling the police, she decided to stay with her parents and that she and the child moved to Nassau County on July 5, 2019. The husband asserts that the wife told him on July 5, 2019 that she and the child were going to visit her parents "for the day," which turned into a weekend. The wife also filed a change of address form with the post office which she signed on July 1, 2019 and provided proof of a DMV address change filed on July 15, 2019. On July 8, 2019, each party commenced an action for divorce, the wife in Nassau County (the husband was served with a Summons and Complaint on July 8, 2019) and the husband in Queens County (the wife was served with a Summons with Notice on July 12, 2019). Each party filed a family offense proceeding on July 8, 2019 in the same respective county. Each party filed an emergency Order to Show Cause on July 10, 2019 in Supreme Court in the same respective county. On

July 10, 2019, the husband made a timely CPLR 511 demand to change venue to Queens County and the wife timely served an affidavit on July 15, 2019 affirming Nassau County as a proper venue based upon her residency therein. As is here relevant, Supreme Court had to determine the husband's cross-motion seeking to transfer venue to Queens County. The wife argues that "where a party is fleeing domestic abuse, residence may be established in only a brief time where there is a bona fide intent to stay in the new county." The Court gave no weight to the change of address form dated July 1, 2019 because it bore no post office date stamp and was inconsistent with both the wife's affidavit stating that she decided to move on July 4, 2019 and with her July 15, 2019 Affidavit pursuant to CPLR 511, which stated that she established residency in Nassau County on July 5, 2019. The Court disregarded the July 15, 2019 DMV change of address transaction because it was created after the July 8, 2019 commencement of the action. Supreme Court found that it "cannot conclude that the Plaintiff spending the weekend with her parents following an incident with the Defendant on July 4, 2019, is sufficient to establish residency in Nassau County" and that litigating the matter in neighboring Queens County does not impose an unreasonable hardship on the wife. For a contrasting result in family offense and custody proceedings involving much more distance between the competing venues, see Matter of

Natalie A. v. Chadwick P., 166 AD3d 528 (1st Dept. 2018).

Equitable Distribution - Pendente Lite Withdrawals and Credits; Proportions – Enhanced Earning Capacity (12%), LLC (50%); Separate Property – Commingling & Transmutation; Maintenance – Amount and Duration Increased

In Yuliano v. Yuliano, 2019 Westlaw 4281721 (2d Dept. Sept. 11, 2019), the wife appealed from a September 2015 judgment of divorce, rendered upon January and May 2015 decisions after trial, which, among other things: (1) awarded her only $50 per week in maintenance from date of commencement (March 2009) through March 31, 2014; (2) awarded the husband 12% ($24,937) of her enhanced earning capacity from degrees and licenses (dental hygiene); and (3) directed her to transfer to the husband 20% of her interest in an LLC formed to purchase commercial property. The husband cross-appealed from so much of the judgment as failed to distribute funds held in certain bank accounts in the wife's name and denied his separate property claims with respect to certain gifts or inheritances. The parties were married in October 1986 and the defendant opened a dental practice during the marriage, in which the wife worked as a dental hygienist for most of the marriage. The Second Department modified, on the law and in the exercise of discretion, by: (1) increasing maintenance to the sum of $1,000 per month for four years from the date of the judgment of divorce, given "the length of the

parties' marriage and the disparity in the parties' incomes; (2) deleting the directive to transfer part of the wife's LLC interest to the husband, holding that the same was an improvident exercise of discretion and simply stating that "both parties were entitled to retain their respective interests"; and (3) affirmed, as a provident exercise of discretion, without further discussion, the enhanced earnings award. On the husband's cross appeal, the Appellate Division found that Supreme Court should have given the husband a credit of $127,665, representing marital funds the wife deposited into an account in her name, and monies she withdrew from the foregoing account and from a dental practice account and deposited into a second account in her name, rejecting the wife's claim that she used said funds to pay "legitimate expenses." As to the separate property claims, the Second Department found that the husband deposited alleged gifts or inheritances into 3 joint CDs, giving rise to a presumption that each party is entitled to a share thereof. The Court noted that the husband thereafter closed the 3 joint CDs and deposited the monies into a savings account in his name. The Appellate Division held that even if the husband demonstrated that his separate property was deposited into the savings account, "those funds lost their separate character when they were commingled with marital property," and remitted to Supreme Court to determine the balance of the savings account

at the time of the commencement of the action and to distribute the same.

Maintenance - Durational – Affirmed

In Murphy v. Murphy, 2019 Westlaw 4656304 (2d Dept. Sept. 25, 2019), the husband appealed from a November 2016 Supreme Court judgment which, upon a May 2016 decision after trial, awarded maintenance to the then 42-year-old wife of $10,760 per month from June 1, 2016 until the first day of the month following her 67th birthday. The Second Department modified, on the facts and in the exercise of discretion, only to the extent of directing that maintenance would terminate sooner upon the death of either party or the wife's remarriage. The parties were married in September 2004, prior to which time the wife was diagnosed with MS. The parties have no children. The wife commenced the divorce action in March 2013 and the parties settled all issues except maintenance. Supreme Court determined that the wife "was incapable of maintaining employment because of the symptoms she experienced as a result of multiple sclerosis" and that she also suffered from Hassimoto's thyroiditis. The Appellate Division held that Supreme Court's "rejection, as incredible, of the opinion of the [husband's] expert witness that the [wife] was capable of working full time in a sedentary job" was "entitled to great deference on appeal."