

NYSBA FAMILY LAW SECTION, Matrimonial Update, October 2018

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Child Support - Aunt & Uncle v. Father; Life Insurance - Reduced

In Matter of Lozaldo v. Cristando, 2018 Westlaw 4344611 (2d Dept. Sept. 12, 2018), the father appealed from a June 2017 Family Court order, which denied his objections to so much of a March 2017 Support Magistrate order as directed him, after a hearing upon the petition of the children's maternal aunt and uncle, to pay 100% of the children's unreimbursed medical and educational expenses, and to maintain a \$1,000,000 life insurance policy designating the children as irrevocable primary beneficiaries. The Second Department modified, on the facts and in the exercise of discretion, by granting the father's objections to the extent of reducing his life insurance obligation to \$750,000. The aunt and uncle were awarded residential custody of the children after the death of the mother, and share joint legal custody with the father. The Appellate Division noted that Family Court Act §413(1)(a) provides that "the *parents* of a child under the age of [21] years are chargeable with the support of such child ***" (emphasis added), but "does not require a third party who is not a parent to financially support a child." The Court reasoned that since the aunt and uncle had not adopted the children, the

father was responsible for their support and Family Court's order was appropriate under the circumstances. The Second Department found that "in view of [the father's] obligations, the amount of insurance that the father must maintain should be reduced from the sum of \$1,000,000 to the sum of \$750,000."

Child Support - Life Insurance Reduced; Counsel Fees - After Trial; Equitable Distribution - Commingled Funds (25%), Medical Practice (0%), Remainder (50%); Maintenance - Durational 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."

Equitable Distribution - Credit - Principal Reduction; Double Counting - Not Found; Proportions - Business (1/3); Maintenance - Durational

In *Westbrook v. Westbrook*, 164 AD3d 939 (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 of the husband's business, 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: (1) by 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 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 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." The Court noted 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 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."

Equitable Distribution - Security Deposits; Transfer Taxes

In *Raposo v. Raposo*, 2018 Westlaw 4472728 (2d Dept. Sept. 19, 2018), both parties appealed from a November 2015 Supreme Court judgment, which, among other things, failed to direct the husband to transfer to the wife any security deposits for the rental properties which the judgment directed to be transferred to her. The Second Department modified, on the law and the facts, by directing the parties to equally share any transfer

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

Pendente Lite - 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."