

NYSBA FAMILY LAW SECTION, Matrimonial Update, October 2017

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Agreements - Interpretation - Interest

In *O'Donnell v. O'Donnell*, 2017 Westlaw 4158945 (2d Dept. Sept. 20, 2017), the wife appealed from a March 2016 Supreme Court order which, among other things, denied her motion for statutory interest on a \$1,000,000 distributive award. The parties' March 2015 judgment of divorce incorporated a March 2014 stipulation, which required the husband to "pay the Wife a lump sum of \$1,000,000 on or before September 30, 2014." The wife moved on June 5, 2015 for a money judgment for \$1,000,000, plus statutory interest at the rate of 9% per annum. The husband paid the \$1,000,000 in full on June 19, 2015. Supreme Court denied interest on the \$1,000,000, because the stipulation of settlement did not provide for such interest. The Second Department affirmed, holding that the wife "was not entitled to postjudgment interest, as the \$1,000,000 distributive award was not explicitly set forth in the judgment of divorce, but, rather, was part of the stipulation of settlement that was incorporated by reference, but not merged, in the judgment of divorce. Though the plaintiff moved to reduce that award to a money judgment, the defendant paid the \$1,000,000 distributive award while the plaintiff's motion was pending, thus avoiding

postjudgment interest." The Appellate Division noted: "[t]here is no automatic entitlement to prejudgment interest, under CPLR 5001, in matrimonial litigation (citation omitted). The general rule in matrimonial actions is that the determination of whether to award prejudgment interest is a discretionary determination with the trial court (citation omitted)." The Court recognized that DRL 244 provides for an award of interest upon a willful default, but where, as is here the case, "there was no finding of a willful default, and the amount was not reduced to a judgment, the denial of prejudgment interest was a provident exercise of discretion."

Counsel Fees; Equitable Distribution - Business Proportions and Separate Property; Maintenance - Durational

In *Nadasi v. Nadel-Nadasi*, 2017 Westlaw 4159147 (2d Dept. Sept. 20, 2017), both parties appealed from a September 2014 Supreme Court judgment, rendered upon a March 2014 decision after trial, which: awarded the wife a credit of \$135,450, representing 15% of the value of the husband's interest in a business; failed to award her any credit related to a business apartment; awarded her maintenance of \$12,000 per month for two years after she vacates the marital home, \$11,000 per month for the following two years, and \$10,000 per month for the following two years, to terminate sooner upon her remarriage or the death of either party; and directed the husband to pay 70% of the

wife's attorney and expert fees. The Second Department modified, on the facts and in the exercise of discretion, by: (1) increasing the wife's share of the business to 25% or \$225,750; (2) awarding the wife a credit of \$90,000 related to the business apartment; and (3) increasing maintenance to 12 years, at the rates of: \$12,000 per month for two years after the wife vacates the marital home, \$11,000 per month for the following two years, \$10,000 per month for the following two years, \$9,000 per month for the following two years, \$8,000 per month for the following two years, and \$7,000 per month for the following two years, to terminate sooner upon her remarriage or the death of either party. The parties were married in November 1989, and had 3 children. The husband is a 50% partner in a commodities brokerage firm, earning approximately \$1.5 million per year. The wife stopped working in 1996 to be a homemaker and primary caretaker of the parties' children. The parties separated in May 2010 and the husband commenced the divorce action in July 2011. With regard to the percentage distribution of the husband's business, the Appellate Division increased the same to 25%, based upon the wife's "indirect contributions to the business as a homemaker and primary caretaker for the parties' three children in this long-term marriage, while forgoing her own career." As to the business apartment, the Second Department found that in connection with a July 1997 refinancing, the

husband purchased an additional 13.33% interest therein, presumably with marital funds, and awarded the wife a credit in the sum of \$90,000, representing one-half of the value of the husband's 13.33% increased interest therein. As to maintenance, the Appellate Division held that Supreme Court "improvidently exercised its discretion in failing to extend the award until the defendant reaches retirement age" (which age, and the wife's present age, were both unspecified), and increased maintenance to 12 years as set forth above. With respect to counsel fees, the Second Department concluded: "In view of the relative financial circumstances of the parties, including the defendant's substantial distributive award, the nature and extent of the services rendered, and the relative merits of the parties' positions at trial, the Supreme Court providently exercised its discretion in awarding the defendant 70% of her attorney and expert fees."

Equitable Distribution - Homeowner's Insurance Proceeds; Proportions - Professional Practice (30%); Veterinary Expenses

In *Katz v. Katz*, 153 AD3d 912 (2d Dept. Aug. 30, 2017), the wife appealed from a June 2014 Supreme Court judgment, which, upon a February 2014 decision after trial: (1) awarded her maintenance of \$400 per week until the sale of the marital residence, to increase to \$600 per week upon the closing the sale thereof, until she attains the age of 66, (2) directed that

certain homeowner's insurance proceeds were to be equally divided, and that \$15,000 thereof would be charged against her share of marital residence sale proceeds, (3) directed that her share of the husband's interest in his accounting firm be 30% or \$90,000, and that \$30,000 of that amount would be deemed paid by the husband assuming full responsibility for the parties' home equity line of credit, and (4) awarded her the sum of only \$500 for reimbursement of veterinary bills. The Second Department modified, on the law, on the facts, and in the exercise of discretion by: (1) increasing maintenance to \$800 per week until the wife's age 66; (2) deleting the \$15,000 charge for insurance proceeds against the wife's share of the residence; and (3) increasing the reimbursement for veterinary bills to \$9,751. The parties were married in August 1979 and the husband commenced the divorce action in December 2008. The Appellate Division increased the maintenance upon its consideration of "the duration of the marriage, the parties' ages, health, and lifestyle during the marriage, the defendant's limited employment history, and the parties' financial circumstances." The Second Department upheld the 30% award of the husband's interest in his accounting firm, finding that the distribution "took into account the defendant's direct and indirect involvement in the firm, including her contributions as the primary caretaker for the parties' children." Given that the

wife "sufficiently established that certain insurance proceeds went towards repairing or replacing items in the marital residence which was damaged by Hurricane Sandy," the Appellate Division held that "Supreme Court improvidently directed that \$15,000 *** be charged against the defendant's share of the proceeds from the sale of the martial residence." The Court concluded that "Supreme Court improvidently determined that veterinary expenses incurred by the defendant were not reasonable" and increased the award to \$9,751.

Maintenance - Modification - Payee Inheritance

In *Schwartz v. Schwartz*, 153 AD3d 953 (2d Dept. Aug. 30, 2017), the former husband appealed from: (1) an April 2015 order which denied, without a hearing, his January 2015 motion to terminate his maintenance and life insurance obligations under a judgment of divorce, and granted the former wife's cross motion for attorney's fees to the extent of \$4,000, and (2) from a December 2015 order which denied, without a hearing, his motion for leave to renew and for counsel fees, and granted the former wife's cross motion for attorney's fees to the extent of \$5,000. The Second Department: (1) reversed, on the law and in the exercise of discretion, so much of the April 2015 order as granted the former wife attorney's fees; (2) modified the December 2015 order, on the law and in the exercise of discretion, by granting the former husband's motion for renewal

and denying the former wife's cross motion for attorney's fees; and (3) remitted to the Supreme Court for a hearing on the former husband's motion to terminate his maintenance and life insurance obligations, following suitable discovery. The parties' 2008 divorce judgment required defendant to pay plaintiff maintenance of \$7,500 per month for the first 60 months, and \$3,000 per month thereafter, until the death of either party or until the plaintiff remarried or held herself out as remarried, and required him to maintain \$750,000 of life insurance. Defendant's motion to terminate his obligations was made upon the grounds that: the plaintiff's father had recently died; the plaintiff was the only beneficiary of his estate; and the late father's estate and assets were worth \$15 to \$20 million, which constituted a substantial change in circumstances so as to make her self-supporting. Plaintiff admitted that her father had died in October 2014, contended that his estate was valued at \$6 million and argued that defendant's motion was premature, since her father's will had not yet been probated and she had received no inheritance from his estate. Defendant's September 2015 motion for renewal included a copy of the plaintiff's deceased father's will and various documents from the Surrogate's Court, demonstrating that the will had been admitted to probate in November 2014, two months before the defendant's prior motion had been made. The Appellate Division

held that an "inheritance of significant funds can constitute a substantial change of circumstances supporting a request to modify a party's maintenance obligation" and that "Supreme Court improvidently exercised its discretion in denying that branch of the defendant's motion which was for leave to renew his prior motion to terminate his maintenance and life insurance obligations, since the motion was based upon new evidence not offered on the prior motion, the defendant provided reasonable justification for his failure to previously present that evidence, and the evidence raised substantial issues as to the propriety of the court's prior determination." The Court concluded: "In view of all of the circumstances in this case, including the parties' respective financial positions and the plaintiff's misrepresentation that her deceased father's will had not been probated, we find that the Supreme Court improvidently exercised its discretion in awarding attorney's fees to the plaintiff in the orders appealed from."

Pendente Lite - Counsel Fees - Denied - No SNW

In *Daich v. Daich*, 153 AD3d 900 (2d Dept. Aug. 30, 2017), the husband appealed from a May 2015 Supreme Court order which granted the wife interim counsel fees. The Second Department reversed, on the law, and denied the wife's motion, without prejudice to renewal upon her compliance with 22 NYCRR 202.16(k), which requires that a motion for counsel fees be

supported by a sworn statement of net worth. The Appellate Division held that the wife's claim that "Supreme Court was in possession of a copy of her statement of net worth is insufficient to meet the requirements of 22 NYCRR 202.16(k), especially where, as here, the court did not indicate, in the order awarding interim counsel fees, that it had considered the plaintiff's statement of net worth or the parties' financial circumstances."