

NYSBA FAMILY LAW SECTION, Matrimonial Update, September 2018

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**Child Support - CSSA - Rental Income; Custody - Parent Abroad;
Equitable Distribution - 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."

Custody - 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."

Custody - 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."

Equitable Distribution - Income Tax Refund

In Kaous v. Kaous, 2018 Westlaw 3999768 (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."

Legislative Items

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.

Court-Appointed Special Advocates

Passed both houses, awaiting signature by Governor: Judiciary Law §212(2) would be is 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.

Judicial Notice - Internet Mapping

Passed both houses, awaiting signature by Governor: 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.