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Monday, July 18, 2005

Bits and Bytes™

Volume 1, Number 11

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Waiver of Right to Pension

In *Leichtner v Leichtner*, 794 N.Y.S.2d 364, the Appellate Division held that although a pension is normally subject to equitable distribution, because the defendant failed to request that the Supreme Court award her a portion of the plaintiff's pension, and no evidence was offered with regard to the plaintiff's pension, the Supreme Court properly declined to distribute a portion of the plaintiff's pension to the defendant.

Maintenance Denied Attorney-Wife Who Failed to Demonstrate Disability Prevented Her Working at Attorney.

In *Ferro v Ferro*, 2005 WL 1346542 (N.Y.A.D. 2 Dept.), the Appellate Division affirmed a judgment of the Supreme Court which awarded the wife supervised visitation with the parties' children, denied her an award of maintenance, and directed her and the defendant to pay equal shares of the Law Guardian's fee from each party's share of the proceeds of the sale of the marital residence. As the Supreme Court awarded custody to the respondent, with the appellant responsible for child support, and as the appellant failed to sufficiently demonstrate that her disability prevented her from earning a living as an attorney, the Supreme Court properly denied her an award of maintenance. The judgment of divorce directed that the marital residence be sold, with the proceeds to be divided equally between the parties. Accordingly, Supreme Court properly directed the parties to pay equal shares of the Law Guardian's fee from each party's share of these proceeds.

Enhanced Earning Capacity Not Marital Property. Retroactive Award Denied.

In *Corless v Corless*, 795 N.Y.S.2d 273 (2d Dept. 2005), Supreme distributed the marital assets, allocated the marital debt, found the wife was solely responsible for a loan taken to finance her graduate school education, awarded her maintenance in the sum of \$4,000 per month until she reached the age of 65 years, to then be reduced to the sum of \$2,000 per month until the defendant reached the age of 65 years, awarded her child support in the sum of \$3,000 per month without specifying that it was to be assessed retroactive to the date of the commencement of the action, determined that the defendant pay 35% of the reasonable attorney's fees and litigation costs incurred by her and awarded her \$17,768 in attorney's fees and litigation costs. The Appellate Division modified the judgment by adding a provision directing the defendant to maintain a life insurance policy with the plaintiff as beneficiary in the sum of \$400,000 until he reached the age of 65 years. It held that Supreme Court erred in failing to direct the defendant to obtain and maintain a life insurance policy to secure his obligation for maintenance and child support. It also held that the defendant's use of his income, including severance pay, to pay legitimate household expenses did not constitute a dissipation of marital assets. While outstanding financial obligations incurred during the marriage which are not solely the liability of either spouse may be deemed marital obligations, a financial obligation incurred by one party in pursuit of his or her separate interests should remain that party's separate liability. The plaintiff's graduate school education was not treated as marital property and the student loan used to finance that education was, under the circumstances, incurred for the plaintiff's sole benefit. In view of the foregoing, the Supreme Court providently exercised its discretion in allocating this debt to the plaintiff as her separate responsibility.

Parent Entitled to Hearing on Law Guardian Fees and May Claim Malpractice

In *Mars v Mars*, 2005 WL 1389223 (N.Y.A.D. 1 Dept.), the Appellate Division held that because the court directed plaintiff to pay the law guardian's fees and the children were old enough to articulate their wishes, plaintiff has standing to assert legal malpractice as an affirmative defense to the fee application to the extent of challenging that portion of the fees attributable to advocacy, as opposed to guardianship. Adopting the rule enunciated by the Second Department that "if a parent who has been directed to pay a fee contests a law guardian's claims relative to the time expended and the reasonable value of the services provided, he or she should be afforded hearing on the issue" (citing *Matter of Plovnick v. Klinger*, 10 AD3d 84, 91 [2004]), the Appellate Division held that if as plaintiff alleged, the law guardian's invoices reflect work never done, plaintiff must be afforded the opportunity to challenge the reasonableness of the law guardian's fee at the fee hearing.

Hearsay Not Admissible in Custody Case Absent Abuse or Neglect Allegations

In *Matter of Jacqueline B v Peter K*, 2005 WL 1353910 (N.Y.Fam.Ct.), a custody modification proceeding the court addressed the issue of the admissibility of out-of-court statements of the child through the testimony of third-party witnesses called by the Petitioner or the Law Guardian. It noted that the petition was filed under Article VI of the Family Court Act and while the Legislature has enacted special provisions, such as FCA § 1046 to admit hearsay statements relating to any allegations of abuse and neglect to be admitted into evidence providing the statements are corroborated by "[a]ny other evidence tending to support" their reliability, no alteration of the rules of evidence had been enacted for custody matters. It noted that a body of case law had developed upholding the admissibility of a child's hearsay statements in custody proceedings where the gravamen of the application is based upon allegations of abuse or neglect, and where the custody proceeding under Article VI becomes, in effect, a substitute for the child protective proceeding under Article X, trial and appellate courts have applied the FCA 1046 exception to custody proceedings and have admitted, when corroborated, the out-of-court hearsay statements of a child in custody proceedings, custody modification proceedings, proceedings to terminate visitation, and applications for supervised visitation. The Court held that as the gravamen of the Petitioner's application to modify the joint custody order did not allege that the father physically or sexually abused the child or that he neglected the physical, mental or emotional condition of the child by failing to exercise a minimum degree of care, statements of the child were not admissible. When, however, the Court is trying a neglect or abuse case within the context of a custody proceeding, and those acts or omissions are the predicate for making or altering a custodial determination, statements of the child pertaining to those allegations would be admissible.

Fair Trial Denied By Judge's Intrusive Questioning

In *Matter of Yadiel Roque C*, 793 N.Y.S.2d 857(4th Dept, 2005), Respondent appealed from an order adjudicating him to be a juvenile delinquent, contending that he was denied a fair trial by the court's intrusive conduct during the fact-finding hearing. Although respondent's contention was not preserved for our review the Appellate Division reviewed it in the interest of justice, and reversed the order. It held that although a trial judge may intervene in a trial to clarify confusing testimony and facilitate the orderly and expeditious progress of the trial, the court may not take on 'the function or appearance of an advocate. In last analysis, ... [the trial judge] should be guided by the principle that his [or her] function is to protect the record, not to make it", including juvenile delinquency proceedings. Here, "[t]he course of conduct of the trial judge was such that he assumed the appearance of an advocate at the trial by his extensive examination of certain witnesses".

Custody Awarded Without Hearing

In *Van Orman v Van Orman*, 2005 WL 1378612 (N.Y.A.D. 4 Dept.), the Appellate Division held that Family Court properly granted the petition for sole custody of the parties' two children without a hearing. At that time, respondent was incarcerated in New York and was also held upon a detainer issued from the Commonwealth of Massachusetts. The Court held that no hearing is required upon a custody petition when the court possesses sufficient information to make a comprehensive assessment of the best interests of the children (citing *Matter of Glenn v. Glenn*, 262 A.D.2d 885, 887, lv dismissed in part and denied in part 94 N.Y.2d 782; cf. *Matter of Mills v. Sweeting*, 278 A.D.2d 943, 944). As a result of his incarceration, respondent was incapable of fulfilling the obligations of a custodial parent. The court therefore properly dismissed respondent's petition, without prejudice to the right of respondent to re-file when he is released from incarceration.

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