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Jim brings a compassionate approach to difficult family law issues. He works diligently to minimize these potentially stressful situations and produce favorable results for his clients. Jim can be reached at 612-877-5294 or VedderJ@moss-barnet.com.

FAMILY LAW PRESUMPTIONS: WHAT IS BEING PRESUMED?

There are a number of key presumptions in family law that often confuse litigants and are misstated or misapplied. Knowing what the presumptions are and how they apply to a case can be a key to reaching a fair settlement or effectively presenting the case to the court. Misunderstanding of a legal presumption can lead to unrealistic expectations and unnecessary attorney fees.

There is often a misperception about the impact a presumption has on a family law case. If the presumption is a “conclusive” or “irrebuttable” presumption, then once the factors necessary to establish it are proven, the court must apply it. The court does not have discretion to choose not to follow a conclusive or irrebuttable presumption. More often, however, a presumption is “rebuttable,” meaning it is a legal assumption the court is required to make if certain facts are established and no contradictory evidence is produced. One should think of a rebuttable presumption as a starting point rather than an ending point.

There is a presumption in favor of joint legal custody, which is the ability to make decisions over education, religion, healthcare, and like issues. Application of this presumption means that parties will jointly share this right and have equal authority on these decisions. With that being said, the joint legal presumption is a rebuttable presumption and can be overcome if a party opposing the presumption can show it is not in the best interests of the child. Further, if a party establishes that there is a domestic abuse order, the presumption switches to a presumption for sole legal custody being given to the non-abusive parent. This presumption also is rebuttable if a party can prove it is in the best interests of the child for the parents to have joint legal custody, even with a domestic abuse order.

With respect to physical custody, the child’s daily care, there are no presumptions. The legislature has looked at the issue of whether to adopt a statutory

presumption in favor of joint physical custody for the last several years. Although none has passed yet, it likely will be raised again.

There is currently a rebuttable presumption that a parent is entitled to at least 25% of the parenting time with his or her child. The presumption is rebuttable, so the court does not have to adopt it if presented with evidence that it is in the child’s best interest that a parent have more or less than 25% of the parenting time. The parenting time presumption is typically measured by the number of overnights a parent has with a child, although the court has the discretion to measure it differently if it finds it is in the best interests of the child to do so. The legislature has explored whether a different parenting time presumption should be applied. The proposals from the legislature have looked at keeping the current presumption and at changing the presumption to at least 35% or 45.1% of the time. The legislature likely will be looking at the presumption on parenting time again in the near future.

A rebuttable presumption applies to the division of assets and liabilities such that all assets obtained during the marriage are marital property to be divided between the parties. A party can overcome this presumption if it can show the property is nonmarital property (*i.e.*, acquired before the marriage, received as an inheritance, received as a gift to one party but not both parties, or protected by a valid antenuptial agreement). To rebut the marital property presumption, a party should provide as much documentation as possible to show that the asset fits into one of the categories of nonmarital property. The more documentation a party can provide, the more likely the marital property presumption will be rebutted.

There is a conclusive presumption that both parties made a substantial contribution to the acquisition of assets during the marriage. No amount of evidence can overcome this presumption. The purpose of

this presumption is to avoid parties arguing over who made what contributions to the accumulation of assets during the marriage and thus trying to value the contributions of a homemaker.

With respect to spousal maintenance, there is a rebuttable presumption in favor of permanent spousal maintenance over temporary maintenance when a party has shown that there is uncertainty about his or her ability to make the adjustments necessary to be self-supporting. This is a rebuttable presumption, and the judicial officer assigned to the case has considerable discretion in determining whether and how to apply it.

With respect to child support there is a rebuttable presumption that child support will be calculated based on guidelines, which look at both parties' incomes and create a baseline amount and percentage each party will pay based on their respective incomes. In order to secure application of this presumption, a party must provide evidence regarding both parties' incomes, parenting time, childcare expenses, and medical/dental insurance premiums. A party can overcome this presumption by showing that the child support should be more or less than the guidelines would dictate. The courts look at a party's income, financial resources, standard of living, children's special needs, and the standard of living the child would have enjoyed had the parties remained married in deciding whether to deviate from the presumptive guidelines.

There is a rebuttable presumption a parent can work full time for purposes of calculating child support. This presumption can be overcome if a party can show it is not typical to work 40 hours a week in the trade or industry in which the party is employed.

It is presumed that an antenuptial agreement should be enforced so long as a party shows that it meets with the procedural fairness requirements set forth by statute. The court, however, still will look at whether it is substantively fair, and evidence can be provided by either party to rebut the presumption. A postnuptial agreement is only presumed enforceable if it proves that it meets with the procedural fairness requirements and the divorce or separation proceeding has not been commenced within two years of the execution of the postnuptial agreement. In the event a divorce or separation is commenced within two years of the postnuptial agreement being signed, then the rebuttable presumption switches so the agreement is presumed to be unfair unless a party can prove otherwise.

These are only some of the presumptions in family law – and a brief discussion at that. A party to a family law proceeding should talk with his or her attorney about the presumptions to make sure the party understands how the presumptions work and how they impact the case.

