Recent Legislation, Cases and Trends in Matrimonial Law

By Wendy B. Samuelson

Recent Legislation

Kyra's Law, proposed bill 2023-S.3170A, seeks to refocus custody determination on children's safety

Kyra's Law is a proposed bill 2023-S.3170A that would amend DRL 240(1) to (1) require judges to assess the child's life and safety during custody proceedings, (2) require the court to rank a child's life and safety above all other considerations when making decisions about custody and visitation, and (3) mandate that judges receive training on how to recognize and address domestic violence and the physical and sexual abuse of children.

In cases where domestic violence or child abuse has been reported, the bill requires the court to hold an early evidentiary hearing to explore the allegations and would mandate that the court grant custody to the non-abusive parent, if the allegations are substantiated.

This proposed change in law is well past due. Many family law attorneys have a horror story about a custody/visitation proceeding that veered off the rails, leaving a child vulnerable to abuse and neglect, or worse, death, because the court remained laser focused on a parent's custodial rights and was oddly blind to concerns that court-ordered parenting time could present a grave danger to the child's safety. The story of Kyra Franchetti is a gruesome example. In 2016, Kyra's father shot his two-year-old daughter in the back while she slept, then doused his Long Island home in gasoline and set it on fire. Kyra's father committed the murder/suicide during a court-ordered unsupervised visit.

In the wake of her daughter's death, Jacqueline Franchetti founded Kyra's Champions, a nonprofit focused on stopping child abuse and child murders, and the Kyra Franchetti Foundation, which is seeking to rewrite the ways in which New York's family courts address custody and children's safety.

"Kyra's murder was entirely preventable. She never should have been with [her father] that day," said Franchetti, speaking to the press from the steps of the Capitol. The court, she noted, had been given repeated reports on the anger, suicidal threats, and stalking tactics of Kyra's father, but granted him unsupervised parenting time nonetheless.

Kyra's murder is not an isolated incident. In New York State, from 2018 to 2021, there have been approximately 1,400 reports of fatal abuse or mistreatment of children, according to the Office of Children and Family Services, which oversees local investigations of alleged abuse.

The bill is sponsored by a bipartisan coalition of representatives including Assemblywomen Gina Sillitti, Inez E. Dickens, Patricia Fahy, Sarah Clark, and in the State Senate by Senators Joseph Addabbo Jr., Jacob Ashby, George Borrello, and Neil Breslin.

Advocates for the bill still have significant legislative mountains to climb. As of early June, the bill remains in committee and has not yet been calendared for debate and a vote. But the path for Kyra's Law may prove notably direct, as the bill appears to have both broad bipartisan support and the backing of Governor Kathy Hochul. Last December, Gov. Hochul signed into law another piece of legislation championed by the Franchetti Foundation requiring domestic violence training for forensic mental health evaluators in child custody and visitation cases. We will, of course, keep you updated as this game-changing bill moves closer to Governor Hochul's desk.

Cases of Interest

Custody

Court punishes mother who abducted parties' child to India by awarding father all of the marital assets

S.C. v. R.N., 187 N.Y.S.3d 541 (Sup. Ct., N.Y. Co. 2023)

The parties were married for 12 years and had one child together. The wife commenced the divorce action in 2020, and despite unfounded criminal and abuse investigations, the husband had various degrees of supervised access with his daughter during the proceedings.

In July 2022, the court denied the husband's request for sole custody, and a month later permitted the wife to travel with the child to India. It was later discovered that she used that initial India trip as an opportunity to plan the child's abduction. The wife then fled to India with the child in November 2022 during the midst of an ongoing custody and divorce proceeding. Since India is not a member of the Hague Convention, the court promptly ordered her to return the child within 72 hours. When the mother failed to comply, she was found in contempt of court. Subsequently, the husband was granted sole legal and physical custody of the child and the marital apartment.

Despite receiving court orders, the wife informed the court that she had initiated divorce proceedings in India and considered the New York matter withdrawn. Thereafter, a warrant for her arrest was issued, and the husband moved for an expedited divorce judgment due to the wife's refusal to participate. An inquest was then held in April 2023, where the husband presented evidence and answered questions, and no evidence was presented to contradict his claims.

The court decided that no parental access can be awarded to the wife until she partakes in proceedings in New York. Furthermore, the court concluded that the wife was not entitled to maintenance because she demonstrated that she was self-sufficient and able to support herself. In particular, since absconding to India (on tickets paid for by her own assets), she paid for expensive private school activities, and baseless litigation in India. Additionally, the court concluded that the plaintiff forfeited her right to any share of the marital assets, as she abducted the parties' child, cutting the husband off entirely from her and it was likely that the father may never be reunited with his daughter.

Mother permitted to relocate with child to Florida, but abusive father will get liberal visitation

Matter of Nancy A. v. Juan A.B., 213 A.D.3d 401 (1st Dep't 2023)

After trial, the court granted the mother's petition to modify the November 2014 final order of custody and visitation to permit the mother to relocate with the parties' child to Florida. Subsequently, the court dismissed respondent father's petition to modify the November 2014 order to award sole legal and physical custody to him. The father appealed the decision.

On appeal, the court noted that the mother had been the child's primary caregiver and has had sole custody for several years. After suffering a change in financial circumstances due to COVID-19, she established a party planning business in Florida, allowing her to work from home and be available for the child since she did not have any financial support from the father. The court further explained that the mother demonstrated that a move to Florida would improve the child's quality of life. Moreover, the child's desire to relocate and the presence of his younger brother in Florida were also significant factors taken into consideration when making the initial determination.

By contrast, during the brief period the child stayed with the father, his schooling and physical safety suffered, as the father left him alone for periods of time and physically abused him. Oddly, the court ensured a liberal visitation schedule to maintain a meaningful relationship between the father and the child, which included visits during summer and school vacations. (*See In re Carmen G.*, 100 A.D.3d 568 [1st Dep't 2012]). It seems extraordinary that despite a finding of abuse, the father was still permitted to have unsupervised and extended visits with the child, and hence the importance of passing Kyra's Law.

Children's soccer practices considered an organized event that both parents are permitted to attend

Matter of Cywiak v. Packman, 214 A.D.3d 654 (2d Dep't 2023)

Pursuant to a so-ordered stipulation of custody, the parties agreed to joint legal custody of their two-year old twins, with the mother having final decision-making authority and physical custody of the children. The father had certain parental access, including dinner each Wednesday.

Three years later, the father filed a petition to modify the so-ordered stipulation to award the parties joint final decision-making authority and to award him additional parental access, by equitably dividing school holidays and vacations. The mother filed a petition to modify the so-ordered stipulation, so as to award her sole legal custody of the children and to limit the father's parental access.

The Family Court awarded the father a telephone call or video conference call with the children every Monday and Thursday, and on Sundays when he did not otherwise have parental access. Thereafter, the court issued a temporary order of protection directing the father to stay away from the mother and the children except for court-ordered parental access.

In May 2021, the mother filed a petition alleging that the father violated the temporary order by attending the children's soccer practice during her parenting time on two occasions. Following a hearing, the court awarded the mother sole legal custody of the children and modified the weekday parental access schedule so as to award the father dinner with the children every other Thursday and telephone or video conference calls with the children every other Wednesday, subject to certain restrictions. Additionally, due to the father violating the temporary order, the court directed that a two-year order of protection be issued, directing him to stay away from the mother's home except to pick up and drop off the children for court-ordered parental access. The father appealed.

On appeal, the court affirmed the Supreme Court's decision in awarding the mother sole legal custody. The court noted, "[a] change from joint legal custody to sole custody by one parent is warranted where the parties' relationship is so acrimonious that it effectively precludes joint decision-making." Therefore, when looking at the relationship between the parties, and the children's best interests, the court concluded that joint legal custody of the children was no longer appropriate.

However, the appellate court acknowledged that the decision to reduce the father's weekday parental access with the children to one dinner every other Thursday and one telephone call or video conference call every other Wednesday lacked a sound and substantial basis in the record. Moreover,

the Supreme Court should have modified the parental access schedule to account for school holidays and vacations, something that was not contemplated by the parties when they initially signed the agreement, because the children were not school age. Lastly, the Supreme Court erred in finding that the father violated the temporary order of protection by attending the children's soccer practices, as the mother failed to show that soccer practice was not an "organized event" contemplated by the stipulation. Thus, the issuance of the two-year order of protection was reversed.

Equitable Distribution

Court blocks husband and his mother's scheme to eject wife from marital home owned by husband's mother

JM v. JWM, 78 Misc.3d 1202(A) (Sup. Ct., Richmond Co. 2023)

The parties were married for 8 years and have two children together. Prior to the marriage, they cohabitated at the home of the husband's grandmother and continued to reside there together after they were married. There is some indication that they contributed to real property taxes at times throughout their residency, but the parties never paid rent. Upon the death of the husband's grandmother, title to the marital residence passed to the husband's mother.

In July 2019, the wife obtained a temporary order of protection against the husband, thereby excluding him from the marital residence. Thereafter, the wife filed an Order to Show Cause seeking exclusive use and occupancy of the marital residence and the husband cross-moved for the same relief.

In May 2020, the husband's mother initiated an action solely against the wife, seeking, *inter alia*, ejectment, fair market value for rent and exclusive use and occupancy of the marital residence. The court issued a *pendente lite* order granting the wife and the children exclusive use and occupancy of the marital residence.

After trial in November 2022, the court granted the husband's mother exclusive use and occupancy of the home, and determined that the wife owed the mother a debt of more than $259,000 in rent payments, and that the debt would accrue at a rate of $200 per day until the wife surrendered possession of the marital residence. The wife appealed.

In January 2023, the parties sought a judicial determination as to the equitable distribution of the debt in question. The court concluded that the money judgment at bar was the result of the collaborative efforts of the husband and his mother to circumvent the temporary order of protection as well as the *pendente lite* order. Notably, the court stated that there was no doubt that the husband's mother knew that the parties could never afford the determined rental value of $6,000; nonetheless, she persisted in seeking the market value rent through an ejectment action. Thus, the court concluded that the debt was unmistakably marital.

Further, the court affirmed that the initial rationale for granting the wife exclusive use and occupancy without any mention of rental value was because there was no rent due and owing, and it was clear to the court that the lawsuit filed by the husband's mother was indeed an attempt to circumvent the court's order and was a "phantom debt." Therefore, the court made the husband 100% responsible for the debt, poetic justice, so to speak.

Husband's stock options valued as of commencement of the divorce action since he was actively involved in the business

Lorne v. Lorne, 2023 WL 3742967 (1st Dep't 2023)

On review of the division of marital assets, the appellate court affirmed the trial court's determination that the husband's stock options and restricted stock units (RSUs) in Teledyne Technologies were properly valued as of the commencement date, since he testified that he was a board member and chairman of the audit committee at Teledyne, and his duties included attending meetings, keeping abreast of the industry, and acting as a conduit for information with audit partners. Notably, the husband elected to receive his compensation in stock options and RSUs, which could have been converted to cash at commencement. Under these circumstances, the court found that the commencement date of valuation was appropriate.

The court also determined that the trial court made a proper decision in awarding the husband 60% and the wife 40% of the marital estate. The couple met in their 50s and had no children together. The wife's behavior at the husband's business events caused friction, and she sent disparaging letters about him to his employer and professional contacts while the divorce was pending. Despite the husband's increased income during the marriage, his highest earning years occurred in the three years preceding commencement, when the parties had effectively set up separate households. Thus, the court found the division of assets to be equitable given the circumstances.

Additionally, it was deemed that the trial court properly gave the husband, an attorney, ultimate decision-making authority, after consultation with the wife, over long-running litigation involving the parties' apartment in New York City, because this limited authority did not turn him into a de facto receiver of the property under CPLR 5106.

Moreover, review of the record revealed that evidence supported the husband's claim that a $420,000 loan was made from his post-commencement earnings; and, therefore, the wife was not entitled to a credit. However, with respect to the trial court's calculation of the wife's distributive share of the husband's deferred compensation, the record supported the

wife's claim that she was entitled to an additional $104,273.08 based on the actual taxes paid in association with this income, as reflected by the husband's income tax returns, rather than the taxes withheld from the payout.

Lastly, the court concluded that the trial court providently exercised its discretion in awarding the wife nontaxable maintenance of $7,000/month for six years based on the statutory factors and the parties' pre-divorce standard of living. The husband was not entitled to any credits for temporary maintenance payments that exceeded the permanent maintenance award as any difference is minimal due to the tax impact.

Child Support

Initial child support agreement where parties applied statutory percentages to their total combined income over the cap does not warrant court to modify child support by same method in the future

Matter of Monaco v. Monaco, 214 A.D.3d 659 (2d Dep't 2023)

The parties were married for 27 years and have three children together. Pursuant to a 2013 stipulation of settlement, the father's child support obligation was the sum of $1,618 every two weeks. In determining the father's child support obligation, the parties agreed to apply the statutory percentage under the Child Support Standards Act to their total combined parental income of $185,980, which exceeded the statutory cap.

Seven years later, the father filed a petition seeking a downward modification of his child support obligation. Subsequently, the mother filed a petition for an upward modification of the father's child support obligation. After a hearing, the father's petition was granted.

The Support Magistrate found that the parties' combined parental income under the CSSA was $251,708, which exceeded the statutory cap of $154,000. The father's child support obligation on the combined parental income up to the statutory cap was the sum of $1,220 biweekly for three children and the sum of $1,051 biweekly for two children. However, if the statutory child support percentages of 29% for three children and 25% for two children were applied to the entire combined parental income, the obligations would be $1,993 and $1,718 biweekly.

The Support Magistrate decided to apply the statutory percentages to the combined parental income up to the cap. Thereafter, the father was directed to pay $1,220 biweekly from August 9, 2021, to February 25, 2022, when all three children were in the mother's care. From February 26, 2022, when the oldest child turned 21, the father was directed to pay $1,051 biweekly for the two younger children, and a lesser amount for a period when the oldest child temporarily resided with the father.

The mother objected to this order, contending that the magistrate erred in failing to calculate child support on the combined parental income over the statutory cap. The Family Court granted the mother's objection and determined that the magistrate should have used the entire combined parental income, including the amount exceeding the statutory cap. Thereafter, the court directed the father to pay basic child support in the sum of $1,329 biweekly for the parties' two younger children for the period from September 23, 2020, through August 8, 2021, the sum of $1,993 biweekly for the parties' three children for the period from August 9, 2021, through February 25, 2022, and the sum of $1,718 biweekly for the parties' two younger children effective February 26, 2022. The father appealed, and the appellate court reversed.

It was error for the Family Court to base its decision to calculate child support on the total combined parental income in excess of the statutory cap solely based on the parties' original agreement to do so. There is no evidence that the children were not living in accordance with their lifestyle.

The court concluded that the Family Court should have denied the mother's objection to the magistrate's determination to calculate child support based on the combined parental income up to the statutory cap. The court should consider the children's actual needs and lifestyle. Although the father's gross income was higher than the mother's gross income, the record did not establish that the difference between the parties' gross incomes warrants applying the statutory percentages to the parties' combined income in excess of the statutory cap.

Court improperly awarded double shelter allowance

Matter of Glaudin v. Glaudin, 213 A.D.3d 762 (2d Dep't 2023)

The parties have one child who was born while they were in the process of obtaining a divorce. The father moved out of the marital residence, which was owned by him as separate property, and the mother and the child continued to live there.

In January 2020, the mother filed a petition against the father for child support. After conducting a hearing, the Support Magistrate determined that the father's assertion that he was unable to procure employment lacked credibility and imputed certain income to him based on his reported monthly expenses. The father was directed to pay basic child support in the sum of $211 per week. Thereafter, the father filed objections, asserting that he had lost his last job due to absences resulting from being required to attend Family Court proceedings, and that the mother was residing in his home without paying rent or utility bills. The Family Court denied the father's objections. The father appealed, and the appellate court affirmed.

On appeal, the court concluded that the magistrate providently exercised her discretion in imputing income to the fa-

ther based on his work experience and earning capacity, and her assessment of his credibility. However, since the father testified without contradiction that he was responsible for paying the mortgage and utility bills for the house where the mother and the child were residing, the magistrate erred in failing to deduct the shelter costs from the child support obligation, as the father was paying a double shelter cost.

The case was remitted to the Family Court to recalculate the father's child support obligation and arrears, taking into account the credit for the housing expenses he incurred for the mother and child.

Court terminates father's child support obligation due to mother's parental alienation

Matter of Morgan v. Morgan, 213 A.D.3d 669 (2d Dep't 2023)

The parties have two daughters, born in 2004 and 2006. Initially, the children lived with their maternal grandmother in the Dominican Republic until 2009 when they moved to New York to live with the mother. Subsequently, the mother was awarded sole custody of the children and the father was directed to pay child support to the mother. Since that time, the father filed multiple petitions for parental access with the children, some of which resulted in awards of therapeutic parental access.

In July 2019, the father moved to suspend his child support obligation, alleging parental alienation on the part of the mother. After a hearing, in November 2021, the Family Court granted the father's motion and suspended his child support obligation on the ground of parental alienation. The mother appealed.

Contrary to the contentions of the mother and attorney for the child, the evidence adduced at the hearing justified a suspension of the father's child support. Ultimately, the evidence demonstrated that the children held distorted views regarding the father. The older child viewed the father's efforts to develop a relationship with the children as threatening, had homicidal thoughts with regard to the father, and refused to believe that the father had traveled to the Dominican Republic to visit with her even when presented with photographs showing that he had.

There was also evidence that the mother failed to make efforts to assist the children in developing a relationship with the father, and instead encouraged the children's negative view of the father in an apparent effort to weaponize the children against him. More importantly, the mother refused to produce the children for parental access on numerous occasions and had also refused to produce the children for an evaluation with the court-ordered forensic evaluator. Notably, the appointed forensic evaluator testified that upon conducting a previous session with one of the children, it was evident that the mother engaged in an intentional "pattern of alienation" in which she would withhold the children from the parental access with the father.

The court concluded that under these circumstances, the Family Court properly determined that the mother deliberately and unjustifiably frustrated the father's right to visit with the children and suspension of his child support obligation was warranted.

Modification of child support not warranted where parties waived basic child support

Frantz v. Marchbein, 2023 NY Slip Op 02499 (App. Div. 2d Dep't)

The parties entered into a stipulation of settlement of their divorce action which provided for joint legal custody of their two children, shared parenting time, and the mother as the custodial parent for purposes of determining child support.

The stipulation of settlement considered the husband's unemployment at the time and set his income as $200,000 and the wife's income as $350,000. The parties agreed to deviate from the child support guidelines and waive basic child support due to various factors, such as their "parenting arrangement, close geographic proximity, the [husband's] current unemployment, the anticipation of (both parties) relocating to Manhattan and the respective finances of the parties." The parties agreed to pay child support add-ons of extracurricular activities and camp on a pro rata basis, 64% by the wife and 35% by the husband with his responsibility capped at $12,000 per year. With respect to modification, the parties agreed to opt out of the statutory provisions that permit a court to modify a child support order based upon the passage of three years from the entry of a judgment, or a 15% change in either party's income since the entry.

Following their divorce in May 2019, the parties entered into a "Summer 2020 Parenting Modification Agreement,"

which addressed COVID-19 protocols and communication requirements. In August 2020, some two years after the parties divorced, the mother moved to modify the stipulation of settlement and judgment of divorce so as to direct the father to pay her basic child support and to enforce the stipulation and "Summer 2020 Parenting Modification Agreement." The court denied, without a hearing, the mother's motion. The mother appealed, and the appellate court affirmed.

On appeal, the court concluded that the mother failed to demonstrate any substantial change in circumstances warranting the modification of child support. The court followed that, "Where the parties have included child support provisions in the agreement, it is presumed that in the negotiation of the terms of the agreement the parties arrived at what they felt was a fair and equitable division of the financial burden to be assumed in the rearing of the child" (*Battinelli v. Battinelli*, 192 A.D.3d 957 [2d Dep't 2021]). Although not specifically stated in the decision, it can be inferred that the mother argued that the father no longer lives nearby, but the court pointed out that the parties' agreement provided that the parents can live anywhere in the five boroughs of New York. In addition, while the father may have been employed at the time of the modification motion, the court pointed out that the parties imputed $200,000 of income to the father in the initial agreement, and therefore, that too, was not a basis to find a substantial change in circumstances.

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