Recent Legislation, Decisions and Trends in Matrimonial Law

by Wendy Samuelson
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Same-Sex Marriage Update

Jurisdictions that permit same-sex marriages

Currently, there are 14 states that recognize same-sex marriage including New Jersey, California, Rhode Island, Delaware, Minnesota, Washington, Maine, Maryland, New York (as of July 24, 2011 when it passed the Marriage Equality Act) (new DRL §§210-a, 210-b), Massachusetts, Connecticut, Iowa, Vermont, and New Hampshire, plus the District of Columbia.

In September, 2013, Judge Mary C. Jacobson of the New Jersey Superior Court ruled that the state must permit gay marriages to comply with the United States Supreme Court decision that guaranteed same-sex married couples the same federal benefits as heterosexual married couples. Originally, Governor Chris Christie decided to appeal the decision. However, after his motion for a stay of the decision was denied by a unanimous State Supreme Court, the governor decided not to pursue the appeal. It's amazing how fast the landscape is changing with respect to same-sex marriage. It was just last year when the New Jersey governor vetoed legislation permitting same-sex marriage.

Eleven foreign countries also grant full marriage rights: Argentina, Belgium, Canada, Denmark, Iceland, Netherlands, Norway, Portugal, Spain, South Africa, Sweden, as well as Mexico City, Mexico.

The Aftermath of the US Supreme Court Landmark Ruling, Windsor v. United States

As reported in my last column, the U.S. Supreme Court, in two 5-4 rulings, ***Windsor v. United States***, 133 S.Ct. 2675 (2013) held that married same-sex couples are eligible for federal benefits, although the justices stopped short of a ruling endorsing a fundamental right for same-sex couples to marry.

The Supreme Court ruling did not legalize gay marriage in every state. Rather, the states are still left to decide the issue. Since the landmark ruling, there has been a Pandora 's Box of litigation in many states in an attempt to legalize same-sex marriage.

If a gay couple marries in New York and moves to another state that does not recognize their marriage, will they still receive federal benefits? The answer hinges on whether the federal government recognizes the marriage based on where the couple was originally married rather than their current residence.

In August, 2013, in response to the Supreme Court ruling striking down DOMA, the U.S. Treasury Department issued a federal rule change that recognizes legally married same-sex couples for federal tax purposes, whether or not gay marriage is legal in the state in which they live. What's interesting to note is that if the same-sex married couple live in a state that do not recognize their marriage, now they will file state

tax returns as single people, but they will have to file as married for federal tax purposes.

Federal agencies, such as the U.S. Citizenship and Immigration Services (USCIS) and the U.S. Office of Personnel & Management look to the place of celebration (where the marriage took place) to determine whether same-sex married couples are eligible for benefits, rather than in their state of domicile. Therefore, if a same-sex couple is in a valid marriage, even if they live in a state that does not recognize their marriage, they will qualify for immigration status and federal employee benefits.

However, the Social Security Administration is using the place of domicile standard. Therefore, if a married same-sex couple lives in a state that does not recognize their marriage, they will not qualify for spousal Social Security, Medicaid or Medicare benefits. The domicile rule also applies to bankruptcy filings, and benefits under the Family Medical Leave Act. Time will tell if Congress acts to change this.

In addition, a troubling issue for family law is if the same-sex married couple seeks to be divorced in a state that does not recognize their marriage. If the state does not recognize their marriage, they may not be able to secure a divorce.

Recent Legislation

Child support and maintenance thresholds

As a reminder, as of January 31, 2012, the combined parental income to be used for purposes of the CSSA changed from $130,000 to $136,000 in accordance with Social Services Law 111-i(2)(b) in consideration of the Consumer Price Index. Agreements should reflect the new amounts. The CSSA chart for unrepresented parties will change to reflect that amount as well. In addition, the threshold amount for temporary maintenance is now $524,000 rather than $500,000.

DRL §§240(1-c) and 111-a; Social Service Law §384-c(3) amended, effective September 27, 2013

DRL §240(1-c) was amended to provide that there shall be a presumption that if the child who is the subject of a custody/visitation proceeding was conceived as a result of one or more of the sexual offenses set forth below, and the perpetrator was in fact convicted of one or more of said sexual offenses, whether in this state or in another jurisdiction (provided same would constitute an offense in this state), that it is not in the best interests of the child to be in the custody of or to visit with such a person:

(A) rape in the first or second degree;

(B) course of sexual conduct against a child in the first degree;

(C) predatory sexual assault; or

(D) predatory sexual assault against a child.

DRL §111-a(1) was amended to provide that a person convicted of one of the enumerated sexual offenses shall not receive notice of adoption proceedings where the child who is the subject of the adoption proceeding was conceived as a result of the sexual offense committed.

Social Service Law §384-c(1) was amended to provide that a person convicted of one of the

enumerated sexual offenses shall not receive notice of specified social service proceedings concerning the child conceived as a result of the sexual offense committed.

Cases of Interest

Equitable Distribution

Pensions in pay status may be considered an asset rather than an income stream for purposes of maintenance

Bellizzi v. Bellizzi, 107 AD3d 1361 (3d Dept. 2013)

The parties were married for 42 years, have three emancipated children, are both retired with health issues and collect social security. The main issue on the appeal is the lower court's decision to treat the husband's two substantial pensions as income for maintenance purposes, where the wife was awarded a mere $2,800 per month in taxable maintenance, when the husband received $8,507 per month from both pensions. The Third Department held that "awarding a percentage of the pay status pensions more accurately and equitably reflects the value to the wife of these assets earned during the long-term marriage." Id at 1362. The judgment was modified to award the wife 50% of the husband's New York State pension, all acquired during the parties' marriage. The court noted that not all cases require that the pension be distributed as an asset rather than maintenance, and this issue must be decided on a case-by-case basis, and care must be taken not to double-count the interdependent issues of distribution of a pension and maintenance.

The issue of the husband's military pension was remitted to the court below for distribution since the record was not clear regarding how many points were acquired prior to the date of the parties' marriage versus during the parties' marriage. Since the wife will now receive equitable distribution of the husband's pensions, upon receipt of same, her maintenance shall cease since the husband's pension income was the primary source of the husband's income when structuring a maintenance award.

Failure to trace personal injury award renders it marital property

Musacchio v. Musacchio, 107 AD3d 1326 (3d Dept. 2013)

The husband's pre-marital personal injury award of $132,000 was properly distributed as marital property where the husband failed to meet the burden of proving that the savings account where the funds were deposited was a separate property account. In fact, the husband's net worth statement failed to carve out the personal injury award as separate property, since the source of funds in the bank account were listed as his earnings.

Child Support

$400,000 cap for child support of the parties' $736,414 combined parental income

Beroza v Hendler, 109 AD3d 498 (2d Dept. 2013)

The parties were married for 11 years and have 3 children. The father was a veterinarian with imputed income of $259,100 per year and the mother was an anesthesiologist earning $487,693 per year. The mother had residential custody of the parties' children. On remittal of a prior order of the Second Department, the Supreme Court capped the parties' combined parental income of $736,414 at $255,000, and directed the father to pay $2,076.75 per month in child support for the

parties' 3 children. (At the time of this case, in 2008, the threshold cap of combined parental income was $80,000.) The Second Department held that the $255,000 cap was "an amount only marginally higher than the plaintiff's net annual income... in effect, improperly excluded consideration of the mother's net annual income." Therefore, in consideration of the factors set forth in DRL 240(1-b)(f), including "the affluent lifestyle which the children undisputedly enjoyed during the parties' marriage, commensurate with the parties' education and net combined parental income of $736,414," the Second Department modified the amended judgment to increase child support to $3,264.43 per month based upon a cap of $400,000 of the parties' combined parental income.

College Expenses

Gretz v Gretz, 971 NYS2d 312 (2d Dept. 2013)

In this post divorce judgment matter, the husband moved to direct the wife to pay 100% of their eldest child's college expenses above the stipulated SUNY cap on the ground that the wife did not adequately discuss their eldest child's college selection with him. Order denying the husband's motion was affirmed. The parties' stipulation of settlement provided that they would equally share their children's college expenses. The husband's contractual obligations cannot be avoided simply because the selection of the school was not adequately discussed with him. The husband claimed he was pleased with the eldest child's selection, which was his alma mater.

Kiernan v. Martin, 108 AD3d 767 (2d Dept. 2013)

In this Family Court support proceeding, the mother filed objections to the Support Magistrate's determination that she owed college expense arrears totaling $28,210 to the father and that she was responsible for 67% of future college expenses. The order denying the mother's objections was reversed, with the matter remitted for a new determination of the parties' respective shares of college expenses. The Support Magistrate improvidently failed to impute to the father the funds he admittedly received from his family to pay for the children's college expenses because he admitted that they were not loans that he was obligated to repay.

Downward modification of child support denied where father failed to diligently seek new employment

T.B. v. G.B., 40 Misc3d 1207(A) (Sup Ct Westchester County 2013) (Colangelo, J.)

The father sought a downward modification of his child support obligation as set forth in the parties' stipulation of settlement, which was incorporated but not merged into their judgment of divorce, and provides that he would pay $4,500 in child support per month, including unreimbursed medical and dental expenses, childcare and camp expenses for children now ages 16 and 14. The father worked in the derivatives securities industry earning approximately $370,000, inclusive of a bonus, in 2003, and his compensation ranged from $120,000 to $250,000 annually from 2004 until 2007, when he lost his job when the derivatives market tanked. The father's sources of income have been extremely limited since that time, including $8,000 to $9,000 made in 2011 by reselling retail items on e-Bay. The court found that the father lost his job through no fault of his own and his income dramatically decreased. The father managed to keep his child support obligation current by drawing off of his savings and his inheritance, and still belonged to his local country club. However, he failed to use his best

efforts to obtain employment over a five year period commensurate with his qualifications and experience, and his job search was "neither broad enough nor deep enough" to satisfy the diligence requirement. Moreover, the father failed to establish that failure to modify his child support obligation would create a severe hardship for him or his family.

Custody & Visitation

Child testifies in camera during a fact-finding hearing, but contemporaneous cross-examination permitted by respondent's counsel

In re: Moona, 107 AD3d 466 (1st Dept. 2013)

At a fact-finding hearing concerning excessive corporal punishment, one child was permitted to testify in camera, although subject to contemporaneous cross-examination by the respondent's attorney after consultation with the respondent. The First Department affirmed, holding that the Family Court properly balanced the respondent's due process rights with the child's emotional well-being, where the social worker submitted an affidavit which sufficiently established that there would be potential trauma to the child if she was forced to testify in front of her mother, and it would interfere with her ability to accurately testify without inhibition.

Children's preference prevails to expand visitation to non-custodial parent

Nicholas v Nicholas, 107 AD3d 899 (2d Dept. 2013)

In an Article 6 Family Court proceeding, the court below properly expanded the father's visitation with the mature 15 and 16 year old children, who articulated legitimate reasons for wanting to spend more time with their father. The court held that the evidence adduced at trial proved that there was a substantial change in circumstances in the 5 years since the parties' previous visitation arrangement was implemented, and it was in the children's best interests.

Sole legal custody to the mother modified where the father to provide the father with decision making authority relating to education

Jacobs v Young, 107 AD3d 896 (2d Dept. 2013)

In an Article 6 proceeding, the Family Court awarded the mother sole legal and residential custody of the parties' child. While the parties had an antagonistic relationship which precluded an award of joint legal custody, the record did not support granting the mother sole decision making authority with respect to the child's schooling, where the father was the one who researched educational options for the child at every stage of his schooling, supervised homework assignments, was involved in school-related activities, contacted the teachers with concerns and was otherwise involved with the child's schooling at every stage. Conversely, overall, the mother was considerably less involved in the child's schooling. Division of authority should take advantage of both parties' strengths and weaknesses. Given the father's involvement in the child's schooling, the Appellate Division modified the order of the Family Court to award the father decision-making authority with respect to the child's schooling.

Denial of petition for visitation without a hearing where the court possessed sufficient information to make a custody determination

Colon v Sawyer, 107 AD3d 794 (2d Dept. 2013)

The Family Court considered the father's incarceration for committing a criminal sexual act in

the first degree, and the Order of Protection issued by the criminal court prohibiting contact between the father and the children, in denying the father's petition for visitation without a hearing. Based upon this information, the Second Department affirms, holding that the Family Court possessed sufficient information to make an informed decision of what is the best interest of the children without a hearing.

Family court erred in terminating the father's visitation without a hearing, where the court did not possess sufficient information to make such a determination

Zubizarreta v Hemminger, 107 AD3d 909 (2d Dept. 2013)

The Second Department held that the Queens County Family Court erred in terminating the father's visitation without a hearing where the court did not possess adequate relevant information to make an informed determination of the best interest of the child. While the attorney for the 13 year old child indicated that the child did not want to visit with her father, the Family Court referee failed to conduct an in camera interview with the child. Therefore, the matter was remitted to the Family Court for a hearing to determine whether the father's visitation should be terminated.

Change of custody warranted where the father was more likely to foster a relationship with the mother, and the mother withheld visitation from the father and had anger management issues

Matter of Flores v Mark, 107 AD3d 796 (2d Dept. 2013)

Where the parties' relationship became so antagonistic that they were unable to communicate and cooperate in matters concerning the child, the lower court properly found that there had been a change in circumstances to warrant a change from joint legal custody to sole legal custody to the father. Further, a change of residential custody was warranted where the mother was found to have willfully interfered with the father's visitation, the mother had anger management issues, and the father was more likely to foster a relationship between the child and mother. The court rejected some of the recommendations of the forensic psychologist, but set forth its reasons for same, which was within the court below's discretion. The lower court also properly chose not to conduct an in camera interview of the three year old child, who was not mature enough to consider his preference.

Relocation

A parent seeking to relocate bears the burden of establishing by a preponderance of the evidence that the proposed move would be in the child's best interests. In determining whether relocation is appropriate, the court must consider a number of factors, including the children's relationship with each parent, the effect of the move on the contact with the noncustodial parent, the degree to which the lives of the custodial parent and the child may be enhanced economically, emotionally, and educationally by the move, and each parent's motives for seeking or opposing the move.

Kevin McK v Elizabeth A.E., 2013 WL 5431590, 2013 N.Y. slip op 06328 (1st Dept. 2013)

It was in the child's best interest to permit the mother to relocate to Mississippi with the parties' child because it would enhance the child's life both economically and emotionally. In New York, the mother had been unable to find employment and received various public assistance benefits. The mother was able to secure a regular job in Mississippi. The

move would give the mother and child an extensive network of family support with which the child had strong emotional bonds. The father was unlikely to contribute financially to the child's care in the near future, was in child support arrears, and was evasive about his finances. Concerns about interference with the father's relationship with the child could be alleviated by allowing him broad access to the child in Mississippi and liberal visitation in New York. The forensic psychologist testified that the move would not be detrimental to the child and that he did not believe the purpose of the move was to interfere with the child's relationship with the father.

Batchelder v. BonHotel, 106 AD3d 1395 (3d Dept. 2013)

Relocation of the mother to Alabama was not in the out-of-wedlock child's best interests, where the mother's desire to be with her fiancé, whom she had met online only five months before, was the true motive behind the move, and not that she was evicted from her home. The mother quit her job and was completely dependent upon her fiancé's income. There was no evidence in support of the mother's assertions that Alabama offered greater diversity, enhanced cultural opportunities, and better schools. Relocation would be highly detrimental to the father's existing relationship with the child, especially since he could not afford the transportation costs to and from Alabama.

Counsel Fees: In the wake of Prichep v. Prichep, 52 AD3d 61 (2d Dept. 2008) and the amended DRL §237(a) and (b) and §238, effective October 12, 2010.

Each column, I continue to update the reader with large counsel fee awards in matrimonial litigation.

GC v KC, 969 NYS2d 803 (Sup Ct Westchester County 2013) (Colangelo, J.)

In a post-judgment divorce enforcement litigation, the former wife was awarded $48,665.56 in enforcement legal fees and disbursements, which amounted to 75% of the total fees sought to be paid. The former husband's recalcitrance and obstructive tactics forced the former wife to inter alia, file three separate motions to compel the former husband to comply with the clear terms of the parties' Stipulation of Settlement, including a motion to reveal his residential address so that the former wife would know where the parties' child would be staying during visitation with the father and to oppose the former husband's application to reduce his child support obligation, which the court found without merit. It is to be noted that in the parties' underlying divorce action, the wife was awarded over $550,000 in counsel fees based upon the husband's dilatory tactics.

Oops Moment 1: Protracted Litigation

Trenore v Trenore, 2013 WL 5451978, 2013 N.Y. slip op 06358 (2d Dept. 2013)

Counsel fees denied to the wife where she was blamed for significant protracted litigation since her counsel admitted that the claim for sexual assault tort was "strictly window dressing" to pressure the defendant into settling the divorce case on terms more favorable to the plaintiff.

Oops Moment 2: Failure to follow 22 NYCRR 1400

O'Sullivan v Ward, CV-10387/12, NYLJ 1202620924093 at 1 (Civil Ct, NY County 2013) (Nervo, J.)

A Manhattan divorce attorney who sued a former client for unpaid legal fees was ordered to return the $12,400 he already collected and that he may not recover the remaining $21,660 he was owed because the retainer agreement was not timely filed and he did not sent out billing statements on time. The lawyer filed the retainer agreement 1 year and 8 months after it was executed and three months after he sued his client for legal fees, rather than filing it with the client's net worth statement. Four of the lawyer's six billing statements were not sent on time, and past the 60 day time requirement. Three were 14 days past due and one was 43 days past due. The court also required the attorney to return the cost of the deposition transcript to the client because the client was precluded from using the deposition transcript at trial because counsel failed to timely serve the transcript on the opposing spouse.

Oops Moment 3: Default on Motion for Counsel Fees

Vujanic v Petrovic, 103 AD3d 791 (2d Dept. 2013)

In an action for divorce, the defendant was awarded $150,000 in counsel fees based upon her unopposed motion. The plaintiff sought to vacate his default, but the court denied same because it did not accept the plaintiff's excuse of law office failure as a reason for his default, and it was not supported by a "'detailed and credible' explanation of the default." Id at 792. The plaintiff also failed to set forth a basis for a meritorious defense.

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