Recent Legislation, Decisions and Trends in Matrimonial Law

By Wendy B. Samuelson

Court of Appeals

Statutory procedure allowing for early expungement of reports relating to alleged child abuse does not apply to FAR track pursuant to SSL § 427-a despite that SSL § 422 permits same

Corrigan v. New York State Office of Children & Family Services, 2017 N.Y. Slip Op. 01020 (2017).

When the Office of Children and Family Services (OCFS) received a telephone call alleging educational neglect by the petitioners, pursuant to SSL § 422(2)(a), the report was referred to the Offices of Child Protective Services (CPS). CPS decided that the case was eligible to proceed under the non-traditional CPS investigation, the Family Assessment Response track (FAR) pursuant to SSL § 427-a. FAR offers flexibility for CPS to provide immediate assessment and social services for some cases without investigating whether abuse existed, while the traditional investigative track under SSL § 422 is required for reports where a child's safety is of serious concern, including physical and sexual abuse.

The CPS case worker closed the case and did not recommend services. The petitioners sought to have their names formally cleared by writing a request to CPS to request the expungement of the FAR report and the records (which would stay sealed for 10 years). The request was denied since the statute does not provide for expungement.

Petitioners then brought an Article 78 proceeding challenging the ruling. The petitioners argued that a process for seeking early expungement of a report (before 10 years has expired) is available to parents who have been investigated by OCFS where there is no finding of abuse and neglect under SSL § 422[5][c], and that the statute governing the FAR track must be interpreted to include the same. The petition contained no challenge to the FAR statute on constitutional grounds. Respondents moved to dismiss, and Supreme Court granted the motion on the ground that no statutory authority exists for early expungement of a FAR report.

The Appellate Division affirmed, reasoning that the legislature's failure to include expungement under the FAR statute, SSL § 427-a, was intentional, especially where the stated purpose in enacting the differential response approach was "to avoid any consideration of the truth or falsity of the allegations of abuse or maltreatment in appropriate cases."

The petitioners appealed to the Court of Appeals, and the high court affirmed. The Court reasoned that SSL § 427-a and SSL § 422 were not adopted together and do not deal with the same subject matter. Rather, "the FAR track was created as a new and entirely separate means of addressing certain allegations of child abuse in a program geared toward the provision of social services, rather than an investigation assessing blame." Only the legislature can change this apparent inequity. Finally, the petitioners failed to preserve for appeal that SSL § 427–a is unconstitutional as applied because the absence of an early expungement provision is not rationally related to a legitimate government objective.

Custody and Visitation

Tri-custody arrangement granted after parties engaged in a three-way relationship

Dawn M. v. Michael M., 47 N.Y.3d 898 (N.Y. Sup. Ct. 2017)

This is the first case of its kind in New York awarding tri-custody of a child. Plaintiff Dawn M. and defendant, Michael M., were married and thereafter had multiple unsuccessful attempts to have a child. Later, Audria G. moved in with the couple where the three began to engage in sexual relations, considered themselves a family, and decided to have a child together. It was agreed by the three parties, beforehand, that defendant and Audria would engage in sexual relations and that all three would raise the child together as parents.

Audria became pregnant and gave birth to baby J.M. in 2007. The parties continued to live together for over

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18 months and all three raised J.M. Specifically, plaintiff accompanied Audria during most of her doctor's appointments during the pregnancy, she used her medical insurance to cover Audria's pregnancy and delivery, and plaintiff and Audria shared motherly duties when the parties lived together. J.M. was raised to believe that he has two mothers and one father.

In 2008, the relationship between the married couple started to deteriorate and plaintiff and Audria moved out of the marital residence and lived together. In 2011, plaintiff commenced a divorce action against defendant. Defendant commenced a custody case against Audria, and thereafter they agreed to joint custody with residential custody to Audria and visitation to defendant.

Plaintiff Dawn, who is the non-biological and non-adoptive parent of 10-year-old J.M., brought this action to secure her custody rights (despite that she was still living with Audria) in order to legally remain in J.M.'s life without being solely dependent on obtaining defendant's or Audria's consent. Defendant opposed, claiming that plaintiff has no standing to seek custody as the non-biological or non-adoptive parent.

> "The Court of Appeals in Brooke S.B. v. Elizabeth A.C.C. *held that where a partner shows that the parties agreed to conceive a child and to raise the child together, the non-biological, non-adoptive partner has standing as a parent to seek visitation and custody."*

The Court of Appeals in *Brooke S.B. v. Elizabeth A.C.C.*, 28 N.Y.3d 1 (2016), held that where a partner shows that the parties agreed to conceive a child and to raise the child together, the non-biological, non-adoptive partner has standing as a parent to seek visitation and custody. In this case, the court relied on *Brooke S.B.*, and held that it was within the best interest of J.M. to continue the loving relationship that he has had with the three parties since birth. Plaintiff and defendant raised J.M. in a loving environment, the three parties have gotten along to maintain a psychologically healthy life for J.M., and it is evident that they will be able to cooperate in making decisions for J.M. in the future. The parties created an unconventional family dynamic when all three agreed to raise a child together, so it is in J.M.'s best interests for him to continue a relationship with his *de facto* mother. The court reasoned,

> Reason and justice dictate that defendant should be estopped from arguing that this woman, whom he has fostered and orchestrated to be his child's mother, be denied legal visitation and custody. As a result of the choices made by all three parents, this ten-year-old child to this day considers both plaintiff and Audria his mothers. To order anything other than joint custody could potentially facilitate plaintiff's removal from J.M.'s life and that would have a devastating consequence to this child.

The court found that joint custody with the defendant is appropriate, which effectively becomes a tri-custody relationship. The court granted visitation to the plaintiff as follows: dinners on Wednesday evenings, one school recess, and two weeks during the summer.

Mother awarded custody despite financial struggles and past history of substance abuse

Snow v. Dunbar, 147 A.D.3d 1242 (3d Dep't 2017)

The unmarried parties had two children together. The parties lived together until the mother moved out to live with her now husband. The mother petitioned for custody of the children. The father cross-petitioned for joint legal custody and primary physical custody.

The mother was the primary caretaker for the children when she resided with the father and took care of most of the housework. When she moved out to live with her new husband, she provided her children with a suitable household and maintained a close relationship with them. The mother had financial issues, but her struggles did not rise to the level of "chronic financial difficulties" that negatively affected the children. She had a history of substance abuse for which she received treatment. Her substance abuse was found by the court to be too remote in time to be relevant.

There was disputed evidence regarding the father's behavior toward the children. The father testified that he was a devoted father who read books, played, danced and watched movies with the children. However, the mother testified that the father would often sleep or watch television when he was at home with them and that he was controlling when the parties resided together. The mother also testified that the father's new home wasn't sanitary and that he made false statements about the mother's new husband to his daughter.

Following a trial, the Family Court awarded the parties joint legal custody of the children, granted primary physical custody of the children to the mother, and set forth a visitation schedule for the father. The father appealed.

The Third Department affirmed. The Family Court's determination of the father's control issues did not make shared custody practical. It was in the best interests of the children for primary custody to remain with the mother because she took care of the children's day-to-day needs and better promoted their intellectual and emotional development.

Maternal aunt demonstrates extraordinary circumstances warranting her to have guardianship of the children

In re Sofia S.S., 145 A.D.3d 787 (2d Dep't 2016)

The mother of two children, Keilah and Sofia, sent her daughters to stay with their maternal aunt. Thereafter, the maternal aunt filed petitions to be appointed the guardian of the children. The Family Court appointed the maternal aunt as permanent guardian of one child, Keilah and temporary guardian of the other child, Sofia. The mother then filed to modify the order, requesting that the aunt be appointed as temporary guardian of Keilah, and to terminate guardianship of Sofia. The Family Court denied the relief. The mother appealed, and the Second Department affirmed.

State intervention is warranted with respect to the custody of a parent's child if there is a finding of

> surrender, abandonment, unfitness, persistent neglect, unfortunate or involuntary extended disruption of custody, or other equivalent but rare extraordinary circumstances which would drastically affect the welfare of the child.

Here, the maternal aunt demonstrated extraordinary circumstances, by providing evidence that the mother continued to live with her husband after he was arrested for committing domestic violence against her, the husband continued to verbally abuse the mother and her children, and the mother failed to fulfill her children's physical and psychological needs. Based on the totality of the circumstances, the court determined that it was in the best interests of the children to award permanent guardianship of them to the aunt.

Father's visitation rights terminated where he failed to contact or visit with his children for five years

Licato v. Jornet, 146 A.D.3d 787 (2d Dep't 2017)

The parties are the parents of two children. In 2007, the father was awarded supervised visitation on alternate Saturdays. In 2013, the mother sought to modify the order because the father had failed to contact or visit his children for five years. The Family Court suspended the father's visitation rights. The father appealed, and the Second Department affirmed.

The mother showed a sufficient change in circumstances to warrant a modification of visitation. Since the father failed to visit and contact his children for five years, such abandonment is a change in circumstances warranting a suspension of his visitation.

Custody award modified where parents failed to work cooperatively in treating child's ADHD

Andrea C. v. David B., 146 A.D.3d 1104 (3d Dep't 2017)

In 2007, the parties stipulated to an order granting joint legal custody of the child with primary physical custody to the mother. In 2013, the mother had the child evaluated for ADHD, and the doctors recommended a combination of medication and counseling. The mother was interested in trying medication for her child, while the father was completely opposed to it. In 2014, the mother petitioned for a change in custody, seeking sole legal custody of the child on the grounds of the father's lack of cooperation and obstruction with her medical care. The father then cross-petitioned for sole legal custody, alleging that the mother lacked the ability to manage the child's behavioral issues and that she placed the child on medication without his consent. The father refused to accept the child's diagnosis of ADHD, failed to follow the recommended treatment of specialists, and did not want to enroll the child in special education classes. He believed that he alone could treat the child.

The Family Court determined that a change of circumstances existed that warranted a change in custody from joint custody to sole custody to the mother, particularly where the parties' relationship deteriorated and they were unable to work together to raise their child. The father appealed, and the Third Department affirmed.

Denial of 17-mile relocation

Lipari v. Lipari, 146 A.D.3d 870 (2d Dep't 2017)

The parties entered into a stipulation of settlement upon their divorce, where they agreed to joint legal custody of their two children, with the mother having primary residential custody and the father having alternate weekend visitation, as well as some overnight visitation during the week, holidays and school breaks. The mother obtained exclusive occupancy of the marital residence in Valley Cottage, Rockland County and the father rented a condominium located about five minutes away. After the mother informed the father that she intended to move 17 miles away to Rye, located in Westchester County, the father sought to enjoin her from relocating.

The father testified that he was very close to his children and involved in their everyday lives, and if the mother relocated, the amount of time he would be able to spend with his children would be significantly decreased. The father worked in New Jersey, and on an almost daily basis, picked up the children from school and cared for them until the mother was able to pick them up. He also

coached many of their sports teams and attended their extracurricular activities. The mother contended that she wanted to move to Rye because it would reduce her commute to work as a school librarian, that she believed the Rye school district was better than the children's current school district, and that she would save money by moving to an apartment.

The trial court enjoined the mother from relocating. Upon the mother's appeal, the Appellate Division affirmed.

A party seeking relocation must demonstrate that the proposed relocation would be in the child's best interests. Here, the evidence displayed that a relocation of only 17 miles would significantly impact the father's relationship with the children, considering the father's frequent contact with them during the week. If the children moved to Rye, it would be difficult for the father to pick them up after school due to the demands of his work schedule and the commute during rush hour. Moreover, the mother failed to demonstrate that the move to Rye would benefit the children's lives, in any way, rather than benefiting herself.

Equitable Distribution

Egregious marital fault found

Pierre v. Pierre, 145 A.D.3d 586 (1st Dep't 2016)

The husband stabbed his wife with a steak knife twice, smashed her head against the toilet, and pushed her head into the toilet bowl. As a result of his actions, the wife entered into a coma, was hospitalized for months, received five surgeries, and thereafter was disabled. The husband pleaded guilty to attempted assault in the first degree. Despite this, the trial court awarded the husband 50% of the marital home.

On appeal, the court modified the wife's award to 95% of the marital home on the grounds of egregious marital fault due to the husband's abuse. According to DRL § 236(B)(5)(d)(14), marital fault is considered where the spousal misconduct is so egregious that it "shocks the conscience of the court," including conduct that imperils "the value [that] society places on the human life and 'integrity of the human body.'"

Support

Imputation of income

Pfister v. Pfister, 146 A.D.3d 1135 (3d Dep't 2017)

The parties were married 13 years and have three children. The husband, who owned a property maintenance business, claimed that he earned approximately $63,000/year two years before trial and $43,000/year before trial. The wife, who has two Master's degrees and is a certified school counselor, worked part-time and earned approximately $18,000/year two years before trial and $16,000/year before trial. The trial court, when determining child support and maintenance for the wife, imputed income of $44,447/year to the wife and $85,000/year to the husband and directed the husband to pay the wife $200/ week for three years in spousal support and $340/week in child support. The husband appealed, and the Appellate Division affirmed.

The husband argued that the court should not have imputed additional income to him and should have imputed more income to the wife. The husband claimed he earned less than $65,000 prior to trial. However, the court found that the husband earned more than $120,000/year in the past, until he changed the way he kept his financial records, and that he paid for the family's expenses from the business accounts. The court observed that his business' gross profits were "extremely disproportionate" to his net income. In addition, there was evidence at trial that the wife had another part-time job earning about $25,500/year.

The trial court properly did not award the husband a credit for marital funds used to pay the wife's pre-marital student loans for her Master's degree because there was no evidence that the wife's Master's degree conferred an economic benefit, and the court cited *Mahoney–Buntzman v. Buntzman*, 12 N.Y.3d 415 (2009) for this proposition. On the other hand, the wife was properly awarded a credit of one-half of the marital funds for the payment of the loans on the husband's pre-marital boat.

Child support awarded regardless of validity of marriage

Commissioner of Social Services ex rel. N.Q. v. B.C., 147 A.D.3d 1 (1st Dep't 2016)

The parties were married through an Islamic religious ceremony. Two years later, they had a child together. There was no written contract and the parties did not obtain a marriage license. After the mother applied and received Medicaid health care, the Commissioner of Social Services filed a petition seeking an order for the child's father to provide support in the form of health insurance on the basis that a ceremonial marriage had taken place and therefore, the child is presumptively the legitimate child of the father.

Family Court Act § 117 provides that

> (a) child born of parents who at any time prior or subsequent to the birth of said child shall have entered into a ceremonial marriage shall be deemed the legitimate child of both parents for all purposes of [support proceedings] regardless of the validity of such marriage.

The father denied that a ceremony took place and claimed he had married another woman.

At trial, the mother testified that they appeared before an imam, she wore traditional wedding garb, and they recited several wedding verses to each other in front of friends. The father gave her a series of gifts which included earrings, a ring, clothing and $100 "haq mehr," which is money the groom gives to the wife, to symbolize their marriage. After the ceremony, the parties celebrated at a restaurant with their friends.

The Family Court found that petitioner met its burden of demonstrating a ceremonial marriage had taken place, and referred the matter to a support magistrate. The father appealed, and the Appellate Division affirmed. Since the parties swore that they intend to be married in the presence of a religious figure or magistrate, the court found that a ceremonial marriage had taken place.

Stipulations

No award of maintenance where postnuptial agreement is silent regarding waiver of maintenance

Herskovitz v. Herskovitz, 145 A.D.3d 549 (1st Dep't 2016)

The parties entered into a postnuptial agreement, which states in the "Whereas" clause the following:

> WHEREAS, they make this Agreement with the understanding that they are hereby settling their marital affairs with respect to, among other things, question[s] of separate property, marital property, *maintenance payments*, inheritance rights, undergraduate and postgraduate degrees, professional licenses and/or practices, pension benefits, equitable distribution of property and distributive awards (emphasis supplied).

Nowhere else in the agreement is there a provision regarding a mutual waiver of maintenance. (The reported decision did not provide any facts regarding the disputed language of the postnuptial agreement; therefore, I reviewed the appellate briefs to obtain more information.)

The husband moved for summary judgment on the issue that the postnuptial agreement prevents the wife from seeking maintenance, which was granted. The Appellate Division affirmed, reasoning that the parties' "Whereas" clause clearly states that all issues are resolved, and therefore, no maintenance is to be awarded to the wife.

Author's note: It seems to me that there was a typographical error in the "Whereas" clause in the agreement. If the parties intended to waive maintenance, surely there would have been an article in the agreement clearly stating such waiver.

Father entitled to deduct son's college room and board fees even though child support paid to mother was only for the parties' daughter

Meshel v. Meshel, 146 A.D.3d 595 (1st Dep't 2017)

Upon divorce, the parties entered into a stipulation of settlement which provided that the mother would have sole legal and primary residential custody of their two children, and that the father would pay $6,000/month in child support for both children. The father was entitled to a room and board credit against his child support payments for all amounts that he pays towards the cost of his son's room and board while at college, provided the credit did not exceed $24,000.

In July of 2013, the parties amended the stipulation of settlement, which provided the father with sole legal and physical custody of their son and the father's child support for the daughter was reduced to $5,000 per month. When the son commenced college, the father began deducting the son's room and board fees against the child support for the daughter.

The mother brought a motion against the father to cease deducting the parties' son's college expenses for room and board from the child support payments for the parties' daughter and to direct him to pay the resulting child support arrears. The father cross-moved for counsel fees. The Supreme Court denied the mother's motion and granted the father's motion. The Appellate Division affirmed, except modified the provision granting the father counsel fees.

The court found the revised stipulation to be unambiguous on its face, as the only modification to the original agreement was that there was a $1,000 reduction in child support payments. Even though the $5,000 monthly child support payment paid by the father was for the daughter only, the court held that the father was entitled to the room and board credit deduction.