

# Recent Legislation, Cases and Trends in Matrimonial Law

By Wendy B. Samuelson

## RECENT LEGISLATION

### AAML's LGBTQ Committee Releases Language Guide for Judges and Attorneys

In 2019 Miriam Webster declared "they" the word of the year. Traditionally thought of as a plural pronoun, the word is now also accepted as a singular—a non-gendered alternative to traditional, gendered pronouns like "he" and "she." As such, the word has been embraced by many transgender and non-binary parties who don't identify as purely male or female.

Easing our transition into this new linguistic world, in which one must no longer assume a party's pronouns, gender, or orientation, the American Academy of Matrimonial Attorneys has provided a helpful guide for judges and attorneys, to help us get our language right. The bench book gives an up-to-date glossary of the terms and acronyms that should be used in cases involving the LGBTQ community.

While many of those terms are commonplace, others may be unfamiliar to many legal professionals, including words like "cisgender" (a person whose gender identity aligns with the gender they were assigned at birth) and acronyms like "FTM" (a transgender person, assigned female at birth, who identifies as a man).

Far more than a list of definitions, the bench book calls out terms that have become redundant, like "gay marriage" and "same-sex marriage" when simply "marriage" would do. The guide also lays out a series of terms now considered offensive, like "homosexual," which is often used by opponents of gay civil rights, and "admitted," which implies a sense of shame in identifying as gay or lesbian.

The bench book project was spearheaded by Ric Roane, the AAML's vice president and a prominent civil rights advocate, in coordination with the organization's LGBTQ Committee. It should serve in the coming years as a trusted tool for judges, who are required by the Code of Judicial Conduct Canon to perform their duties without bias or prejudice and who need the right language to demonstrate their commitment to that code.

The AAML's bench book is two pages and can be found at this website: [https://cdn.ymaws.com/aaml.org/resource/resmgr/files/lgbtq\\_bench\\_book\\_guide\\_v1\\_20.pdf](https://cdn.ymaws.com/aaml.org/resource/resmgr/files/lgbtq_bench_book_guide_v1_20.pdf).

### Gender Recognition Act Signed into Law by Governor Cuomo

In late June, 2021, in one of his last official acts before resigning from office, Governor Andrew Cuomo signed

the Gender Recognition Act (GRA) into law.

The Act frees transgender and non-binary New Yorkers from using the restrictive, binary options of "M" or "F" when indicating their gender on state forms. Citizens will now have the option to use the gender neutral letter "X" to indicate their sex on drivers' licenses, state IDs, and birth certificates.



The GRA also eliminates the need to provide the court with a doctor's note when changing one's gender on a state-issued ID, and it gets rid of the requirement of publishing one's name change in a newspaper, a bizarre and outdated demand that for decades had forced transgender citizens to place a public spotlight on a purely private decision.

In recent years, many judges had waived the doctor's approval and publication provisions, but the new law transforms what had been rare court courtesy into a legal requirement.

The GRA was championed by two lawmakers, State Senator Brad Hoylman and Assemblyman Daniel O'Donnell. "Today is a proud day for New York State," O'Donnell said as the Act moved to Cuomo's desk for signature. "No one should face overwhelming financial, medical, and bureaucratic barriers simply to have their existence officially recognized."

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### **For Disabled Children, Child Support Extended to Age 26: New DRL 240-d and FCA 413-b**

In a major change for single parents of disabled children, the state has extended child support obligations by five years. For those children, the new Act moves the age of emancipation from 21 to 26 years of age.

The law (A898B/S04467B), which went into effect in October 2021, amends the DRL by adding Sec. 240 d, which extends support to age 26 when the child has been diagnosed as being developmentally disabled, as defined by the Mental Hygiene Law; lives with the parent seeking the additional support; and is largely dependent on that parent. The legislation makes a similar change to the Family Court Act.

The changes to the DRL and FCA were sponsored by State Senator John Mannion, chairman of the Senate Disabilities Committee, and Assemblywoman Carrie Woerner. They explain in the legislation that the challenges faced by the parents of disabled children are often “overwhelming, especially when they are being faced by a single parent, [and it] is the responsibility of both parents to assist in the expenses.”

The extension of child support for disabled children is not mandatory and is determined on a case-by-case basis. The five additional years of support can be waived, at the discretion of the court.

### **CASES OF INTEREST**

#### **Equitable Distribution**

##### **Court Improperly Used Doctrine of Laches To Deny Spouse Retroactive Disability Pay**

***Taberski v. Taberski*, 197 A.D.3d 871 (4th Dep’t 2021)**

The parties divorced pursuant to an agreement, which equitably distributed the husband’s retirement benefits under New York State Local and Retirement System

(NYSLRS) pursuant to the *Majauskas* formula. The DRO was filed in December 2011. A year later, the husband received a letter from the NYSLRS approving the DRO, but indicating that since the DRO was silent as to what would happen if the husband retired due to a disability, the NYSLRS would apply its standard policy of calculating the wife’s distribution using the disability retirement allowance. Five years later, the husband retired and filed a disability retirement application.

While the parties began receiving their respective shares of the husband’s service retirement benefits, the NYSLRS had not yet approved the husband’s disability retirement. Rather, it was approved in February 2019, six months after his retirement. To cover that delay, the NYSLRS increased the parties’ monthly benefits and indicated that it would provide a lump sum retroactive payment, to be split by the parties.

But before that retroactive payment was distributed, the ex-husband’s attorney notified the ex-wife that he would be disputing her entitlement to his disability retirement. Soon after, the ex-husband moved to amend the DRO to clarify that the ex-wife had no right to collect a portion of his disability retirement benefits and he sought to reduce her monthly benefits, in order to recoup the portion of his retroactive payments.

The court granted the husband’s motion to amend the DRO, clarifying that while the wife was entitled to a portion of his service retirement benefits, she had no right to his disability retirement benefits. But the court also held that the defendant wasn’t entitled to recoup the retroactive disability payments that the wife had already received, due to the doctrine of laches, which denies a party the right to make a claim for equity when his extended delay in making that claim would prejudice the opposing party.

The husband appealed that portion of the court’s ruling. The appellate court reversed, and remitted the matter back to the lower court. While it acknowledged the ex-

husband's delay in filing his motion, the appellate court determined that the ex-wife's claim of laches was not valid since she failed to show any specific prejudice.

Two appellate judges dissented, claiming that the time for the husband to amend the DRO should have been right after he received the letter from NYSLRS eight years ago.

## Support

### Surgeon With Six Kids Cannot Decrease Child Support Obligation, Despite Developing a Disability

#### *Ryan v. Ryan*, 197 A.D.3d 869 (4th Dep't 2021)

The parties divorced pursuant to an agreement that required the husband, a surgeon, to pay maintenance and child support. A year later, the husband's health went south, and he was forced into disability retirement, ending his accomplished career as a surgeon.

Thereafter, the husband filed a motion to end his maintenance obligation and reduce his support for the parties' six children. After a hearing, the court recalculated his support obligations, but after imputing income to him, ended up reaching the same numbers.

The husband appealed, and the appellate court affirmed. The court reminded the husband that child support is based not on the parties' current incomes, but on a court's broader evaluation of the parents' ability to provide for their children.

Given the surgeon's substantial assets, the child support obligations ordered by the court were not beyond his means, the appellate court ruled, and he failed to show that continued enforcement of his spousal support obligation would cause him "extreme hardship," under DRL 236[B][9][b][1].

Furthermore, the appellate court noted, in seeking a downward modification, the husband was required to show that he faced a "substantial, unanticipated and unreasonable change in circumstances" that was not due to any fault of his own and that he made a "good faith effort" to obtain commensurate employment.

While the appellate court agreed that the husband's newly developed disability was not of his own making (the surgeon had recently undergone surgery to regain his own health), the court found his effort to regain commensurate employment lackluster at best. The husband had acquired a position as an administrative consult at a hospital, but he was fired soon thereafter and only made one additional inquiry to fulfill his job search obligation.

## Counsel Fees

### Defendant Granted Counsel Fees After Plaintiff, Who Was Present at Trial, Claims He Wasn't

#### *Handakas v. Handakas*, 196 A.D.3d 469 (2d Dep't 2021)

At the parties' divorce trial, the plaintiff-husband ap-

peared, but declined to testify, leaving the defendant-wife as the only witness. The court determined that the wife was entitled to her equitable share of the \$1.1 million marital home, the \$950,000 in marital funds that the husband attempted to wire transfer to Greece, the \$350,000 that he forfeited to the federal government upon being criminally convicted, and the \$60,000 from the sale of their boat.

Thereafter, the husband filed a motion for renewed judgment, demanding that the court set aside its equitable distribution ruling, based on his claim that he was not present at the trial, when he, in fact, was.

The court denied the motion, ruled that it was frivolous, and awarded the wife's attorney \$15,000 to cover the cost of opposing it. The husband appealed, and the appellate court affirmed.

## Enforcement

### Husband Can't Evade Obligations of Separation Agreement Despite 29 Years of Delay

#### *Sangi v. Sangi*, 196 A.D.3d 891 (3d Dep't 2021)

The parties signed a separation agreement in 1995, which was incorporated into a divorce judgment that required the husband to pay maintenance and child support to his wife, and to buy a home for his wife and children and pay the home's monthly mortgage.

When the husband refused to buy the home as ordered, the wife brought a motion for contempt. The Ulster County Supreme Court granted her motion, finding the husband in willful contempt. The court converted the obligation into a lump sum payment, imposed a fine of more than \$130,000, and committed the husband to jail until the fine and sheriff's fees were paid.

Thereafter, the husband was granted leave to purge his contempt by paying the fine and the outstanding mortgage on the home that the wife had eventually acquired. But once again, he refused to pay. Soon after, the wife lost her home in foreclosure.

Ten years later, the wife filed a motion to reaffirm and recalculate the 1995 order, based on the husband's subsequent defaults. The court granted her motion and ordered the husband to pay the \$130,000 directly to her.

In July 2018, after the husband continued to default on his obligations, the wife sought an order directing the county clerk to enter a money judgment, plus interest dating back to 2005, the date of the order. The husband cross-moved to vacate the court's order, arguing that the wife had waived her right to enforcement due to the extended delay. The court granted the wife's motion for enforcement and denied the husband's cross-motion to vacate. The husband appealed.

The appellate court affirmed, and acknowledged the six-year statute of limitation on contract actions (CPLR 213[2]) and the 20-year statute of limitations on actions

brought to enforce a support order (CPLR 211[e]), but asserted that those statutes were irrelevant in this case. The wife's motion to enforce the terms of the separation agreement were "not an action . . . but rather a post-judgment motion to enforce the terms of the separation agreement" and "thus not subject to the statute of limitations set forth in [the] CPLR." (*See Holsberger v. Holsberger*, 154 A.D.3d 1208 [3d Dep't 2017].)

## Child Custody

### Abused Mother Retains Custody of Child Despite Relocating to Arizona Without Permission

**Robert C.E. v. Felicia N.F.**, 197 A.D.3d 100 (4th Dep't 2021)

In a standard situation, a parent who disappears with her child, relocating out of state without the other parent's knowledge or consent, could be charged with kidnapping and face a loss of custody. But domestic violence completely reshapes that legal landscape, as the appellate court made clear in this case.

The Monroe County Family Court had awarded the mother sole custody of the parties' five-year-old child and granted the father visitation rights. The order explicitly prohibited either parent from removing the child from Monroe County without a court order or the other parent's written consent.

Nonetheless, the mother relocated to Arizona, taking the parties' child with her, without informing the court or the father. A year later, after the father discovered the mother's new location, he filed for sole custody. The mother cross petitioned for retroactive permission to move out of state with the subject child.

In her testimony, the mother detailed years of brutal abuse and harassment at the hands of the father: choking her until she lost consciousness after she refused to have sex with him, breaking the tail lights on her car, kicking her front door to gain entry to her home, sending her hundreds of harassing messages on social media, and screaming obscenities at her in front of their child. After her fiancé discovered a threatening note in her car, fearing for her life, she decided to flee the state with the subject child.

The court found that the mother's testimony was corroborated by the maternal grandmother. In his testimony, the father issued a blanket denial of all domestic violence allegations, a claim the court found dubious. Subsequently, it denied the father's custody petition and granted the mother's cross petition for retroactive permission to relocate. The father appealed, and the appellate court affirmed.

When considering a parent's unilateral relocation of a child, the court must consider the parent's reasons for making that move. (*See Tropea v. Tropea*, 87 N.Y.2d 727 [1996].) In this case, the appellate court concluded that the mother was motivated to move "out of a legitimate

fear for her own safety," and not out of retaliation against the father or as part of some sinister effort to estrange the child from him.

The court took proper action in placing "considerable weight on the effect of domestic violence, particularly when a continuing pattern of domestic violence perpetrated by the child's father compels the mother [to move]." (*See Ramon R. v. Carmen L.*, 188 A.D.3d 545 [1st Dep't 2020].) Furthermore, "there is a sound and substantial basis in the record supporting the court's determination that "relocation would enhance [the child's] life economically, emotionally, and educationally" and that the child's relationship with the father could be preserved through his visitation rights.

### Child in Foster Care Returned to European Mother, in Accordance With Italian Court Order

**In re Francesco D.**, 195 A.D.3d 929 (2d Dep't 2021)

In 2004, an Italian mother gave birth to a baby boy. Nine years later, after ending her relationship with the child's American father, the Juvenile Court of Palermo, Italy, awarded her physical custody.

But after the child traveled to New York to spend time with his dad, the boy remained in New York in his father's care, until 2016, when ACS began a neglect investigation. That investigation revealed the father's addiction to drugs and concluded that his addiction had resulted in the boy's educational neglect. Soon after, the Richmond County Family Court removed the child from his father's custody and placed him in foster care, where he bounced from home to home.

In 2019, the mother filed the Italian custody order with the Family Court, which certified the Italian order. The court conducted an *in camera* interview with the child, now 15 years old, to determine his wishes, and it called for an investigation of the mother's new residence in London. After the residence was cleared by authorities, the court ruled that it was in the child's best interests to be returned to his mother's care.

The court terminated the child's placement in foster care, granted custody to the mother, and directed the Seamen's Society for Children and Families (a New York-based nonprofit) to coordinate with the Italian consulate to transport the child to England, to reunite him with his mom. The father, seeking to keep his son in New York, appealed the court order.

The appellate court affirmed, finding that the court below had a sound substantial basis in the record to return the child to his mother.