Recent Legislation, Cases and Trends in Matrimonial Law

By Wendy B. Samuelson

Recent Legislation

Virtual notarization is suspended, at least for now

Governor Cuomo has announced that New York's COVID-19 state of emergency expires June 24, 2021, and will not be renewed. The expiration of the state of emergency means that the governor will no longer be able to suspend and modify laws using executive orders.

Executive Order 202.110 allowed for remote notarization until July 5, 2021. It is not clear whether the end of the state of emergency means that the executive order authorizing remote authorizations is immediately terminated, or whether it cannot be extended beyond the date of July 5. Therefore, the best practice is not to virtually notarize any documents going forward.

While the Legislature passed legislation to make remote notarization permanent, that bill has not yet been sent to the Governor and is not yet law. Readers are advised to visit the Department of State's official notarization website (https://dos.ny.gov/notary-public) for the latest information.

Blue-ribbon commission seeks to reshape forensic custody evaluations

When parents battle for custody of their children, and accusations of abuse or domestic violence are raised, judges often turn to forensic custody evaluators to obtain a careful, unbiased view inside the family's home. But while these evaluators' reports can be pivotal to the courts' custody rulings, uncomfortable questions have lingered as to who these evaluators are and what training they have to identify abuse and assess children's best interests.

"Parents have reported experiences with forensic custody evaluators who have no comprehensive training about domestic violence, child abuse, or other issues that can be part of contested custody matters," said Melissa DeRosa, secretary to Governor Cuomo and chair of the New York State Council on Women and Girls, in a statement released by the governor's office. This lack of training and knowledge can "place children at risk of harm or even death," she said.

Spurred by these concerns, Governor Cuomo announced the formation of a blue-ribbon commission to reshape forensic custody evaluations, with an eye on standardizing how evaluators are chosen and what qualifications they must have. The commission, which began meeting in June, is composed of 20 esteemed judges, academics, family law attorneys, domestic violence advocates, and children's rights experts, and is co-chaired by Judge Sherry Klein Heitler, Sheila Poole of New York's Office of Children and Family Services, and Kelli Owens of the state's Office for the Prevention Domestic Violence. Owens said the commission has a sense of urgency and is determined to create a certification process for forensic evaluators and establish standards for their evaluations

Best interest of pets? Proposed bill would require courts to consider the issue during divorce

While court rulings in divorce and custody cases are driven by the best interests of the children, for families going through divorce, who will get the children isn't the only custody consideration—there's also the often-heated debate over who will get custody of the family pets.

The New York Legislature has now drafted a new bill to address this issue (Assembly Bill A5775/Senate Bill S4248), which would require courts to consider the best interests of the family pets when awarding custody of the animals in a divorce case.

The bill would expand DRL 236(B)(5)(d), which establishes equitable distribution factors, directing courts, when "awarding the possession of a companion animal,"

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to "consider the best interest of such animal. 'Companion animal,' as used in this subparagraph," the bill states, "shall have the same meaning" as Section 350(5) of New York's Agriculture and Markets Law (AGL). The AGL defines a "companion animal" as any dog or cat and any other domesticated animal normally maintained in or near the household of the owner, but not a farm animal.

In a recent press release, the American Academy of Matrimonial Lawyers (AAML) acknowledged the importance of fair and equitable determinations of pet custody. Nonetheless, the organization announced its fervid opposition to the bill.

"Requiring a court to engage in the same type of analysis and evidentiary proceeding with regard to pets would add an unnecessary and costly layer to [divorce] cases," delaying resolution and opening the "litigation floodgates into the underlying psychology" of the parties and their pets, the AAML wrote.

While I acknowledge the validity of the AAML's concerns, I believe the bill provides a commonsensical update to the DRL, essentially elevating pets' current legal status from mere property to the more modern view of pets as members of the family, while standardizing the court's currently haphazard approach to pet custody. (The NYSBA Family Law Section also opposes the proposed law and the author's opinion is her own.)

The bill has passed the State Assembly and Senate, and will now head to the Governor's desk for a signature or veto. Stay tuned.

Recent Cases of Interest

Custody/Visitation

Family Court grants custody of autistic child to mother's aunt, over father's objection

***Michael P. v. Joyce Q.*, 191 A.D.3d 1199 (3d Dep't 2021)**

Soon after Michael P.'s son was born, the child began displaying atypical behaviors. He communicated far less than other three-year-olds and displayed signs of a sensory disorder that made it difficult for him to touch objects or tolerate loud noises. When he'd get frustrated, the boy would process his vexation through self-abusive behavior, his special education teacher testified.

In May 2016, after the boy's mother defaulted, the Cortland County Family Court granted joint legal custody to the boy's father and his mother's aunt. The aunt was granted physical custody and the father visitation. A year later, the father filed to modify the custody order, demanding overnight stays and accusing the aunt of blocking significant visitation. The aunt, in return, filed her own modification petition, seeking sole legal and physical custody.

As a non-parent squaring off against a father, the aunt faced an arduous climb to custody. A parent's custody rights trump a non-parent's, unless she can prove surrender, abandonment, persistent neglect, unfitness, an extended disruption of custody, or other "extraordinary circumstances." (See *Bennett v. Jeffreys*, 40 N.Y.2d 543 [1976].) Even then, after a non-parent proves the existence of extraordinary circumstances, she must then convince the court that awarding her custody is in the child's best interests (*Donna SS. v. Amy TT.*, 149 A.D.3d at 1212).

The aunt here succeeded in both of those claims, exposing the father's refusal to accept his son's diagnosis, as well as his inability to name his son's medications. She also spotlighted the father's own mental health struggles, including an incident from seven years ago in which he was arrested for intentionally crashing into his ex-wife's car after catching her with another man.

Recognizing the strong bond between aunt and child, and the aunt's exceptional commitment to the boy, including her setting up a trampoline and a ball pit in her home for his play and installing locks on her cabinets for his safety, the court granted her full physical and legal custody.

The father appealed, and the appellate court affirmed, finding that the aunt has completely devoted her home to the subject child, while the father does not understand the scope of the child's autism diagnosis, and therefore, the child's best interests are served by the aunt.

Failure to appoint AFC requires rehearing

***Weilert v. Weilert*, 191 A.D.3d 788 (2d Dep't 2021)**

At the parties' divorce trial, the court awarded sole legal and residential custody of the parties' children to the father. Five years later, the mother filed a petition to modify the custody order to award her sole custody. The Family Court denied her petition, and the mother appealed.

While the appellate court declined to reverse the Family Court's custody order, it did embrace the mother's argument that the Family Court had improvidently exercised its discretion by ruling on her petition without appointing an attorney for her children.

Appointing an AFC in a highly contested custody case is "the strongly preferred practice," the appellate court declared, since the children have a "real and vital interest in the outcome and a voice that should be heard." (See *Newton v. McFarlane*, 174 A.D.3d 67, 75; FCA § 241.)

While it acknowledged that appointing an AFC is discretionary, not mandatory, the appellate court asserted that the Family Court should make the appointment any time that denying the children an in-court voice would create the "possibility of prejudice" to their rights. (See *Ambrose v. Ambrose*, 176 A.D.3d 1148.) To make this determination, the court should consider the ages of the children, the level

of antagonism between the parents, and the amount of disputed facts in the case. (See *Walter v. Walter*, 178 A.D.3d 991; *Anonymous 2011-1 v. Anonymous 2011-2*, 102 A.D.3d 640.)

Here the children, ages 12 to 16, were clearly old enough to express their own views about their parents' dispute and mature enough to lay out their own visions of the outcome that would serve them best. The children's parents also had a notably curdled relationship, leading each party to voice dramatically disparate accounts of the other's conduct. Therefore, the appellate court remanded the matter to the Family Court, directing that an AFC be appointed and the mother's custody petition be reheard.

The appellate court's ruling represented a remarkable statement about the central role of AFCs in custody cases, given that the mother did not raise her AFC objection while arguing before the Family Court, leaving the issue unpreserved for appeal. Yet, the appellate court declared that it was using its power to address the issue nonetheless "in the interest of justice."

Grandmother neglected grandson by leaving him unsupervised with his mentally ill father

Matter of Christian G. (Alexis G.), 192 A.D.3d 1027 (2d Dep't 2021)

The paternal grandmother knew her son was both unstable and uncommitted to remedying his mental health problems, and yet she allowed her son to care for the young boy without supervision. The mentally ill father had refused to take his medication as prescribed and was regularly smoking marijuana, which, his doctor warned, could worsen his condition. As a result of his failures of self-care, the father displayed overly aggressive behavior, which landed him in a psychiatric hospital twice within the two months before the neglect petition was filed.

The Family Court held that both caretakers had committed neglect, and Social Services placed the child in his paternal uncle's care. The father and grandmother appealed, and the appellate court affirmed.

The Family Court Act § 1046[b][i]) establishes that a custodian has committed neglect when "the child's physical, mental, or emotional condition had been impaired or was in imminent danger of becoming impaired as a result of the failure of a parent or other person legally responsible for the child's care." Leaving a child in such danger means the caretaker has failed to provide the "minimum degree of care," as outlined in FCA § 1046[b][i]; FCA § 1012[f][I]. By playing blind to her son's untreated illness and leaving her grandson unsupervised while in his father's care, the grandmother placed her grandson "at imminent risk of harm." As such, the Family Court correctly determined that she had committed neglect.

Agreements

While an action for a separation does not terminate the marital economic partnership, a postnuptial agreement may provide otherwise

Savignano v. Savignano, 194 A.D.3d 769 (2d Dep't 2021)

The parties signed a postnuptial agreement in which they agreed that upon divorce, the wife would receive monthly child support in accordance with the CSSA, based on the husband's income up to $300,000. The agreement also granted the wife a combined tax-free distributive award and maintenance of 10% of the husband's adjusted gross income from the date of the agreement's execution until a "separation event." In addition, if the wife had residential custody of the children, she could remain in the marital home for two years at the husband's expense.

The parties had three children, but their relationship ended in a disquieting collapse, leading the husband to secure a temporary order of protection and stay away order, excluding the wife from the marital residence. In 2013, the wife filed for separation, and in 2017 in an amended and supplemental verified answer and counterclaim, the husband counterclaimed for divorce.

Seeking additional funding from her husband, while at the same time confronting the limitations instituted by their postnuptial agreement, the wife argued that they had intended for the $300,000 of income demarcation to be a floor, not a ceiling, for their child support calculation. Likewise, she argued that she was entitled to 10% of her husband's adjusted gross income from the date of the postnuptial agreement's execution to the husband's 2018 filing for divorce rather than from her 2013 filing for a separation.

The court rejected both arguments, ruling that the $300,000 demarcation was clearly intended as a ceiling, not a floor, and that calculations for her 10% entitlement extended until her 2013 filing for separation, not the 2018 filing for divorce. The wife appealed, and the appellate court affirmed.

A postnuptial agreement is "a contract subject to ordinary principles of contract interpretation." As such, the appellate court ruled, the court's interpretation of the agreement is restricted to the plain and ordinary meaning of the document's language, when that language is "clear and unambiguous on its face." The intent of the parties "must be gleaned from within the four corners of the instrument." (See *Meccico v. Meccico*, 76 N.Y.2d 822, 824; *Rainbow v. Swisher*, 72 N.Y.2d 106, 109–110; *Rauso v. Rauso*, 73 A.D.3d 888, 889.)

The court conceded that the wife was correct that marital property terminates upon the commencement of a divorce action and not a separation action, and referenced the Court of Appeals' case, *Anglin v. Anglin*, 80 N.Y.2d 553 (1992), which held that a separation action is not a

matrimonial action within the meaning of DRL § 236(B)(1)(c), and the commencement of the separation action does not terminate the economic partnership nor the accrual of marital assets. However, in this case, the postnuptial agreement expressly defined the accrual of marital property as ending with a filing for separation. Therefore, the court below properly determined that the distributive award/maintenance should be calculated up until the commencement of the separation action.

Wife challenges prenuptial agreement she signed while pregnant

***Pia M. v. Mitchell M.*,71 Misc.3d 666 (Sup. Ct. N.Y. Co. 2021)**

At the time of signing a prenuptial agreement, one month prior to the parties' wedding, the fiancee-husband was a wealthy Manhattan businessman, whose net worth was approximately $30 million. The fiancee-wife was as an immigrant on a 90-day tourist visa, with no job and $24,000 of debt, who was four months pregnant with the husband's baby. Under the agreement, the wife waived maintenance, estate rights, legal fees, and equitable distribution of marital assets in exchange for $1.5 million, i.e., $100,000 for each year of marriage, capped at 15 years, as well as a home in the wife's home country, and the payment of her $20,000 school debt. The prenup provided that the parties would have joint custody of the future unborn children with the wife having residential custody, and the wife would be permitted to relocate to her home country with visitation rights to the husband. The husband's income was capped at $100,000 (when the CSSA provided for $80,000 cap) for child support purposes.

The wife's attorney advised the wife against signing the prenup. The wife claimed that the husband pressured her to sign the agreement as is, refused to pay the first attorney, and then picked another lawyer for her, with whom she only met with twice, and who made no substantial changes to the agreement. The husband claimed he had no control over the wife's choice of counsel. The wife felt that if she did not sign the agreement, she would not be married and would be forced to return to her family's home in Europe, unemployed, and forced to raise their child as a single mother, and that her innocent child would not be able to grow up near his or her father. She believed that she had absolutely no alternative but to sign the agreement "as is." The husband claims that there were negotiations and multiple edits to the agreement, and that she could have easily obtained a visa.

After 16 years of marriage, the wife commenced the divorce action and sought to vacate the prenuptial agreement based on fraud, duress and unconscionability. The husband cross-moved for summary judgment. The court denied both motions, and declared that there were material issues of fact that required a hearing, including but not limited to whether the wife had the benefit of independent counsel and whether it was the product of overreacching.

The court noted that child support and custody of unborn children cannot be the subject of a prenup and is void against public policy and/or subject to a court's best interest determination.

The court "cannot set aside the agreement here merely because the husband's repeated refusal to marry his then-pregnant fiancée without a prenuptial agreement might be viewed by some as callous." *Gottlieb v. Gottlieb*, 138 A.D.3d 30, 40–41, 25 N.Y.S.3d 90 [1st Dep't], *leave to appeal dismissed*, 27 N.Y.3d 1125, 36 N.Y.S.3d 880, 57 N.E.3d 73 [2016]. However, the wife raised a novel issue of whether her lack of legal immigration status absent marriage, combined with her pregnancy, created an additional factor of duress. In addition, the husband's failure to fully disclose his assets, alone, is insufficient to overturn a prenup.

The court required a hearing to determine whether the wife's waiver of maintenance, based on the grave disparity of income and assets, was fair and reasonable at the time of the execution of the prenup and at the time of the divorce action. At the time of the divorce, the wife earned approximately $82,000 and the husband earned approximately $780,000 or more. The parties lived an extravagant lifestyle. The court believed it was circumspect that the wife would be able to afford housing for her three children on child support alone.

Finally, the court requires testimony as to each party's respective net worth, because if the husband's net worth is anywhere from $30 million to $120 million, then the wife is only receiving approximately 1-5% of the husband's total net worth, and therefore, the terms of the agreement may be shocking enough to be unconscionable.

This decision is 25 pages long, and is a treasure trove of cited prenuptial agreement cases. So, while there is no final determination in this case, it serves the practitioner well as a springboard when deciding whether bringing an action to set aside the agreement is an appropriate strategy.

Equitable Distribution

Title controlled in equitable distribution of two-year marriage

***Turisse v. Turisse*, 194 A.D.3d 1090 (2d Dep't 2021)**

The parties were married for two years, and have a two year old child. After a trial, the court awarded the husband sole legal and physical custody of the child, child support commencing as of June 15, 2018 (despite that the divorce action commenced in 2014), and directed that each party shall be responsible for the unreimbursed medical expenses for the parties' child incurred by whichever party incurs the cost on behalf of the child, directed that each party shall retain any marital assets in their individual names, and awarded the husband attorney's fees of approximately $82,000. Both parties appealed the decision.

The judgment of divorce was modified in part and remanded in part. The court below properly distributed the marital assets based on title, as there is no requirement that the assets be equally divided. The award of sole custody to the father was also appropriately within the trial court's discretion, after a determination of the child's best interests.

The court below erred by granting the husband legal fees when he was the more monied spouse and had the ability to pay his own legal fees, whereas the award would cause the wife to exhaust all of her available resources. The court below also erred by failing to direct each party to pay their *pro rata* share of the child's unreimbursed medical expenses. In addition, the court below failed to order that the mother pay her *pro rata* share of child care expenses when the father is working, and that child support is retroactive to the commencement of the divorce action; therefore, the matter was remanded for the trial court to calculate the child support arrears, including child care arrears.

It should be noted that this case fails to state basic facts, including the respective income of the parties and the value of the assets that each party received.

Ex-wife did not intend to convey her 50% interest in real property to ex-husband

***Deckoff v. W. Manning Family L.P.*, 193 A.D.3d 812 (2d Dep't 2021)**

The Mannings purchased their marital residence in 1967. One year later, their marriage ended, marking the beginning of a twisty dispute over ownership of their home. The spouses owned the home as tenants in common, after their ownership as tenants by the entirety was extinguished by their divorce.

In an apparent effort to clarify their respective stakes in the marital residence, in a 1997 quitclaim deed, the wife conveyed to her husband all of her interest in his 50% interest in the marital home.

The wife died in 2009. Soon after, the husband used a second quitclaim deed to convey ownership of the home to the W. Manning Family Limited Partnership, of which he was a general partner. Soon after, the husband died.

The plaintiff, home buyer Deckoff, claimed that before the husband's death, the husband and the partnership signed a contract with him, conveying to him full ownership of the marital home. When the partnership refused to honor that contract, Deckoff sued, and the Mannings' five children intervened on the action, seeking to have Deckoff's motion dismissed.

The court granted the children's motion. Deckoff appealed, and after years of additional legal wrangling, the appellate court affirmed, rejecting the homebuyer's ownership claims. The court asserted that Deckoff's claim to the home was based on a purposeful misreading of the wife's 1997 quitclaim: She wasn't conveying *her* 50% ownership in the marital residence to her husband—she was conveying any ownership she may have had in *his* 50% ownership of the home.

The language of the quitclaim was unambiguous, the appellate court ruled, and as such, the wife retained her 50% ownership in the home. Thus, the husband's subsequent quitclaim deed with the family partnership could only convey his 50% ownership of the property, which in turn made the partnership's contract with Deckoff—apparently intended to convey full ownership—null and void because the partnership never possessed full ownership of the Manning home.