Recent Legislation, Decisions and Trends in Matrimonial Law

By Wendy B. Samuelson

Recent Legislation

22 N.Y.C.R.R. 202.50(b) amended to add NYCRR 202.50(b) (3), effective August 1, 2017

Administrative Order 100/17 amends 22 N.Y.C.R.R. 202.50(b) to add a new section 202.50(b)(3), requiring every uncontested and contested divorce judgment to contain certain decretal paragraphs, including one concerning the venue where post-judgment Supreme Court applications for modification or enforcement should be brought.

> ORDERED AND ADJUDGED, that the Settlement Agreement entered into between the parties on the day of , an original OR a transcript of which is on file with this Court and incorporated herein by reference, shall survive and not be merged in this judgment,* and the parties are hereby directed to comply with all legally enforceable terms and conditions of said agreement as if such terms or conditions were set forth in its entirety herein; and it is further
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> * In contested actions, this paragraph may read either [shall survive and shall not be merged into this judgment] or [shall not survive and shall be merged into this judgment].
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> ORDERED AND ADJUDGED, that the Supreme Court shall retain jurisdiction to hear any applications to enforce the provisions of said Settlement Agreement or to enforce or modify the provisions of this judgment, provided the court retains jurisdiction of the matter concurrently with the Family Court for the purpose of specially enforcing, such of the provisions of that (separation agreement) (stipulation agreement) as are capable of specific enforcement, to the extent permitted by law, and of modifying such judgment with respect to maintenance, support, custody or visitation to the extent permitted by law; or both; and it is further
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> ORDERED AND ADJUDGED, that any applications brought in Supreme Court to enforce the provisions of said Settlement Agreement or to enforce or modify the provisions of this judgment shall be brought in a County wherein one of the parties reside; provided that if there are minor children of the marriage, such applications shall be brought in a county wherein one of the parties or the child or children reside, except, in the discretion of the judge, for good cause. Good cause applications shall be made by motion or order to show cause. Where the address of either party and any child or children is unknown and not a matter of public record, or is subject to existing confidentiality order pursuant to DRL § 254 or FCA § 154-b, such applications may be brought in the county where the judgment was entered; and it is further

22 N.Y.C.R.R. 202 amended to add 202.16-b, effective July 1, 2017

Administrative Order 99/17, amends 22 N.Y.C.R.R. 202 to add a new section 202.16-b, addressing the submission of written applications for *pendente lite* relief in matrimonial actions for maintenance, child support, counsel fees, exclusive occupancy, custody and visitation.

An application for relief designated as an emergency without good cause may be punishable by sanctions.

All motion papers must be submitted on one-sided copy, have one inch margins on 8.5 x 11-inch paper with all additional exhibits tabbed, and be in Times New Ro-

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man font 12 and double-spaced. They must be in dark ink for ease of reading. Self-represented litigants may submit handwritten applications so long as they are legible.

Affidavits, attorney affirmations, and memorandum of law in support of a motion or in opposition to a motion shall each not exceed 20 pages. Expert affidavits shall not exceed 8 additional pages. (It's unclear if that means 8 pages or 28 pages.) Reply affidavits or affirmations shall not exceed 10 pages. Sur-reply affidavits can only be submitted with prior court permission. With respect to exhibits to motion papers, they must be tabbed and shall not exceed three inches of thickness, with the exception of the net worth statement, retainer agreement, maintenance guideline worksheet and/or child support worksheets, and counsel fee billing statements.

If the papers exceed the page or size limitations, counsel must certify in good faith the need to exceed such limitation, and the court may reject or require revision of the application if the reason is deemed insufficient.

22 NYCRR 202.21(l) and 202.50: Divorce packet for undefended divorce actions, effective March 1, 2017

Administrative Order 102/17 modifies the undefended divorce packet forms and reflects increases in the self-support reserve as of March 1, 2017 ($16,281) and the poverty level income for a single person ($12,060).

Military pensions: Section 641 of the National Defense Authorization Act (NDAA) of 2017

Section 641 of the National Defense Authorization Act (NDAA) of 2017, signed into law by President Obama on December 23, 2016, amends the definition of disposable pay in the Uniformed Services Former Spouses' Protection Act (USFSPA), 10 U.S.C. § 1408.

Under the new law, the former spouse's share of the retirement is "frozen" as of the date of dissolution, and cannot include any future promotions or longevity increases. As such, the traditional *Majauskas* formula will not be recognized for military pension distributions. The method that is now going to be the standard, has actually been around for some time, and was optional. It is just now that the military is making it mandatory.

The military member's disposable income is limited to "the amount of basic pay payable to the member for the member's pay grade and years of service at the time of the court order" and increased by the cost-of-living amounts granted to military retirees from the time of the divorce to the date the member retires.

In order to enable the Defense Finance and Accounting Service (DFAS), Garnishment Operations to calculate the "new" disposable retired pay amount, a court order entered after December 23, 2016,that provides for a division of military retirement pay **must** provide the following components.

If the member entered the service *before* September 8, 1980:

- A fixed amount, a percentage, a formula, or a hypothetical amount that the former spouse is awarded;
- The member's pay grade at the time of divorce;
- The member's years of creditable service at the time of divorce; or in the case of a reservist, the member's creditable reserve points at the time of divorce.

If the member entered military service *on or after* September 8, 1980:

- A fixed amount, a percentage, a formula or a hypothetical that the former spouse is awarded;
- The member's high-3 amount at the time of divorce (the actual dollar figure);
- The member's years of creditable service at the time of divorce; or in the case of reservist, the member's creditable reserve points at the time of divorce.

Special thanks to Thomas Treacy of QDRO Advisors, Inc. (www. qdroadvisors.us) for his assistance in this military pension section.

Child Support

Credits for overpayment of child support against child support add-ons

McGovern v. McGovern, 148 A.D.3d 900 (2d Dep't 2017)

The parties executed a stipulation requiring the father to pay the mother child support for their two children, up until one of the children began attending college, at which time the support obligation would be reduced. The stipulation also required the father to pay 60% of the children's college expenses, and allowed him to deduct room and board payments from his child support obligations.

The father made significant child support overpayments after his eldest child started college in 2011. So in 2014, the father filed a petition seeking a downward modification of his child support payments and requested an overpayment credit on the grounds that the Support Collection Unit failed to reduce his payments, after his child started college in 2011.

The mother then filed a cross-petition to enforce the stipulation and alleged that the father failed to pay his 60% payment toward the children's college expenses. The Support Magistrate denied the mother's cross-petition, downwardly modified the father's child support obligation, and credited him for past support overpayments.

The mother objected to the Support Magistrate's order, which was denied by the Family Court, and thereafter, the mother appealed. The Appellate Division reversed,

to show a sound and substantial basis that the requested move will be in the children's best interest and outweigh the father's ability to foster a close relationship with the children.

Modification of custody where there were false allegations of sexual abuse

***In re Oscar S. v Joyesha J.*, 149 A.D.3d 139 (1st Dep't 2017)**

The father petitioned for a modification of custody of the parties' four children. The Family Court granted the father sole legal and physical custody of the children and visitation to the mother. The mother appealed. The evidence adduced at the hearing was that the mother purposefully tried to disrupt the children's relationship and contact with the father by making repeated false sexual abuse allegation against him, and often failing to produce the children for visitation. The father was best able to foster a good relationship between the children and the mother, and was therefore properly awarded custody. However, the matter was remanded back to Family Court for an order addressing the process of the transfer of custody to the father and to conduct a hearing regarding whether it is still in the oldest child's best interest for custody to be transferred to the father in light of new issues raised by the child's attorney on appeal.

Equitable Distribution

The appreciation of separate property life insurance policies paid with marital funds deemed marital property

***Seale v. Seale*, 149 A.D.3d 1164 (3d Dep't 2017)**

The parties were married for eight years, and have two children ages 3 and 7. The husband owned a car wash business prior to the marriage. During the marriage, he transferred his 50% interest in the business to his business partner in exchange for other businesses. The court below did not err in concluding that the property that the husband took title to during marriage was separate property because he received it in exchange for separate property. Pursuant to DRL § 236[B][1][d][3], separate property includes property acquired in exchange for separate property. In addition, the wife's valuation expert lacked credibility, and she was unable to prove that the husband's separate property business appreciated in value during the marriage.

The trial court erred in concluding that all of the insurance policies purchased by the husband were entirely his separate property due to the fact that he took out the polices prior to the marriage or, for policies taken out after the marriage, in exchange for his separate property. Where a life insurance policy appreciated in value and the husband used marital income to pay the premiums, the wife should have been awarded a share of the life insurance policy. At bar, the appellate court awarded the entire amount of the appreciation to the wife.

The court below properly imputed $173,000 of income to the husband and $50,000 of income to the wife. For purposes of the husband's income, the court discredited the parties' experts and relied on the tax returns from 2002-2011, the parties' net worth statements, and the husband's credit applications, and the husband's testimony. With respect to the wife's income, the wife had a master's degree in reading and had taught at various times prior to and during the marriage, earning between $45,000–$50,000. At trial, she was only a substitute teacher. The court found her testimony that she would be unable to become employed again as a teacher incredible.

Marital debt equally divided despite some funds that were used to finance the husband's medical practice, which was his separate property

***Marin v. Marin*, 148 A.D.3d 1132 (2d Dep't 2017)**

The parties were married for 19 years and have two children, ages 12 and 16. The plaintiff wife was the primary caretaker of the children, and the defendant husband owned a medical practice, and was the sole source of financial support for the family.

The Supreme Court imputed income to the husband of $350,000 and thereafter awarded the wife maintenance of $3,500 per month for two years, child support of $4,362.46 per month, declined to direct the husband to pay for the children's college expenses, declined to award the wife *pendente lite* support arrears, and declined to award the wife counsel fees.

The wife appealed. The Second Department modified the order of maintenance to $5,000 per month until the emancipation of the parties' second child, and then $7,000 per month, to terminate in seven years after the marital home is sold. In addition, it reversed the denial of counsel fees, and awarded the wife $118,000 in counsel fees, which was one-half of her total fees.

The wife disputed the husband's income, and claimed that the court should have imputed income to him of more than $350,000. However, his 2007-2011 tax returns showed a declining income, with the highest amount earned to be approximately $336,000. The court found the husband's testimony credible that his income declined as a result of managed care. However, the court properly imputed additional income to the husband based on substantial cash income.

The lower court did not abuse its discretion in allocating debt equally between the parties, despite the fact that some funds were used to finance the husband's medical practice, which was his separate property. Even though the funds were used to benefit the husband's medical practice, the medical practice was the sole source of income in supporting the family, so the court determined

and remitted the matter to the Family Court to determine the amount of child support arrears.

There is a strong public policy against restitution or recoupment of the overpayment of child support payments, and repayment is only appropriate under limited circumstances. Here, the father failed to set forth a sufficient basis for the exception to the rule. However, even though child support overpayments may not be recovered by reducing future basic child support payments, public policy in New York does not forbid offsetting add-on expenses against an overpayment, including educational expenses. Therefore, the father is permitted to reduce his share of the college expenses against the overpayment of basic child support.

Imputation of income

***Gao v. Ming Min Fan*, 148 A.D.3d 897 (2d Dep't 2017)**

The mother filed a petition for child support against the father for the parties' child. The Support Magistrate ordered the father to pay child support in the amount of $888 per month based on his imputed annual income of $70,000. Thereafter the father filed objections to the Support Magistrate's order, which the Family Court denied.

The Appellate Division affirmed, and reasoned that since the father purposely reduced his income in order to reduce his child support obligation, it was appropriate for the Support Magistrate to impute income to him based on his past employment income and rental income.

Custody and Visitation

Step-grandfather lacks standing under grandparent visitation statute

***B.S. v. B.T.*, 148 A.D.3d 1029 (2d Dep't 2017)**

The paternal grandmother and paternal step-grandfather commenced an Article 6 Family Court Act proceeding for visitation with their grandchild. After a hearing, the court granted visitation to the grandmother and step-grandfather. The mother appealed.

The Appellate Division determined that the step-grandfather's petition should have been dismissed since he lacked standing pursuant to DRL § 72, due to lack of biological or legal ties to the child. However, Supreme Court properly held that the grandmother had standing to seek visitation under equitable circumstances, since she had an ongoing affectionate relationship with her grandchild (despite having an acrimonious relationship with the mother). Moreover, since the father unexpectedly died during the proceeding, the grandmother acquired automatic standing. Although the grandmother and mother had an acrimonious relationship, this did not affect the grandmother's right to visitation. However, the visitation schedule was modified to conform to the child's best interests such as requiring the grandmother to provide transportation for the child during all court-ordered visitation periods and adjustments were further made to the timing and frequency of the schedule.

Family Court did not lack subject matter jurisdiction where newborn child never lived in New York

***In re Milani X.*,149 A.D.3d 1225 (3d Dep't 2017)**

The mother, a New York resident, gave birth to her daughter in a Pennsylvania hospital. Social Services commenced a neglect proceeding based on allegations that the mother abused drugs during her pregnancy and the child was hospitalized for withdrawal symptoms. The mother moved to dismiss based on lack of subject matter jurisdiction on the grounds that the child had never lived in New York, which was denied.

The Appellate Division affirmed on the grounds that subject matter jurisdiction does not depend on where the neglect takes place but rather upon satisfying the standards set forth in the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), i.e., determining the child's home state. When the child is less than six months old, the state where the child lived from birth with a parent is the home state. Since the child did not have the opportunity to live with her parents, the child has no home state.

Where a child lacks a home state when a neglect proceeding is commenced, the alternative UCCJEA basis governs, DRL 76(1)(b), which requires that the child and the child's parent have a significant connection with the state and there is substantial evidence available in the state relating to the child's care, protection, training and personal relationships. Here, the child's father has significant connections to New York, CPS in New York became involved with this case after the child was hospitalized, and the child has relatives who are able to take care of her in New York. Therefore, New York has subject matter jurisdiction over the matter.

Father equitably estopped from contesting paternity

***Aranessa L. v. Isaac C.*, 148 A.D.3d 609 (1st Dep't 2017)**

The Family Court properly concluded that it was within the best interests of the child for the putative father to be equitably estopped from obtaining DNA testing and denying paternity where he led the child to believe, for the past 15 years, that he was her biological father.

Relocation from Floral Park to East Hampton denied

***DeFilippis v. DeFilippis*, 146 A.D.3d 750 (2d Dep't 2017)**

While the divorce action was pending, the wife sought to relocate from Floral Park to East Hampton. The husband opposed, claiming that if the children moved so far away, he would be unable to remain involved in their daily lives, school, or extracurricular activities, and he would only be able to see them on the weekends. The court below granted the wife's motion, and the husband appealed. The Second Department reversed, stating that the wife failed

that the debt was not incurred for the sole benefit of the husband.

This case was brought before the maintenance guideline statute came into law, and therefore, maintenance is governed by the statutory factors rather than a formula. The Appellate Division held that the maintenance award was inadequate in amount and time since the parties were married for almost 20 years, the wife was a housewife and the primary caretaker for the children, and the wife had a limited employment history and education level.

The court below did not err in failing to direct the husband to pay for a portion of the children's future college expenses where the parties had already set aside a substantial amount of funds to pay for college. With respect to the parties' younger child, the issue of college was premature.

Invoices of art purchases, standing alone, are not evidence of ownership

***Anonymous v. Anonymous*, 150 A.D.3d 91 (1st Dep't 2017)**

In this divorce action, the husband claimed separate ownership of tens of millions of dollars' worth of art, while the wife claimed the art was jointly owned. The wife also claimed to separately own four specified works of art purportedly worth a total of approximately $22 million. The parties' prenuptial agreement does not instruct how the parties' artwork is to be divided; rather, it states that any property owned on the date of execution of the prenuptial agreement or thereafter acquired by one party remains that party's separate property. A property acquired in the parties' joint names shall be the parties' marital property.

During the marriage, the parties agreed to acquire certain art as a joint collection. The wife claims that this art was jointly held. The husband claims that there was no blanket agreement that all pieces from those vendors would be considered marital property. Rather, he states that he relied on the prenuptial agreement and purchased certain works solely in his name when he wanted them to remain his separate property. The husband moved for a declaratory judgment that the title to the artwork as listed on the invoices determines whether the art is marital or separate property.

The motion court relied on the invoices as proof of whether the art was jointly or individually held. The First Department reversed, and concluded that invoices, standing alone, may not be regarded as evidence of title or ownership of the art. While the invoice may be indicative of the price paid, it is not necessarily indicative of the actual owner. For example, two people may purchase the art, but only one person may be listed on the invoice. In determining title to artwork in question, all facts and circumstances of acquisition must also be considered. The matter was remitted to the Supreme Court for further proceedings, including discovery and an evidentiary hearing to determine ownership of the disputed art.

Legal Representation

Party lacked authority to retain counsel where guardian *ad litem* appointed

***Yerushalmi v. Yerushalmi*, 149 A.D.3d 793 (2d Dep't 2017)**

During a divorce action and prior to the completion of the continued hearing on the husband's motion to terminate his temporary maintenance obligation, the husband suffered a stroke. When he appeared *pro se* for the continuation of the hearing, the Supreme Court determined that he was no longer competent, and directed the appointment of a guardian *ad litem*. Three days later, the husband retained counsel to represent him.

The wife moved to disqualify counsel and for a release of funds from escrow. The lower court's denial of the wife's motion was error. Once a guardian *ad litem* is appointed for a party, only the guardian *ad litem* can retain counsel, and therefore the husband did not have authority to retain counsel. In addition, it was error not to release $133,000 from escrow since the release was necessary to pay capital gains taxes on the sale of the marital home.