Recent Legislation, Cases and Trends in Matrimonial Law

By Wendy B. Samuelson

Recent Legislation

Appellate Divisions Enact New Statewide Practice Rules

On June 29, 2018 and effective September 17, 2018, all four Appellate Departments enacted revised Practice Rules set forth at 22 N.Y.C.R.R. Part 1250. The new Rules will be applicable statewide and include cases in which a Notice of Appeal was already filed so that all pending appellate matters are governed by the Rules unless it can be shown that application of the new Rules will be manifestly unjust, impracticable or substantially prejudicial. Local Rules of each Appellate Department are also amended as of September 17, 2018 and will remain to supplement and be read in conjunction with the Statewide Rules. Notably, each set of Local Rules provides that in the event of a conflict with the Statewide Rules, the Local Rules will control when practicing within each Department.

E-Filing Now Mandatory in Second Department's Westchester and Suffolk Counties

On March 1, 2018, the Second Department began requiring e-filing of all appeals through the New York State Courts Electronic Filing (NYSCEF) system for all matters originating in Supreme and Surrogate Courts in Westchester County.

On July 2, 2018, Suffolk County followed suit, as the Second Department expanded mandatory e-filing to include all appeals of matters originating or electronically filed in Supreme and Surrogate's Courts in Suffolk County. E-filing is required in appeals where (1) the notice of appeal is dated on or after July 2, 2018, and (2) the notice of appeal is dated prior to July 2, 2018, and the appeal is perfected on or after August 15, 2018.

Practitioners with questions about the Second Department's new e-filing regulations can call the clerk's office at (718) 722-6324 or e-mail AD2-ClerksOffice@nycourts.gov. If you have a technical question about e-filing, contact the NYSCEF Resource Center at (646) 386-3033 or e-mail efile@nycourts.gov.

22 N.Y.C.R.R. § 202.50(b) Amended, Effective May 31, 2018

22 N.Y.C.R.R. § 202.50(b) has been amended, and now requires that the following provision be included in all divorce judgments:

> ORDERED AND ADJUDGED that pursuant to the parties' Settlement Agreement dated_____ (OR the court's decision after trial), all parties shall duly execute all documents necessary to formally transfer title to real estate or co-op shares to the Plaintiff (OR Defendant) as set forth in the parties' Settlement Agreement (OR the court's decision after trial), including, without limitation, an appropriate deed or other conveyance of title, and all other forms necessary to record such deed or other title documents (including the satisfaction or refinance of any mortgage if necessary) to convey ownership of the marital residence located at _____, no later than _____; (OR Not applicable); and it is further

Recent Cases

Assignment of Counsel When Deciding Whether Party Is Eligible For Court-Appointed Representation, Court Must Not Impute Income to a Party

***Carney v. Carney*, 160 A.D.3d 218 (4th Dep't 2018)**

The divorced father brought an application to modify the order of supervised visitation to unsupervised. While in Family Court, the indigent father was provided with a court-appointed attorney. Two months later, the mother moved the case back to Supreme Court by an order to show cause, requesting that the court declare the father in contempt for violating court orders, incarcerate him, and

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eliminate his rights of visitation and communication with the children.

The father, a Ph.D. student with almost no income except for a few tutoring jobs, who had been living with his parents for 6.5 years, requested court-appointed counsel. The Supreme Court rejected his request, citing the father's "high level of skills" and the requirement that parties be "unable to retain counsel." The court reasoned that inability to retain counsel means "incapable" of earning the funds necessary to retain counsel, and a party with a Ph.D. was clearly capable of earning the required funds. Despite an assertion by the public defender's office that the father was eligible for assigned counsel, the court ordered a hearing to determine his eligibility, imputed $50,000 in income to the father, and declared him ineligible.

The appellate court reversed, ruling that the lower court abused its discretion in directing a hearing on the appellant's imputed income. The court ruled that "unable," refers to a party's current ability to pay for counsel, not a party's capability to earn the necessary funds. The appellate court noted the broad protections provided by the FCA, given that parties involved in certain family court proceedings "may face the infringements of fundamental interests and rights, including the loss of a child's society and the possibility of criminal charges, and therefore have a constitutional right to counsel in such proceedings." FCA § 261; *Bly v. Hoffman*, 114 A.D.3d 1275 (4th Dep't 2014). The court noted that unlike child support and maintenance statutes, where the court may consider imputing income to a parent or spouse, FCA 262(a) is silent on the issue of imputation of income, and therefore the legislature did not intend for the court to consider this factor. Therefore, the appellant was assigned counsel, and the case was remanded to a new Supreme Court judge.

Custody and Visitation

Fact-Finding Hearings Are Not Required in Contested Custody Cases When Extraordinary Circumstances Exist

Strobel v. Danielson, 159 A.D.3d 1287 (3d Dep't 2018)

After the father assaulted and fatally injured the mother, as their child watched, the maternal grandmother filed a petition for sole custody. Soon after, the paternal aunt filed a cross-petition for custody. Family Court awarded the grandmother temporary custody. After a home study of the aunt's residence was completed, the court awarded the aunt visitation. The father was then convicted and incarcerated for the mother's murder. Family Court, on consent of the grandmother and aunt, granted the grandmother sole custody and awarded visitation to the aunt.

Because the court did not hold a fact-finding hearing before making its ruling, the father contended that his due process rights had been violated. The appellate court rejected the argument, noting that while fact-finding hearings are "generally necessary" to determine contested custody, the right to such hearing is "not absolute." Under extraordinary circumstances, the court can submit a final custody ruling without conducting a fact-finding hearing. Here, the fact that the father was convicted for the murder of the child's mother was sufficient to establish extraordinary circumstances.

The appellate court noted that the Family Court should have obtained the father's consent before approving the parties' custody stipulation, but ruled that its failure to do so was harmless error.

Equitable Estoppel Prevents DNA Testing in Paternity Claim

Bernard S. v. Vanessa A.F., 160 A.D.3d 750 (2d Dep't 2018)

In April 2005, when Vanessa F. gave birth, no father was listed on the child's birth certificate. More than eight years later, Michael S. commenced a paternity proceeding against the mother to establish his paternity of the child, despite knowing immediately after the birth of the child that he may be the child's father. Soon after, a second man, Bernard S., asserted paternity and commenced a paternity proceeding. Bernard moved for leave to intervene on Michael's proceeding, seeking to equitably estop Michael's paternity petition and have his custody and visitation petition dismissed for lack of standing. Vanessa and the child's attorney supported Bernard's motion to dismiss Michael's petitions.

The boy had been raised by Bernard and Vanessa, and the child was held out publicly as Bernard's son. Evidence established that the boy had always lived with Bernard, even when Vanessa did not, that Bernard had been the boy's sole financial support, and that they had a strong father-son bond.

Michael, by contrast, was aware of Vanessa's pregnancy and knew that he might be the boy's biological father. Michael also knew that the child was being publicly presented as Bernard's son. Yet Michael waited more than eight years to file a paternity petition.

The Family Court held a hearing on the issue of equitable estoppel and whether genetic testing for paternity would serve the best interests of the child. The court ruled that genetic testing was not in the child's best interests, denied Michael's petitions, and dismissed his proceedings. Michael appealed, and the appellate court affirmed.

While parties in a paternity proceeding generally have the right to a DNA test, the Family Court can deny such a test by equitable estoppel. See FCA § 532[a]. The court can justifiably apply estoppel to preclude a man who claims to be a child's biological father from asserting

his paternity when he acquiesced in the establishment of a strong parent-child bond between the child and another man. Here the Family Court ruled that the child's best interests were served by denying a DNA test and equitably estopping Michael from asserting his paternity claim. The appellate court agreed and denied Michael's appeal.

Parties' Frozen Embryo Agreement Must Be Strictly Construed

Finkelstein v. Finkelstein, 162 A.D. 3d 401 (1st Dep't 2018)

The parties were married in 2011, and shortly thereafter signed a Consent Agreement in the hopes of conceiving a child by artificial insemination. A section of the Consent Agreement states that consent remains in effect unless one of the parties withdraws their consent. After many ongoing, unsuccessful attempts at IVF, the husband filed for divorce and asked for custody of the one remaining embryo. He then acquired a temporary restraining order against the wife to ensure that she could not use the last embryo, which relief was denied. The husband then signed a revocation of his consent to the use of any of his genetic material. The Supreme Court referred the matter to a special referee to determine equitable distribution of the embryo. The special referee awarded the embryo to the wife, reasoning that it was her last chance at becoming a biological parent. The special referee also stated that the husband had no right to revoke consent.

On appeal, the First Department reversed. The special referee interpreted the Consent Agreement contradictory to its plain meaning. The Consent Agreement stated that participation is voluntary and can be revoked at any time. It also stated that the court does not have authority to decide ownership of the embryo in the event of divorce. Since one party has withdrawn consent, the other party may not use the embryo for any purpose. Therefore, the appellate court awarded the embryo to the husband for the sole purpose of destroying it.

Child Support

Failure to Pay Child Support Does Not, in Itself, Amount to Willful Disregard of a Court Order

Lisa D. Mosher v. Jody L. Woodcock, 160 A.D.3d 1085 (3d Dep't 2018)

A Family Court order required the father to pay the mother $277/week in child support. He failed to do so and was in arrears of $20,000. In 2017, following a hearing, the court found that the father's failure to abide by the order was willful and ordered him incarcerated for four days or until he paid $20,000, whichever occurs first. The father appealed, and the appellate court reversed.

The father lost his job due to his injury, where he suffered two strokes, which compromised both his memory and his ability to conduct heavy lifting. The father presented medical evidence to document his significant injuries and his total disability. He was receiving Social Security disability, food stamps, and government assistance to pay his heat.

While failure to pay child support constitutes *prima facie* evidence of willful violation pursuant to FCA § 454[3](a), the non-complying party must be given the opportunity to present evidence that he was unable to pay. At the hearing, the Family Court gave the father the opportunity to introduce evidence of his physical incapacity, but the court's ruling made no mention of the father's claims of physical incapacity, and focused entirely on his failure to pay. Consequently, the appellate court concluded that the lower court did not properly consider the incapacity claim. The appellate court reversed the Family Court's commitment order and remitted the case back to the lower court to fully address the father's incapacity claim.

In Altering Out-of-State Child Support Orders, FFCCSOA Preempts UIFSA

Reynolds v. Evans, 159 A.D.3d 1562 (4th Dep't 2018)

The parties lived in New Jersey, had a child, then split up. The New Jersey court issued a child support order. Thereafter, the mother and child moved to Tennessee, and the father moved to New York. For enforcement, the New Jersey child support order was registered in New York. Several years later, the father filed a petition in New York for a downward modification of his child support obligation.

The Family Court dismissed his petition for lack of subject matter jurisdiction.

The Fourth Department reversed and remanded. The Family Court erred in dismissing the father's petition on jurisdictional grounds. The appellate court conceded that the father could not seek a modification of the New Jersey order under the Uniform Interstate Family Support Act (UIFSA), adopted in New York as FCA § 5B. Under UIFSA, the order must be registered in the state where the petition is filed and three additional conditions must be fulfilled: "(I) neither the child, nor the obligee nor the obligor resides in the issuing state; (ii) a petitioner who is a nonresident of this state seeks modification; and (iii) the respondent is subject to the personal jurisdiction of the tribunal of this state" (FCA § 5B [580–611]). Here, the order was registered in New York, and neither the child nor the obligee (father) nor the obligor (mother) resided in the issuing state of New Jersey, but the petitioner (father) was a resident of the state in which he was seeking modification (New York), and the respondent (mother) was not subject to the personal jurisdiction of New York.

The appellate court ruled that a petition that is permissible under the federal Full Faith and Credit for Child Support Orders Act (FFCCSOA) even if the petition is impermissible under the strict requirements laid out in the state's UIFSA. Under this federal statute, a New York

court can modify an out-of-state child support order if "the court has jurisdiction to make such a child support order" and "the court of the other State no longer has continuing, exclusive jurisdiction of the child support order because that State no longer is the child's State or the residence of any individual contestant" (28 U.S.C. § 1738B [e][1], [2][A]).

The father's petition is permissible under the FFCCSOA, given that neither the parties nor the child live in the issuing state of New Jersey, and therefore New Jersey does not have continuing, exclusive jurisdiction over the order.

15% Decrease in Income Does Not Guarantee Success in Petition for Support Modification

***Valverde v. Owens*, 160 A.D.3d 873 (2d Dep't 2018)**

The Family Court directed the father to pay $1,000/month in child support for the parties' two children. He failed to do so, and the mother filed a petition claiming willful violation. The father, in turn, filed a petition seeking a downward modification of his child support obligation. Following a hearing, the Family Court denied the father's petition for downward modification and ruled that he had willfully violated the court's order. The father appealed, and the appellate court affirmed.

FCA § 451(3)(a) gives the Family Court the power to decrease a parent's child support obligation upon a showing of a "substantial change in circumstances," and FCA § 451[3][b][ii] specifies that "a change in either party's gross income by fifteen percent or more since the order was entered, last modified, or adjusted" can constitute a "substantial change." However, to qualify as an actionable "substantial change" worthy of a downward modification, the drop in income must be "involuntary," and the party must have made "diligent attempts to secure employment commensurate with his or her education, ability, and experience." FCA 451(3)(B)(ii).

Here, while the father's income may have declined and the decline may have been involuntary, the father failed to show that he had made diligent attempts to secure employment commensurate with his education, ability, and experience. Consequently, the Family Court properly denied the father's petition for downward modification.

Equitable Distribution

Wife's Stock Remained Her Separate Property, Despite Withdrawal of Funds to Pay Marital Expenses

***Giannuzzi v. Kearney*, 160 A.D.3d 1079 (3d Dep't 2018)**

Before the couple married, the wife inherited over $1 million in IBM stock from her grandfather. The husband argued that her stock, originally separate property, was transmuted into marital property because the couple filed joint tax returns and sold portions of the stock to pay for marital expenses. While the Supreme Court acknowledged that transmutation of separate property is possible, the court ruled that transmutation does not occur simply because the couple filed joint tax returns or because the spouses sold stock to pay for marital expenses.

The appellate court affirmed. The "mere reporting of income earned from the separate assets of one spouse on a joint return does not transmute the separate property to marital property." On a joint return, both spouses are required to report all of their income, whatever the source. The court reasoned that ruling that joint filing transmutes separate property "would force married persons to file separate income tax returns, and to pay higher income taxes, simply to protect the non-marital status of their separate property." *Id.* at 1081. The court distinguished income reported as dividends and/or capital gains from ordinary income reported from the sale of corporate stock, stating that even if corporate stock was separate property, once sold and reported as ordinary income, it would be considered marital property.

Likewise, using funds withdrawn from an account that is separate property to pay marital expenses does not magically morph the account into marital property. The wife's IBM stock remained separate property, even if withdrawals were made for marital expenses.

On another issue, the wife argued that the husband engaged in wasteful dissipation via the unauthorized sale of stock. The husband countered that the stock sales were merely an effort to diversify the portfolio, and each sale was done with the wife's knowledge. Here the Supreme Court found incredible the wife's claim that she was unaware of the stock sales not to be credible/incredible, and the appellate court deferred to the lower court's assessment.