Recent Legislation, Decisions and Trends in Matrimonial Law

By Wendy B. Samuelson

Same-Sex Marriage Update

June 2014 marked the one-year anniversary of the landmark Supreme Court decision of *United States v. Windsor*, 133 S. Ct. 2675 (2013), which struck down the core of the federal Defense of Marriage Act (DOMA) and held that married same-sex couples are eligible for federal benefits, but stopped short of endorsing a fundamental right for same-sex couples to marry. There is grave legal uncertainty and chaos for same-sex married couples who move to states that don't respect their marriage, while the federal government does. Since *Windsor*, same-sex marriage litigation has exploded in dozens of states.

I have been following the steady increase of states that allow same-sex marriage. We now have 37 states that permit gay marriage, including, in alphabetical order: Alabama, Alaska, Arizona, California, Colorado, Connecticut, Delaware, Florida, Hawaii, Idaho, Iowa, Illinois, Indiana, Kansas, Maine, Maryland, Massachusetts, Minnesota, Montana, North Carolina, New Hampshire, New Jersey, New Mexico, Nevada, New York, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, Utah, Virginia, Vermont, Washington, West Virginia, Wisconsin, and Wyoming, plus Washington, D.C. Additionally, based on a pro-marriage ruling that is currently on appeal, same-sex couples can marry in some counties in Missouri and Missouri will recognize out-of-state same-sex marriages.

On January 16, 2015, the U.S. Supreme Court agreed to take on a historic constitutional challenge with wide cultural impact by agreeing to hear four new cases on same-sex marriage from four states—Kentucky, Michigan, Ohio and Tennessee. After oral arguments on April 28, 2015, the Supreme Court will rule on the power of the states to ban same-sex marriages and refuse to recognize such marriages performed in other states. A final ruling is expected in late June of 2015. A positive outcome will mean that gay marriage will be permitted nationwide.

The following countries permit same-sex marriage: Argentina, Belgium, Brazil, Canada, Denmark, Finland, France, Iceland, Luxembourg, Netherlands, New Zealand, Norway, Portugal, Spain, South Africa, Sweden, United Kingdom, Uruguay, and Mexico City, Mexico. In Slovenia, Parliament approved a marriage bill in early March 2015, which will permit same-sex couples to marry and adopt children.

Recent Legislation

As a reminder, as of January 31, 2014, the combined parental income to be used for purposes of the CSSA changed from $136,000 to $141,000 in accordance with Social Services Law § 111-i(2)(b), and in consideration of the Consumer Price Index. Agreements should reflect the new amounts. The CSSA chart for unrepresented parties will change to reflect that amount as well. In addition, the threshold amount for temporary maintenance is now $543,000, rather than $524,000. The self-support reserve is now $15,512.

My last column reported new legislation through December, 2014. Since then, no new legislation has been passed in the Domestic Relations Law or Family Court Act. However, there have been some new CPLR amendments.

Civil Practice Law and Rules § 3216(a) and (b)(2)-(3) amended, effective January 1, 2015: Want of Prosecution

Section 3216(a) of the Civil Practice Law and Rules was amended to require that the court shall provide notice to the parties upon dismissing a party's pleadings *sua sponte* or on motion as a result of that party's unreasonable delay in the prosecution of an action. In addition, section 5241(b)(2) was amended to specify that no dismissal shall be directed, unless, among other things, one year has elapsed since the joinder of issue or six months has elapsed since the issuance of the preliminary court conference order, whichever is later. Lastly, subsection (3) of section 5241(b) was amended to include that where written demand to resume prosecution is served by the court (as opposed to a party to the action), the demand must state the specific conduct that constituted neglect and such conduct must evidence a general pattern of delay.

Civil Practice Law and Rules § 2106 amended, effective January 1, 2015: Affirmation of Truth of Statement

Section 2106 of the Civil Practice Law and Rules was amended by adding a subdivision (b), which provides that the statement of any person physically located outside of the United States, Puerto Rico, the United States Virgin Islands, or any territory subject to the jurisdiction of the United States, which is subscribed and affirmed by that person to be true under the penalties of perjury, may be used in an action in lieu of an affidavit.

Cases of Interest

Support

Imputation of income based on lifestyle

Weitzner v. Weitzner, 120 AD3d 1406 (2d Dept. 2014)

The wife, who had custody of the parties' five children (ranging in age from 3-16), was properly awarded $3,530 per month in temporary child support, $4,604 per month in temporary maintenance, and the husband's pro rata share of the child's playgroup expenses. The trial court imputed $200,000 in income to the husband because the parties' marital lifestyle far exceeded the amount of income reported on the husband's income tax returns. In addition, the court imputed to the wife, who had not worked throughout the marriage, the equivalent of a ten-hour work week as an accountant. The court found that playgroup expenses were in the nature of school expenses, especially where the husband was paying the child's pre-school and playgroup expenses prior to the commencement of the action. Based on the large disparity in the parties' respective incomes, the court below properly awarded $30,000 in interim counsel fees to the wife.

Imputation of income based on parental gifts

G.R.P. v. L.B.P., No. 2011-08834 (Sup. Ct., Monroe County Dec. 15, 2014)

Following the court's award of child support and spousal maintenance, which imputed a significant sum of income to the husband based on annual gifts from the husband's parents, the husband sought termination of his maintenance obligation, downward modification of his child support obligation, and reimbursement from the wife for her 25% *pro rata* share of the children's health insurance costs and unreimbursed medical expenses.

The husband alleged, *inter alia*, that in the three years since the court's initial review of the husband's income, he has not received any gifts from his parents, his current income represents his true earning capacity, and the payment of child support and maintenance have depleted his retirement accounts and accumulated wealth. The wife's attorney, opposing the husband's application and noting the substantial costs of this matrimonial action, sought permission to withdraw as the wife's counsel, or alternatively, an award of counsel fees.

The court determined that there had not been a substantial change in the husband's financial condition in the three years preceding this application. In fact, the court found that the husband's parents had continued to pay for virtually all of the husband's monthly expenses, including the mortgage, medical insurance and unreimbursed medical expenses for the husband and the parties' children, the husband's car, and vacations. With regard to the husband's claim that his current income is much less and that his reported taxable income represents his true earning capacity, the court rejected this contention, citing the husband's failure to offer any evidence that he has diligently sought employment or employment retraining to increase his income. In considering the husband's assertion that his interests in certain reserve accounts have been reduced by the payment of maintenance and child support, the court noted that, for the year 2014, the husband withdrew in excess of $208,000 from these accounts, a substantial portion of which was used to pay debts he owed his parents.

Declining to "countenance this self-made poverty as a basis for modifying the husband's support obligations," the court found that the husband's claimed "hardship" was a result of favoring his parents as creditors over his wife and his children by electing to use his separate property funds to repay his intra-family loans as opposed to paying his support obligations.

With respect to the husband's request for reimbursement from the wife of her *pro rata* share of the children's health insurance costs and unreimbursed medical expenses, the court found that the husband's father pays the health insurance and unreimbursed medical expenses for the husband and the parties' children. The court, in denying the husband's request for an order directing the wife to pay her *pro rata* share of the unreimbursed health insurance costs, stated that requiring the wife to do so would essentially convert the wife's obligation to pay health insurance costs incurred by the children into a gift from the wife to the husband.

The court awarded the wife $20,000 in counsel fees. The court explained that, upon the commencement of the divorce action, the husband's parents, after not requesting repayment of their monetary contribution to the marital residence for years, threatened to demand payment of the mortgages or foreclose on the marital residence, which forced the wife to expend substantial fees in bringing an action to invalidate the mortgages as liens against her marital interest in the property. Finding that the wife's financial circumstances warranted an award of counsel fees, the court stated, "[i]t would be grossly unfair, unjust, and inequitable for this court to close its eyes to what is really happening in this case: the husband's father is financing litigation against his daughter-in-law to diminish claims that she has to equitable distribution of the marital residence, and to diminish his son's obligations to pay mandated child support and maintenance." Additionally, the court found that the merits of the wife's position trumped that of the husband, because the wife was acting in the best interests of the marital estate by protecting the residence from an unwarranted debt. Although questioning the husband's motives in siding with his father against his wife and children, the court declined to find that either parties' conduct resulted in unnecessary litigation.

Downward modification of support

***Gadalinska v. Ahmed*, 120 AD3d 1232 (2d Dept. 2014)**

The parties entered into a stipulation of settlement in July 2010, prior to the effective date of the 2010 amendments to Family Court Act § 451, providing that the mother would have custody of the parties' children and the father would pay a specified amount of child support on a weekly basis. In 2012, the father petitioned for a downward modification of his child support obligation, alleging that he had become unemployed, that his financial resources had decreased significantly, and that the mother's income had significantly increased since the signing of the stipulation. The Family Court dismissed the father's petition without a hearing on the basis of failure to state a cause of action. The Appellate Division reversed, noting that "a substantial and unanticipated change in circumstance" was the applicable standard at the time the parties' stipulation of settlement was executed, and determined that the father's allegations were sufficient to warrant a hearing on the issue of modification.

Upward modification of support

***O'Gorman v. O'Gorman*, 122 AD3d 743 (2d Dept. 2014)**

The court below properly granted the mother's petition to increase the father's child support obligation and require him to contribute his *pro rata* share of the oldest child's college expenses for an out-of-state public school. The court found a substantial change in circumstances based on a significant increase in the father's income and an increase in the cost of the children's expenses. No facts were provided in the decision regarding the parties' original income, their present income, or the specific needs of the children that were not being met.

Support enforcement by QDRO

***Lundon v. Lundon*, 120 AD3d 1395 (2d Dept. 2014)**

The parties are married and have one child. The Supreme Court, among other things, dismissed the cause of action for divorce, and awarded the wife permanent maintenance and child support, including a portion of child support add-ons for the child's extracurricular activity expenses, school costs, and unreimbursed health care expenses. After the husband defaulted in paying his support obligations, the parties entered into a so-ordered stipulation providing that the husband would pay the wife child support and maintenance arrears owed according to the 2009 judgment as well as the legal fees she incurred in attempting to enforce the judgment. The husband, however, again failed to make the required payments, and thus, the wife moved for a money judgment for unpaid child support, maintenance, unpaid counsel fees, pre-judgment interest pursuant to DRL § 244 on the unpaid obligations, and QDROs directing payments from the husband's retirement plan to the wife to satisfy unpaid judgments for child support, maintenance and counsel fees, and for counsel fees for the enforcement motion.

The trial court properly denied the wife's motion for awards of pre-judgment interest and counsel fees based on a showing by the husband that the default was not willful pursuant to DRL §§ 237(c) and 244. The trial court improperly denied the wife's motion for a QDRO directing payments from the husband's retirement plan to the wife to satisfy the judgments for arrears of child support and maintenance. However, the court properly denied the wife's motion for a QDRO directing payments from the husband's retirement plan to the wife's attorney for unpaid counsel fees, because the attorney did not qualify as an "alternate payee."

Child Neglect

***Matter of Isaiah L.*, 119 AD3d 797 (2d Dept. 2014)**

Despite his living with the mother for only one month, the Family Court properly found that the mother's boyfriend was considered a parent legally responsible for the child under FCA § 1012. Where the mother and the child moved into the boyfriend's apartment, the boyfriend purchased food and fed the child, slept in the same bed as the child and the mother, and represented himself to caseworkers as the child's parent, the court found that the boyfriend had assumed parental responsibilities. Thus, the boyfriend's failure to act upon noticing an extreme decline in the child's weight and witnessing the mother aggressively shake the child on two occasions amounted to child neglect. In addition, the boyfriend's biological child, who was born 11-months following the neglectful treatment of the first child, was considered derivatively neglected as a result of the boyfriend's failure to receive services to remedy his conduct in the interim.

Custody

Modification of custody

***Doyle v. Debe*, 120 AD3d 676 (2d Dept. 2014)**

The Family Court's decision to deny the mother sole custody of the parties' 8-year-old daughter and permission to relocate with the child to Georgia was reversed on appeal. In reaching this decision, the court considered the home environment provided by each parent, the likelihood of each parent fostering a relationship between the child and the non-custodial parent, a custody agreement entered into by the parties in 2010, and the recommendation of the court-appointed evaluator. The parties' custody agreement provided that the child would reside with the mother in Georgia during the school year and visit with the father during the summer. The father withheld the child from the mother in violation of the parties' stipulation. The court deemed this to be evidence of the father's inability to nourish a relationship between the mother and the daughter. In Georgia, the child would have her own bedroom in a home shared by the mother

and her new husband, whereas in New York, the child would be sharing a bedroom with her grandmother in a one bedroom apartment occupied by the father, the grandmother, and the child's two uncles. The court believed that the mother's home environment was in the child's best interests.

Modification of decision-making authority

Goldhaber v. Rosen, 119 AD3d 862 (2d Dept. 2014)

The Family Court granted the father additional parenting time with the children based on his claim that a strained relationship existed between the mother and the children. On appeal, the Second Department concluded that this finding was not supported by a sound and substantial basis in the record, and thus, did not warrant a modification of the father's parenting schedule. Since the parties' relationship was acrimonious, the Appellate Court affirmed the Family Court's decision to grant the mother sole decision-making power with respect to the children's extracurricular activities and directed the father not to pick up the daughter early from any extracurricular activities or events.

Modification of custody

Cisse v. Graham, 120 AD3d 801 (2d Dept. 2014), *lv. granted*, 24 NY3d 1028 (2014)

Pursuant to a stipulation entered into by the parties in June 2004, the parties shared joint legal custody of their daughter, now age 13, with the mother having primary residential custody and the father having parenting time with the child. Between 2007 and 2008, both the mother and the father petitioned for a modification of the custody provisions of the stipulation. The Family Court determined that a change of custody to the father was in the daughter's best interests based on evidence that the mother had interfered with the father's visitation, the opinion of the court-appointed forensic psychologist that the mother was not capable of transforming her words into actions with respect to acknowledging the importance of the daughter's relationship with her father, the mother's new work schedule that hindered her ability to spend quality time with the daughter and hindered the daughter's opportunity to socialize with other children, the daughter's frequent attendance in aftercare on the days she was not visiting with her father, the close bond exhibited between the daughter, her father, her step-mother, and her half-siblings, and the daughter's expressed desire to live with her father. On appeal, the Second Department found that a transfer of custody from the mother to the father was supported by a sound and substantial basis in the record. In the dissenting opinion, Justice Roman found that the father failed to demonstrate a sufficient change in circumstances to warrant a modification in custody, cited the importance of maintaining stability for the child, who had lived with the mother for her entire life, and intimated that the mother was being penalized for being a working mother.

Equitable Distribution

Personal injury settlement

Rizzo v. Rizzo, 120 AD3d 1400 (2d Dept. 2014)

Following an on-the-job accident that rendered the husband unable to work, the parties jointly commenced an action to recover damages for personal injuries and loss of consortium. The parties, both named plaintiffs in the action, entered a settlement agreement, which provided for an initial lump-sum payment, periodic monthly payments of $3,235 for a guaranteed 30 years, and a continuing monthly payment for the life of either party. The agreement failed to specify the portion of the award that was for personal injuries and the portion that was for loss of consortium. Thereafter, an annuity was created to effectuate the monthly payments, naming both parties as joint payees with rights of survivorship. The parties proceeded to deposit the monthly payments into a joint bank account and use the funds to pay household expenses. The trial court held that the annuity was the husband's separate property. The Appellate Division reversed, holding that while a personal injury award is typically the separate property of each party named in the action, the award in this case had been converted into marital property by virtue of the parties' conduct in receiving an annuity as joint payees with rights of survivorship and depositing the funds into a joint account. However, the court held that the husband was entitled to a 90% share of each monthly annuity payment and the wife was entitled to a 10% share of such payment, but upon the death of one party, the surviving party would be entitled to receive the entire monthly annuity payment. In addition, the court reversed the trial court's determination that the husband's disability pension was his separate property, explaining that a disability pension that serves as compensation for personal injuries is considered separate property, while a disability pension that constitutes deferred compensation is marital property subject to equitable distribution. Finding that the wife was entitled to that portion of the pension that represents deferred compensation, the court remitted to the trial court the issue of apportioning the disability pension. With respect to certain debt incurred during the marriage, the Supreme Court properly determined that the cost of the defendant's surgery constituted a marital debt, and thus, the defendant was required to reimburse the plaintiff for the funds that he had paid for the defendant's share of the cost of the surgery.

Equitable distribution of business interests

Hymowitz v. Hymowitz, 119 AD3d 736 (2d Dept. 2014)

The parties, who were married for 20 years and have two now emancipated children, acquired various interests in businesses throughout their marriage. One such business was a family-owned hardware store, which the

husband acquired as a gift during the marriage via a transfer of a one-third interest from his father and uncle. The Appellate Division, finding that the trial court erred in failing to award the wife a share of the appreciation in value of the business, awarded the wife a 25% share of the appreciation on the basis of her indirect efforts as a housewife and mother.

The husband also acquired a one-third share in BSH Park Row, LLC, which owned the building where the family's hardware store was located and operated. The Appellate Division found that, since the business was formed and the building was acquired during the marriage, and the husband failed to trace the use of separate funds to establish the purchase of his portion of the cost of the property, the business was marital property subject to equitable distribution, and awarded the wife a 25% share of the husband's interest in the business.

In addition, the husband held an interest in HGH Family, LLC, which was acquired during the marriage and operated an MRI facility. The parties entered into an oral stipulation of settlement in open court agreeing that the husband's entire 12.9% interest in the business was marital property. However, the trial court, rather than awarding the wife an equitable share of the husband's interest in the business in accordance with the terms of the stipulation, awarded the wife a 50% share of the husband's annual distributions from the business until her 66th birthday. The Appellate Division found that the trial court erred by not incorporating the parties' stipulation into the judgment, and consequently, modified the trial court's decision by awarding the wife a 40% share of the marital interest in the business.

The trial court erred in awarding the husband a credit against the proceeds of the sale of the marital residence for 100% of the payments he made to reduce the principal balance of the mortgage during the divorce proceedings, rather than a credit for 50% of the payments. Additionally, the trial court erred in failing to award the wife a credit against the proceeds of the sale of the marital residence for the amount of money the husband withdrew from the parties' home equity line of credit to pay his attorney's fees and expert's fees. By doing so, the non-monied spouse was essentially paying for a substantial portion of the monied spouse's counsel fees, which violates DRL § 237.

With regard to maintenance, the trial court erred in fixing the duration of maintenance awarded to the wife. Based on the parties' ages, the parties' pre-divorce lifestyle, and the parties' respective financial circumstances, the court found that the wife should be awarded maintenance until the earliest of her eligibility for full Social Security benefits at the age of 66, her remarriage, or the death of either party. With respect to child support, the trial court should not have limited the calculation to the statutory cap of the first $130,000 of the combined parental income, but rather $175,000 of combined parental income. The amount of child support must be awarded retroactive to the date that an application for support was made, which was when the wife served her motion for *pendente lite* child support. Thus, the Appellate Division remitted the matter to the trial court for calculation of the husband's retroactive support obligation. In calculating the husband's retroactive support obligation, the trial court was directed to determine the amount of payments made by the husband on behalf of the wife and children under the pendente lite order, and to the extent that these payments could appropriately be allocated to temporary child support, rather than temporary maintenance, the husband should be permitted to offset such payments against accrued arrears.

Capital gains taxes

Cavaluzzo v. Cavaluzzo, 121 AD3d 538 (1st Dept. 2014)

Where the wife was awarded approximately $93,000 for her interest in the husband's investment property, the trial court properly determined that the wife should not be responsible for any capital gains tax liability that the husband may incur upon a future sale of investment property. The court reasoned that, since the husband would not incur any taxes upon the wife's transfer of her interest in the subject investment property to him and there was no imminent sale, the wife should not be forced to pay any capital gains tax liability that the husband may incur from a future sale. In addition, the trial court properly permitted the wife to claim all three of the parties' children as exemptions for income tax purposes, because the wife's income was half of the husband's income, and the husband had declared the children as dependents on his own tax returns for the past few years.

Wasteful dissipation of marital assets

Lowe v. Lowe, 123 AD3d 1207 (3d Dept. 2014)

Over the course of the parties' six-year marriage, the wife spent over $30,000 of marital funds to purchase various items from television shopping channels, over the husband's objections. As a result of the wife's extreme shopping habits and expenditures, the trial court properly found that the wife's award of equitable distribution should be reduced by one-half of the amount she wastefully dissipated.

Pensions

Fisher v. Fisher, 122 AD3d 1032 (3d Dept. 2014)

The parties were married for more than 40 years, were both in their early 60s and in good health, and have two adult children. Over the course of the marriage, the husband's $40,000 per year salary was the primary source of financial support. At the time of trial, the wife was employed and earning approximately $27,000 per year. Considering the nearly equal distribution of the parties'

marital assets and the wife's award of 50% of the husband's pension, which was not yet in pay status, the trial court granted the wife maintenance for only 3 years in the amount of $500 per month. The Appellate Division, however, noting that the husband had not yet retired, opted to avoid a break in the wife's receipt of financial support by extending the wife's maintenance until the husband's retirement and the wife's simultaneous receipt of her portion of the husband's pension benefits. In addition, the trial court did not err in failing to compel the husband to select survivorship benefits on his pension since the wife failed to request such relief during the trial or in her post-trial brief.

Counsel Fees

McMahon v. McMahon, 120 AD3d 1316 (2d Dept. 2014)

Due to the great disparity in the parties' incomes, the insignificant equitable distribution award received by the wife, and the husband's role in prolonging the litigation, the Second Department held that awards of counsel fees in the sums of $22,480 and $22,520 to the wife were warranted. The court did not provide any facts regarding the parties' respective incomes, the actual equitable distribution award, or the specific conduct of the husband that protracted the litigation. Additionally, the court below erred by granting, *sua sponte*, an additional $3,500 in counsel fees to the wife for having to defend against the husband's motion for leave to reargue since the wife did not make an application for such relief or present evidence of the subject fees.

Sutaria v. Sutaria, 123 AD3d 908 (2d Dept. 2014)

Based on the husband's significantly higher income and his behavior in protracting the litigation, the wife was properly awarded $73,602 in counsel fees. Once again, the Appellate Court failed to provide any facts regarding the parties' respective incomes or the behavior that caused protracted litigation.

Ralph D. v. Courtney R., 123 AD3d 635 (1st Dept. 2014)

In a child custody proceeding, the First Department affirmed the Family Court's award of $105,680 in counsel fees to the mother based on the father's ownership of property listed for sale for $13 million, the significant rental income that the father received from this property, the father's regular receipt of money from his father, and the father's filing and withdrawing of several petitions throughout the litigation.

Lubrano v. Lubrano, 122 AD3d 807 (2d Dept. 2014)

The trial court properly directed the husband to pay the sum of $38,000 towards the wife's attorneys' fees. In doing so, the court noted the disparity in income between the parties, the merits of the parties' positions, and the husband's actions in prolonging the proceedings. No facts were provided regarding the parties' respective incomes or the specific conduct of the husband that prolonged the litigation.

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