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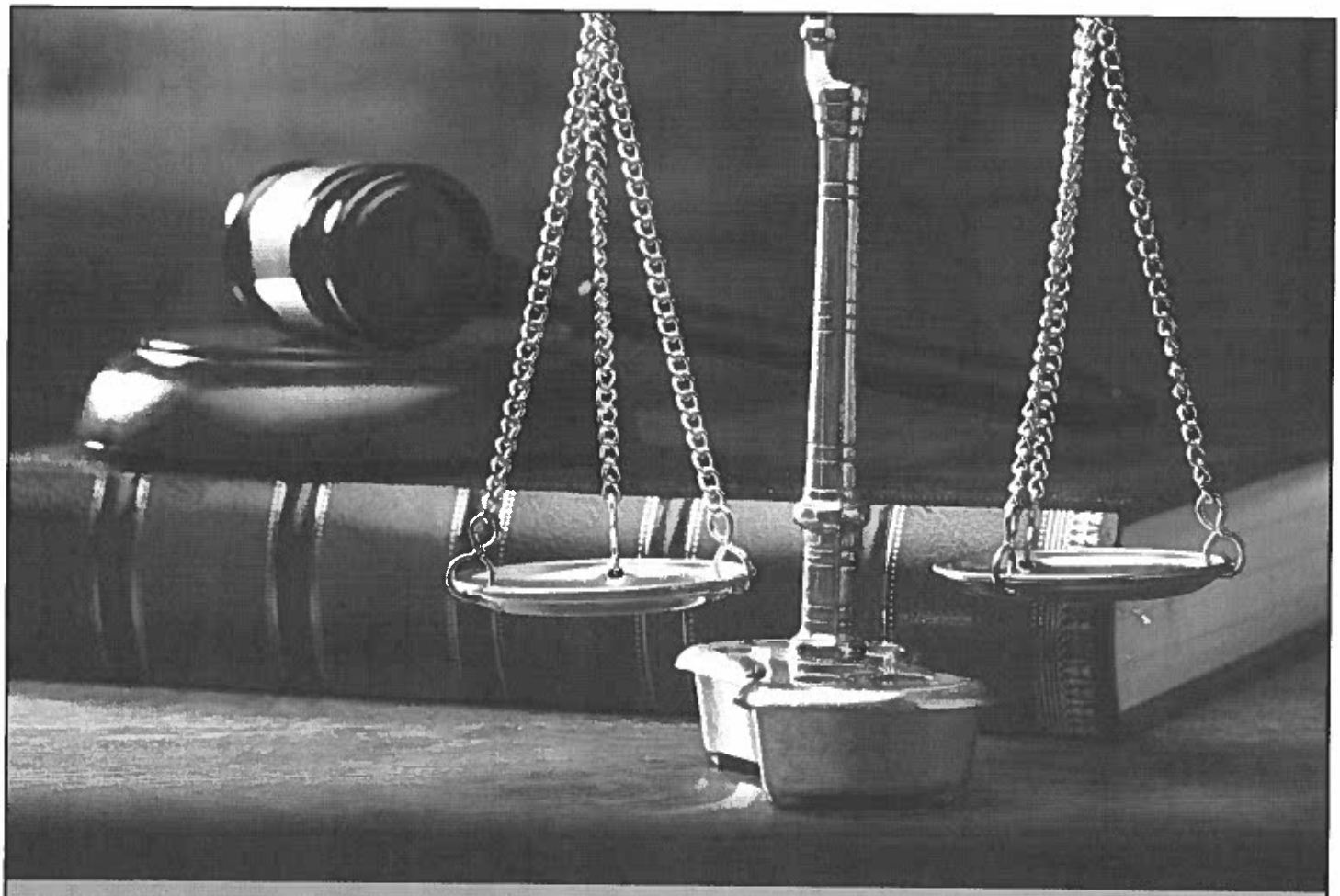

Continued Double Dip Dilemma: Court Must Clarify *Keane*

By Lee Rosenberg, Editor-in-Chief

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Recent Decisions, Cases and Trends in Matrimonial Law

By Wendy B. Samuelson

Recent Legislation

Maintenance cap increased, effective January 31, 2018: Administrative Order A/O/117/18

Pursuant to an Administrative Order A/O/117/18, effective January 31, 2018, the temporary and permanent maintenance cap of the support payor's income was increased from $178,000 per year to $184,000 per year. The increase is based on the CPI increases required by the 2015 Maintenance Guidelines statute. The court's forms and calculators for contested and uncontested divorces have both been revised to reflect the new maintenance cap.

Child support cap increased, effective March 1, 2018

For purposes of determining basic child support, the cap on the combined parental income has increased from $143,000 to $148,000. The 2018 poverty income guidelines amount for a single person as reported by the United States Department of Health and Human Services is $12,140 and the 2018 self-support reserve is $16,389.

Court of Appeals Roundup

Family Court has jurisdiction to issue permanent order of protection for violation of a temporary order that is dismissed

In the Matter of Lisa T. v. King E. T., 30 N.Y.3d 548 (2017)

The wife filed a family offense petition against her husband and obtained a temporary order of protection *ex parte*, barring the husband from communicating with her, except in an emergency and in regards to arranging visitation of their child. The husband violated the order by e-mailing his wife about an unrelated matter. Family Court found there was insufficient evidence to sustain the family offense petition and dismissed it; however, since the husband violated the temporary order of protection, the court issued a one-year final order of protection.

The husband appealed, asserting that the Family Court lacked jurisdiction to enter a final order of protection once it denied the family offense petition. The Appellate Division rejected the husband's argument and affirmed the lower court's ruling. The Court of Appeals affirmed.

Pursuant to Family Court Act §846-a, "Powers On Failure to Obey Order," if it is proven that the respondent wilfully violated a court order, the court may "modify an existing order or temporary order of protection to add reasonable conditions of behavior to the existing order, make a new order of protection in accordance with section [842] [or] may commit the respondent to jail for a term not to exceed six months." The Court of Appeals rejected the husband's contention that the Family Court's dismissal of the family offense petition deprives the Family Court of the powers enumerated above, given that the Family Court Act does not contain any language tying the Family Court's authority to impose specific penalties to its determination of whether a family offense has been committed. Once Family Court obtains jurisdiction over the parties by virtue of a petition facially alleging a family offense, the court may issue a temporary order of protection, and any violation of that order is a separate matter from the original family offense petition, over which FCA § 846-a gives the court authority to act.

Recent Cases

Child Custody

Child born to same-sex married couple given same legitimacy as one born to a heterosexual couple

Matter of Christopher YY v. Jessica ZZ, 159 A.D.3d 818 (3d Dept. 2018)

Jessica ZZ and Nichole ZZ, a married lesbian couple, had a baby with assistance from petitioner Christopher YY, a male family friend who provided a sperm donation for artificial insemination. The parties crafted a written agreement in which the petitioner waived any right to custody or visitation, and the respondents waived any claim to child support. The relationship between the parties later broke down, and the couple did not want the petitioner visiting with the child. The petitioner's partner admitted in sworn testimony to destroying the only copy of the agreement. (The legality of that agreement was not

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before the court, although it was determined to be relevant to the parties' understanding, intent and expectations at the time that petitioner donated his sperm and the wife impregnated the mother.)

When the petitioner filed a paternity petition, the mother of the child, Jessica ZZ, moved to dismiss, based on the presumption of legitimacy accorded to a child born of a marriage pursuant to DRL § 24[1] and Family Court Act § 417. Family Court denied the motion to dismiss, and the mother appealed.

The Third Department reversed, finding that a child born to gay married parents is entitled to a presumption of legitimacy, just as a child born to heterosexual married parents is afforded that presumption. Thus, the lower court erred in denying the motion to dismiss.

The court viewed this novel marital issue as a battle between legal principles—on one hand, the presumption of legitimacy for offspring of married couples, and on the other, the court's duty to dismiss that presumption if the petitioner presents "clear and convincing evidence tending to prove that the child was not the product of the marriage" (*Beth R. v. Ronald S.*, 149 A.D. 3d at 1217, 52 N.Y.S.3d 515). Given that a same-sex married couple cannot biologically produce offspring, the presumption of legitimacy would appear to be overcome. However, the appellate court concluded that the "presumption of parentage is not defeated solely with proof of the biological fact that, at present, a child cannot be the product of same-gendered parents." *Christopher YY* at 4. To presume differently would be an act of gender discrimination and would violate the dictates of the Marriage Equality Act, which guarantees to such couples the same "legal status, effect, right, benefit, privilege, protection or responsibility relating to marriage as exist for different-gender couples." A court's commitment to the presumption of legitimacy must be "unaffected by the gender composition of the marital couple."

In addition, the court determined that the petitioner was equitably estopped from claiming paternity since the petitioner knew that he was donating his sperm for the purpose of allowing this same-sex couple to conceive and be the parents of the child, and took steps to disavow his paternity and being responsible for child support. He was not present for prenatal care or at her birth, did not know her birth date, never attended doctor appointments and did not see her for at least one or two months after her birth. By contrast, the wife was present at the child's birth, gave the child her surname, was recorded as a mother on the child's birth certificate, and was listed as a parent for purposes of government benefits. There was no dispute that the wife played a significant role in raising and nurturing the child, and there was a strong psychological bond between the child and the wife. Therefore, it was in the child's best interest to equitably estop the sperm donor from claiming parental rights.

Another sperm donor case, ***Joseph O v. Danielle B.***, 158 A.D.3d 137 (2d Dep't 2018) is substantially similar in facts to *Christopher ZZ* and yielded a similar result. The parties previously entered into a "Three-Party Donor Contract" where they agreed to provide the respondents, a same-sex married couple, with his sperm for purpose of artificial insemination, and agreed he would not have any parental rights/responsibilities with respect to the resulting child, and would not request any guardianship, custody or visitation. After the child was born, the biological father visited with the child approximately four times per year, and sent gifts on the child's birthday. Three years after the child's birth, the biological father petitioned for paternity and visitation. The Family Court erred in denying the mother's motion to dismiss the petitioner's petition. It is an established legal presumption that every child born during marriage is the legitimate child of both spouses, even if they are of the same gender. In addition, equitable estoppel applies here, since the petitioner acquiesced in the child establishing a close relationship with the non-biological mother.

Incarceration does not constitute reasonable excuse for default in custody proceeding

***Kathy C. v. Alonzo E.*, 157 A.D.3d 503 (1st Dep't 2018)**

The Family Court granted sole legal and physical custody of a child to the maternal grandmother and granted her permission to relocate to South Carolina. The child's father had a history of domestic violence, was incarcerated when the custody proceeding began, and defaulted in the custody proceeding.

The father sought to vacate his default, citing his incarceration, but the court rejected his motion, ruling that incarceration does not constitute excusable default, and in any event, the father waited until six months after his release from prison to bring the application. The appellate court affirmed. The court found that even assuming at a rehearing that the father established evidence regarding a strong bond between him and the child, the fact that he had relinquished parenting responsibilities for the entirety of the child's life, coupled with his history of significant domestic violence, would nonetheless have merited a finding of extraordinary circumstances, and thereafter a determination that it was in the child's best interest for the grandmother to have sole custody.

Excessive corporal punishment constitutes neglect and a sound basis for custody removal

***Jackson v. Jackson*, 157 A.D.3d 694 (2d Dep't 2018)**

A boy who had lived most of his life in his father's custody was removed from the father's home after ACS alleged neglect based on an allegation that the father had used excessive corporal punishment. (No facts were provided as to what actions constituted excessive corporal punishment.) The boy's mother was granted temporary custody of the child, and after Family Court found that the father had indeed abused the boy, she was awarded

sole legal and physical custody. The father appealed the Family Court's ruling, and the appellate court affirmed.

The appellate court found that excessive corporal punishment constitutes neglect, which in turn constitutes a "sound and substantial basis" for a change in custody to the mother.

Change of circumstances that occurs after the custody order appealed from may warrant remittal

***Latham v. Savage*, 158 A.D.3d 629 (2d Dep't 2018)**

After a couple separated, the Family Court awarded custody of their child to the father, and the mother was granted supervised visitation. Almost seven years later, the mother filed a petition for modification of custody, based on a change in circumstances. The Family Court denied the mother's petition, and the mother appealed. The appellate court reversed and remitted to Family Court for further proceedings.

The appellate court concluded that, in light of the serious allegations raised by the child's attorney, there had been a change of circumstances *after* the date the order appealed from was issued. (The decision fails to reveal what that key piece of information was.) Changed circumstances is a particularly powerful argument in child custody matters, so much so that it "may render the record on appeal insufficient to [determine] whether the Family Court's determinations are still in the best interest of the children" (*Leval B v. Kiona E.*, 115 A.D. 3d 665). The mother was granted temporary custody of the child by Family Court just before the appeal was determined. The appellate court determined that temporary custody should remain with the mother, and remitted the matter to the Family Court for a new expedited determination as to whether it is the child's best interest for custody to remain with the father.

Child Support and Maintenance

Award of non-durational maintenance and denial of child support based on constructive emancipation

***Tiger v. Tiger*, 155 A.D.3d 1386 (3d Dep't 2017)**

The parties were married 24 years and were in their early 50s at the time of their divorce. The husband earned $125,000/year, plus extensive benefits, and had an inheritance of approximately $1.1 million. The wife was a housewife and raised the parties' two children. At the time of trial, she was disabled from a progressively debilitating neurological condition, leaving her unable to work and required assistance for daily living tasks. She received Social Security disability of $685/month. At the time of trial, the parties' older child was emancipated but living with the father, and their younger child was a 20-year-old college student, who lived with the father during college breaks.

The Supreme Court ordered the husband to pay the wife non-durational maintenance of $794/week. The husband appealed, claiming that the wife's maintenance should have been terminated or reduced upon the wife's receipt of one-half of his Social Security benefits at age 62. The appellate court affirmed, reasoning that the wife's eventual combined monthly income at age 62 of $5,373—from SSD ($685), Social Security ($1,245.50) and maintenance ($3,442.50)—is not excessive or unreasonable in view of her marital standard of living, degenerative health, lengthy marriage and lack of any other assets or earning potential.

The husband requested child support for their 20-year-old daughter. The Supreme Court rejected the request, and the appellate court affirmed, reasoning that the child was constructively emancipated since she refused all contact with her mother due to no fault of the mother, and despite the mother's efforts to maintain a relationship.

Awarding child support based on the income stream used to determine the value of a law practice is not impermissible double-counting

***Kimberly C. v. Christopher C.*, 155 A.D.3d 1329 (3d Dept. 2017)**

The wife filed for divorce and a temporary order of protection following 23 years of marriage that produced two children. The wife was awarded sole custody of the parties' children, and the husband received supervised visitation one day per week. The wife was awarded child support from the father, a partner in a successful law firm.

The husband appealed, claiming that the child support award constituted impermissible double-counting of his assets, given that his partnership interest in his law firm was equitably distributed as marital property, while the child support award was based on his income from the same law firm.

The appellate court rejected the husband's argument, reasoning that the rule against double-counting does not apply to child support, since the CSSA does not authorize the deduction of a distributive award from a parent's income.

The husband also appealed the order of supervised visitation. The lower court determined that the father was remorseless over his repeated physical abuse of his wife, violence that was witnessed by their children and left one child hospitalized for depression and post-traumatic stress. Therefore, supervised visitation was appropriate and in the children's best interests to protect their safety. However, the court's determination that the wife had the authority to determine when visitation no longer needed to be supervised was error, since only a court (and not a parent or therapist) has such authority.

Equitable Distribution

Inheritance as a factor in dividing marital assets

***Culen v. Culen*, 157 A.D.3d 926 (2d Dep't 2018)**

After 26 years of marriage, the parties divorced. The husband had a successful diving services company, and the wife was a full-time mother and homemaker. The parties agreed on the valuation of the marital assets, but entered into a protracted legal battle over the equitable distribution of assets.

Following a non-jury trial, the Supreme Court awarded the marital residence (net equity of $508,000) to the husband, with a credit to the wife of $254,000. The husband appealed, claiming the court erred by granting the wife an outsized portion of the marital estate due to the court's improperly factoring into its division of property the husband's right to a significant inheritance from his aunt.

The appellate court affirmed, and emphasized the lower court's broad discretion in dividing the marital assets. One of the factors to be considered in equitable distribution is the catch-all discretionary factor, i.e. "any factor which the court shall expressly find to be just and proper" pursuant to DRL § 236[B][5][d][4], [9].

Prenuptial Agreements

Prenuptial agreement set aside as unconscionable

***Taha v. Elzemity*, 157 A.D.3d 744 (2d Dep't 2018)**

The parties signed a prenuptial agreement where 1) each party waived their right to the other's separate property, including property acquired from the proceeds of each party's separate property, 2) each party would keep separate bank accounts, and 3) the husband's maintenance obligation would be limited to one lump sum payment of $20,000.

At the time of the divorce, the parties were married six years. The husband was a doctor who earned $300,000 annually. The wife was a stay-at-home mother, caring for the parties' three children, including a special needs child. The wife moved to set aside the prenuptial agreement on the grounds that the agreement was unconscionable. The husband cross-moved, seeking summary judgment, declaring the prenuptial agreement valid and enforceable. The trial court denied the wife's motion and granted the husband's cross-motion.

The wife appealed, and the appellate court reversed. A prenuptial agreement is unconscionable and unenforceable if "no person in his or her senses would make [it] on one hand, and no honest and fair person would accept on the other, the inequality being so strong and manifest as to shock the conscience" (*Sanfilippo v. Sanfilippo*, 137 A.D.3d 773, 774, 31 N.Y.S.3d 78). Even if a prenuptial agreement does not "shock the conscience" when drafted, it could be determined to be shocking when it is later enforced. Here, the enforcement of the agreement would result in the risk of the wife becoming a public charge since she is unemployed, largely without assets and, as the primary care giver for the parties' young children, would only receive $20,000 in full satisfaction of all claims. By contrast, the husband earns approximately $300,000 annually as a physician.