Recent Legislation, Cases and Trends in Matrimonial Law

By Wendy B. Samuelson

RECENT LEGISLATION

Adult Survivors Act becomes law, opening legal options for sexual assault survivors

In 2019, Albany passed the Child Victims Act (CVA), which extended the criminal and civil statutes of limitations and opened a one-year "lookback window" to allow victims of childhood sexual abuse to sue their abusers and the co-conspiratorial institutions that facilitated their abuse, regardless of how long ago the crimes occurred.

In the three years since the CVA's passage, more than 10,000 victims have used that window to take the first steps towards justice, filing civil suits against their attackers.

On May 24, 2022, Governor Hochul followed up on the CVA's success, signing the Adult Survivors Act (ASA), which creates a lookback window for those who suffered sexual violence as adults. This window for the statute of limitations-immune lawsuits opens six months after the Act's passage (November 24, 2022) and closes one year later (November 24, 2023).

The ASA, which was sponsored by Assemblymember Linda Rosenthal and Senator Brad Hoylman and passed with overwhelming support in the State Assembly and Senate, was greeted with adulation and relief by a wide array of victims and advocates. Liz Roberts, head of Safe Horizons, a New York nonprofit that provides services for victims of abuse, called the act "monumental." In a statement, Roberts expressed gratitude to the Act's sponsors and credited the efforts of survivors who spent years "retelling their stories and reliving their trauma endlessly, pleading with legislators to make them a priority."

State's legislative session ends without determining the issue of salary increase to 18B attorneys

The number of attorneys participating in the Assigned Counsel Plan has been rapidly dwindling, as inflation has soared and the plan's pay scale remains stagnant. New York currently pays 18B attorneys $60 an hour for misdemeanor cases, and $75 an hour for Supreme, Family and Criminal Court cases. On June 2, 2022, the state's legislative session ended once again without passing a pay increase.

The minuscule rates, which haven't been increased in 18 years, have left thousands of children and indigent defendants without timely access to counsel, as a diminishing roll of 18B attorneys cannot afford to participate in the program. The frozen pay scale has also clogged the Family Court's calendar with custody and neglect cases that need to be adjourned until an attorney for the subject child can be found.

In 2021, the New York County Lawyers Association, which played a significant role in the creation and implementation of the Assigned Counsel Plan, sued the state, demanding that it increase the wages for 18B attorneys to $158 an hour, the rate for assigned counsel in New York's federal courts. The NYCLA case is currently being considered by the New York County Supreme Court.

The NYCLA's push for a pay increase has received support from a broad spectrum of legal organizations, including the New York City Family Court Judges Association. In January, the organization wrote an open letter to Governor Hochul advocating for the increase. "As judges, we observe daily the heartbreaking impact the inadequate supply of attorneys has on the children and families who come before us, and it is not an overstatement to assert that our system for providing counsel to indigent litigants in Family Court is in a crisis," the association wrote.

In contrast, the governor's office has offered a baffling jumble of contradicting positions, advocating for and aggressively opposing the proposed increase. In April, Hochul told reporters that she supported the pay increase and said that 18B attorneys "absolutely need this, the work they do is so critical." But, she said, the state should hold off on passing legislation to increase rate while the proposed increase is still winding its way through the courts. At the same time, Hochul's lawyers have continued to fight the NYCLA in court, arguing that the court should leave the issue of 18B attorney pay to the Legislature.

We will continue to cover this issue as it moves through the courts and Legislature and will provide an update for you in our next column.

CHILD SUPPORT

Father must pay his share of college costs, even after children turn 21

***Pape v. Pape*, 205 A.D.3d 920, 166 N.Y.S.3d 574 (2d Dep't 2022)**

The parties' divorce agreement required the father to pay 50% of his two children's college costs, for the first four years of college. It also provided that the father would receive a room and board credit against any child support paid.

In 2019, when the oldest child turned 21, the father stopped paying his share of the academic expenses, citing the child's age. In response, the mother filed a petition in Suffolk County Supreme Court to enforce the financial obligations in the settlement agreement. The father argued that his obligation to pay part of the college tuition had ended now that their child had reached the age of emancipation.

After the Suffolk County Supreme Court embraced the father's view, the mother appealed to the Second Department, which reversed the lower court's opinion and remitted the case for further hearings on the college expense arrears.

The appellate court held, "In the absence of a voluntary agreement, a parent may not be directed to contribute to the college education of a child who has attained the age of 21 years. (*See Sinnott v. Sinnott*, 194 A.D.3d 868, 149 N.Y.S.3d 441; *Calvello v. Calvello*, 20 A.D.3d 525, 527, 800 N.Y.S.2d 429; *Miller v. Miller*, 299 A.D.2d 463, 464, 750 N.Y.S.2d 112)." But here there was a voluntary agreement that specified the duration of the obligation (four years of college). The lower court "may not write into a contract conditions the parties did not insert [themselves], nor may it construe the language in such a way as would distort the contract's apparent meaning." (*See Fleming v. Fleming*, 137 A.D.3d 1206, 28 N.Y.S.3d 440.).

FAMILY OFFENSE

Father who claims he was assaulted by mother after stealing her counsel's computer is permitted a hearing

***Walter Q. v. Stephanie R.*, 201 A.D.3d 1142 (3d Dep't 2022)**

The wife filed petitions with the Tompkins County Supreme Court, alleging that her husband had committed a family offense and requesting that she be granted sole custody of their son. The court granted both of her petitions and issued a full stay-away order, barring the father from appearing at the

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mother's home. When the father decided to drop by anyway, in clear violation of the order, he was prosecuted and convicted for criminal contempt and sentenced to jail.

In June 2019, after his release, the parties' custody wrangling continued, and they returned to the courthouse for a deposition. For the proceeding, the mother's attorney brought a laptop that contained the parties' financial information. Moving fast and again disregarding the law, the father swiped the computer during a break in questioning and fled the scene. The police were called, and the mother, alerted to the theft on her way to the deposition, identified the father in the street, ambling away from the courthouse with the stolen computer in hand.

In response, she jumped out of her car, dialed 911, and chased after the father, who evaded capture by boarding a bus and fleeing the scene. Soon after, the father filed a family offense petition against the mother, claiming that after chasing him down, she grabbed him, hit him, and yelled obscenities at him, causing him to burst into tears, seek help from onlookers, and call the police.

The mother moved to dismiss the father's petition. The attorney for the child moved the court to dismiss the petition as well, asserting that the father failed to state a claim and, alternatively, seeking summary judgment. The court granted the motions, obviating the need for a hearing on the facts.

The father appealed, and the appellate court granted his appeal and reversed the lower court's ruling, remitting the matter to the court for a hearing on the facts.

The question before the court, the appellate court noted, was "whether [the father's] petition sufficiently alleges an enumerated family offense, which requires a court to afford the petition a liberal construction, accept the allegations contained therein as true and grant the petitioner the benefit of every favorable inference." (*See Christina Z. v. Bishme AA.*, 132 A.D.3d 1102; *Craig O. v. Barbara P.*, 118 A.D.3d 1068 [2014].) By alleging in his affidavit that the mother grabbed, hit, and verbally abused him, the father sufficiently described actions that, if true, would constitute a criminal offense and perhaps even the family offense of harassment in the second degree. (*See* Penal Law § 240.26[1],[2]; *Jodi S. v. Jason T.*, 85 A.D.3d 1239 [2011].)

Granting summary judgment, the appellate court ruled, was error because it is a "drastic procedural device which will be found appropriate only in those circumstances when it has been clearly ascertained that there is no triable issue of fact." The AFC argued that no triable issue existed because the mother's 911 call, admitted into evidence under the "excited utterance" hearsay exception, provided auditory proof that no physical attack occurred.

But the 911 recording presented only a partial view of the encounter, as the audio began after the chase and subsequent confrontation was in progress. For a full, fair consideration of the father's allegations, the court should have denied the mother's and AFC's motions and granted the father a fact-finding hearing.

CUSTODY/VISITATION

Father's inappropriate in-court interruptions of the judge don't obviate need for custody hearing

***Corcoran v. Liebowitz*, 204 A.D.3d 910 (2d Dep't 2022)**

The parties' divorce agreement provided for joint custody of their two children. Three years after the divorce, the mother petitioned the Westchester County Family Court for sole custody. The Family Court granted her motion without even allowing for a hearing.

The father appealed, and the appellate court granted his appeal in part, remitting the custody question back to the lower court.

As the appellate court explained, a parent seeking to modify a custody order, claiming a sufficient change in circumstances, isn't automatically owed a hearing. The Family Court's refusal to grant the father a hearing was in the form of punishment to the father for his disrespect of the court rather than for determining the children's best interests. "The Court abruptly awarded sole legal custody of both children to the mother in response" to the father's blurting out that the court was being "ridiculous." In the face of such open disrespect, the court informed the father, "[Your] interjections changed my mind. . . . I was going to give you the option . . . to remain a joint custodian, but . .. you didn't let me even finish my thought."

The appellate court remanded the matter for a hearing before the lower court, and under the circumstances, required a new judge be assigned for the hearing so that the defendant would not be prejudiced.

Court ends biological mother's visitations with adopted children

***Jennifer JJ. v. Jessica JJ.*, 203 A.D.3d 1444 (3d Dep't 2022)**

In 2017 an Otsego County couple adopted a boy and girl. Recognizing the value to adopted children of continued contact with their birth mother, the couple entered into a post-adoption visitation agreement with the children's biological mother, granting her two supervised visits each year, along with occasional photos of the children. The Family Court incorporated the agreement into its adoption order.

Two years later, the adoptive mother filed a petition to modify the post-adoption agreement, asserting that the ongoing visits were not in the children's best interests. In response,

the birth mother filed a cross-petition alleging that the adoptive mom refused to bring the son for their recent scheduled visit, in violation of the court's order.

Following a hearing, the Family Court ended the birth mother's visitation rights. The birth mother appealed. The Third Department affirmed the lower court's ruling.

Under DRL § 112–b(4), birth parents and adoptive parents may enter into post-adoption agreements for visitation that can be enforced by Family Court, but they can be modified if it's no longer in the children's best interests.

Here, the adoptive mother presented ample evidence that her son's visits with his biological mother were creating a radical disturbance in his behavior. A therapist who had been treating the boy testified that he had autism and, due to his medical condition, would become deeply agitated by alterations in his schedule. The adoptive mother testified that after being sent to visit his biological mother, the son would return home "completely out of control," destroying rooms in her house, hitting his friends, and hurting his sister—serious behavioral changes that didn't subside for several months. Additional testimony revealed that the daughter had also become increasingly disturbed by the visits with her birth mother. After a December 2017 visit, she had a series of nightmares and began banging her head.

The Family Court embraced the testimony of the adoptive mother and therapist as credible, and therefore the Family Court's determination that it is in the children's best interests to terminate post-adoption contact with the biological mother was supported by a sound and substantial basis in the record.

EQUITABLE DISTRIBUTION

Court properly granted wife 50% ownership of family's car wash business

***Keren v. Keren*, 201 A.D.3d 906 (2d Dep't 2022)**

During their 25-year marriage, the parties acquired a partial ownership of a car wash company, Manhattan Bridge Car Wash Inc. The company owned a lease to a car wash in Brooklyn, before selling that lease in 2007 and using the proceeds to buy a building in Manhattan. The company sold that building, and used those proceeds to buy a building in Huntington, which was leased by Walgreens.

When the parties commenced divorce proceedings, the battle began for possession of the car wash company and its assets. The husband argued for full ownership of the corporate assets because he claimed it was derived from a separate property gift from his brother, a contention the wife disputed. At trial, the husband presented testimony from his brother, who claimed that he had gifted his interest in the car wash company. But, the husband had no documents to support that claim. The court found the brother's testimony incredible. The lower court granted the wife 50% of the husband's interest in the company and 50% of his interest in the Huntington property, in the event that it was ever sold.

The husband appealed. The appellate court affirmed the lower court's decision. The appellate court reasoned that the trial court did not abuse its discretion, particularly where the parties "were involved" in the car wash business during their long-term, 25-year marriage. There were no specific facts cited by the court regarding each party's participation and roles in the car wash business.

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Contact: Melissa O'Clair
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