Recent Legislation, Cases and Trends in Matrimonial Law

By Wendy B. Samuelson

RECENT LEGISLATION

Remote notarization becomes a permanent reality, rather than a pandemic necessity

The New York legal system has made some remarkable technology changes worth appreciating. For generations, family law attorneys had to march into the courthouse to deliver their motions. Now, with Electronic Document Delivery System, a few clicks completes the job. For years, we commuted up and down the state, and across all five boroughs, for preliminary conferences and hearings that became all-day affairs. Now, with Microsoft Teams, we wrap up our virtual appearances in a matter of minutes.

With Governor Hochul's signing S1780C, the new virtual notarization law, our court system takes its next quantum leap forward, establishing electronic notarization as a permanent component of legal practice, following years of debate and several temporary, pandemic-driven measures.

The new law lays out a detailed framework of requirements for attorneys and notaries providing virtual services.

If you choose virtual notarization, you must follow certain protocols. You must record, with both audio and video, your verification of the signor's identity (i.e., using FaceTime, Zoom, Teams, etc). Once the client signs the document, she or he must immediately scan it back to you. Your recording must be stored for 10 years. You need to create a backup recording and make sure it is protected from unauthorized users. You can authorize a third party to retain the recordings for you, provided that all of the third party's recordings are available for inspection by the Secretary of State, upon request.

You must keep a journal of every virtual notarization, documenting the date and time of the notarial act, the number and type of documents that you notarized, the type of ID the signor used, and you must keep this written description of the notarization for the entirety of your career, plus five years after retirement. For your efforts, you can charge up to $5 for each virtual notarization.

The most important criterion is still to come: Starting Jan. 31, 2023, notaries will need to register with the State Department's Division of Licensing Services in order to perform virtual notarizations.

Additional details on the new law, along with information about registration, are on the State Department's website: https://dos.ny.gov/notary-public.

Court grants 18B attorneys their first pay raise in 18 years

***New York County Lawyers Association, et al. v. State of New York, et al.*, N.Y. Slip Op. 32476 (N.Y. Sup. Ct. 2022)**

In a blockbuster court order, the New York County Supreme Court reset the pay scale for court-appointed attorneys for indigent clients in criminal and family law matters, raising their hourly rates from $90 to $158. The move comes courtesy of a temporary order from Judge Lisa Headley, granting the New York County Lawyers Association's motion for a preliminary injunction.

The association is suing the city and state of New York, as well as the New York Department of Finance, in an effort to increase 18B pay permanently. In its motion, the organization argued that failure to implement the pay increase immediately, while the case winds its way through the courts, would cause irreparable harm to children and the indigent parents, who depend on 18B attorneys in Supreme and family courts.

With inflation skyrocketing and the salaries of private attorneys soaring to keep pace, court-appointed attorneys had been left in the dust, earning a fraction of standard matrimonial attorney rates. As a result, the number of attorneys joining

18B panels, or agreeing to stay on them, is plummeting in counties across the state.

Queens County, for example, had approximately 150 attorneys on its 18B panel. With assigned counsel wages frozen for the last 18 years, more than 60 attorneys have decided to quit the county's program, leaving the few remaining lawyers often juggling more than 100 cases.

The New York County Lawyers Association's petition has been joined by the bar associations of Queens, Brooklyn, and Richmond counties, along with the Black, Asian and Latino bar associations, as third-party plaintiffs.

In its opposition to the motion, the state argued that 18B pay was a budgetary issue properly resolved by the state's legislative and executive branches, and that the court's raising pay would undermine the separation of powers. The state also argued that the bar associations who entered the case as third-party plaintiffs lacked proper standing.

In her ruling, Judge Headley rejected the state's "separation of powers" and standing arguments, and embraced the association's call for immediate action, asserting that the worsening shortage of available attorneys and its clear connection to the relatively minuscule pay is an immediate danger of "severe and irreparable harm" to both children and the indigent.

Even with the hourly salary boosted to $158, the disparity between 18B pay and private practice salaries remains remarkable, with private attorneys routinely charging more than two times the newly increased rate for court-appointed counsel. More pressingly, whether the court will order that this temporary increase be made permanent remains to be seen, and will be followed in this column.

RECENT CASES

Equitable Distribution

Tax impact of sale of assets to satisfy distributive award of wife's business considered when determining husband's distribution

***Culman v. Boesky*, 207 A.D.3d 18 (1st Dep't 2022)**

The parties were married approximately 13 years, were in their early 50s and had a 12-year-old daughter. The wife owned an art gallery prior to the marriage. The husband was in finance, but when the child was four, he left his employment, and thereafter did not contribute much financially to the household. The parties employed a nanny five days a week, and even had the nanny assist on vacations. The husband did not contribute to the daily operations of the wife's art gallery. The husband had minimal knowledge of his wife's art business and may have actually hampered its growth by engaging in "inappropriate behavior" with various staff members and an artist whom his wife represented.

When the divorce action commenced, custody of their child was resolved, with a parenting agreement of joint custody and primary physical custody to the husband. But, the battle over distribution of their vast assets—cash, stocks, retirement funds, real estate, cars, an upscale collection of wine and art—took approximately six years to resolve.

After a 21-day trial, the trial court granted the husband a small percentage of his wife's wealth. Both parties appealed, and the First Department affirmed in part, reversed in part, and modified the trial court's order, in a nuanced ruling that amounts to a master class in equitable distribution law.

Arguing before the trial court, one such distribution of assets that the husband spotlighted was his wife's pre-marital art gallery business (their largest asset) and the millions of dollars that it increased in value during their marriage. He demanded 25% of that appreciation. The trial court granted him 7.5%. The appellate court doubled that amount to 15%, or approximately $3.5 million.

The appellate court acknowledged the discretion a trial court enjoys in deciding the precise division of marital assets in a complex estate. It acknowledged the husband's minimal contributions to the family finances, and the lilliputian level of credit he deserves for the boom in his wife's business.

Nonetheless, in granting the husband a *de minimis* distribution like 7.5%, the trial court went too far, the appellate court ruled. A spouse need not "quantify the connection" between his contribution to a spouse's business "with mathematical, causative or analytical precision," as the wife argued. He must merely show "some nexus" between the growth in his wife's business and his "limited indirect contributions as a

supportive spouse and active parent." (*See Hartog v. Hartog*, 85 N.Y.2d 36 [1995]; DRL § 236[B][1][d][3].)

The husband met that standard by making financial contributions to the family before he quit his job and parenting their child. But, the appellate court rejected the husband's claim for a far higher award, because it is necessary to take into account the enormous taxes his wife will have to pay in selling her artwork in order to satisfy the court-ordered distribution. The wife's expert testified that if the wife sold art that she has owned for more than one year, she'll be required to pay 31.8% in federal capital gains tax and 12% in state taxes, which amounts to approximately art worth $1.7 million to $1.9 million. In other words, in order to pay 15% of the appreciation of the art gallery, the wife would have to sell approximately 29% of the marital value. The wife was given several years to pay the award, with 3% interest. The court, interestingly, took judicial notice that the art world took a financial hit during the pandemic.

The husband's counsel fee award of $320,000 was affirmed on appeal. The appellate court noted that this was proper based on the disparity of income and assets of the parties, but also the large equitable distribution award that the husband was to receive.

Custody and Visitation

Mother granted relocation to Ireland

***Lavery v. O'Sullivan*, 205 A.D.3d 1013 (2d Dep't 2022)**

The parties were married four years and had a three-year-old daughter. The mother was a dual citizen of the U.S. and Ireland, and the father was a citizen of Ireland. The parties lived and worked in New York, but were struggling financially.

After suffering verbal and physical abuse at the hands of her alcoholic husband, the wife filed for divorce, and requested sole custody of the parties' daughter and permission to relocate to Ireland, which was granted by the IDV Part of the Rockland County Supreme Court, and affirmed on appeal.

The wife had coordinated with her family to create a new life for herself and the child: living rent-free in her grandparents' guest home, working a steady job as a clerical administrator at an Irish nursing home, and raising her child with the support of her extended family as well as the husband's relatives.

The husband appealed to the Second Department, which stayed enforcement of the lower court's ruling until the appeal was decided.

As the Second Department noted, the child's best interests are the court's "paramount concern," and the court must consider five factors: (1) which living arrangement would "best promote stability" for the child; (2) the available home environments; (3) the parents' past performance; (4) the parents' relative fitness, including their ability to "guide the child, provide for the child's overall well-being, and foster the child's relationship with the noncustodial parent;" and (5) the child's desires.

The appellate court determined that the trial court was correct in ruling that the mother had met that mark, since moving back to Ireland would alleviate the financial pressures on the mother and child, and open the door to supplemental child care by the child's extended family.

The appellate court conceded that the move would disrupt the father's regular contact with the child, but countered that the father would be properly compensated for that loss through the "meaningful extended vacations" of the visitation schedule.

Children granted access to cell phones to speak with their father, after mother violated court-ordered telephonic communication

***Timothy RR. v. Peggy SS.*, 206 A.D.3d 1123, (3d Dep't 2022)**

The court awarded the father sole custody of the parties' children, ages 10 and 12, with visitation to the mother. According to the order, both parents are entitled to phone contact with the children every other day while in the other parent's care, unless phone contact is initiated by the child.

The father brought a violation petition against the mother, alleging that the mother refused to allow telephone communication with the children while in her care, including failing to have the children respond to his daily phone calls to the land line or the mother's cell phone. During a two-month period, the children only spoke to the father five times, and had almost no paternal contact for the summer. The father even emailed the mother, begging for her to have the children return his calls, to no avail.

To circumvent the mother's rebuffing of his calls, the father bought cell phones for his children, so he could contact them directly. When the mother squashed that effort at paternal connection, asserting that the children were too young to have cell phones, the father filed a violation petition. The court granted the petition, and required that the mother permit the children to use their cell phones to have contact with their father during her visitation.

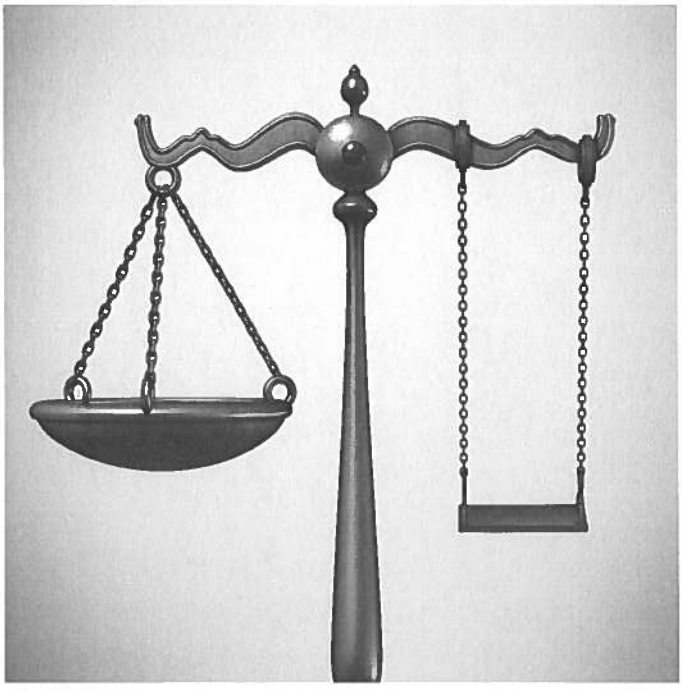
The mother appealed, and the Third Department affirmed. The trial court gave a thorough, three-dimensional review to the allegations, including holding a Lincoln hearing with the children, and properly determined that the mother's actions were in violation of the court order.

Parental alienation warrants split custody, suspension of child support, and award of counsel fees to the more monied spouse

***Y.B. v G.B.*, 76 Misc3d 1213(A) (Sup Ct. Richmond Co., 2022)**

After a divorce trial, the court found that the mother alienated the parties' 8- and 11-year-old children from the father, but found that it had no choice but to award physical custody of them to the mother, since their allegiance to the mother was so strong, and they refused to visit with the father, so forcing them to live with the father would endanger their health and safety. Due to the parental alienation, the father was granted sole custody of the parties' 4-year-old child, in order to protect the child from the mother's bad behavior. However, the court granted the parties joint custody of the older children, and granted him final say of medical decisions, including mental health decisions, in order to prevent further marginalization of the father, particularly where he would need reunification therapy with them.

The mother interfered with husband's relationship with the children by intentionally involving them in a domestic violence incident she instigated, having the father falsely arrested, and fostering the children's erroneous perception that their father was the aggressor, and encouraging them to "forever remember" the event as she portrayed it. She also used the children to convey complaints about financial aspects of the divorce case, and about the loss of their "dream home" that the father took away. The mother disparaged the father in the children's presence at home, during the divorce proceeding, and even in the presence of the forensic psychiatrist. The mother filed a false police report, a frivolous family offense petition, and made repeated baseless applications to suspend the father's visits. Based on the trial evidence, the parties' testimony, in-camera examinations, the testimony of the forensic evaluator, and the positions of the AFC, the father demonstrated that the mother engaged in a pattern of parental alienation that severely impacted his parental rights, and severely impaired and damaged his relationship with the parties' two older children.



Since the wife engaged in extreme parental alienation, she was ordered to attend personal therapy as a component of her visitation with the parties' youngest child, and to inform her chosen therapist of the alienation issues. Such therapy was in addition to family reunification therapy recommended by the forensic evaluator, and the husband was directed to enroll all children in private therapy with a therapist of his choosing.

In addition, although under the child support guidelines, the wife would receive $2,717/month as basic child support, the court suspended the husband's child support obligation because of the wife's alienation, considering also that the husband was directed to pay $38,866 a year maintenance and will be required to pay for exorbitant therapy fees. The court determined that this suspension of support was its only available remedy to entice the wife to take steps to reverse the alienation.

In considering the parties' competing counsel fee requests, the wife was denied counsel fees and the husband, despite being the monied spouse, was awarded $50,000 in legal fees. During the course of the three-plus year litigation, the wife retained six prominent matrimonial firms, and incurred approximately $613,836 in counsel fees, with $314,336 still owed. The husband retained one attorney who represented him continuously, and incurred $317,515 in counsel fees, $92,516 of which is still owed. Although the husband currently earns approximately $220,000 a year and the wife is unemployed, the court found that the difference between the parties' incomes is due primarily to the wife's refusal to seek gainful employment. After the parties' marketing agency closed due to market forces at the time of the divorce, the husband secured employment, but the wife did not look for a job. Also, the wife was awarded over $440,000 in liquid assets in equitable distribution, while the husband will have no liquid assets. The court found that most of the wife's legal fees incurred were directly related to her meritless and unsupported legal positions, her inability to accept sound legal advice, and her excessive micromanagement of her attorneys, all of which have unnecessarily delayed the conclusion of the divorce case and resulted in hundreds of thousands of dollars in legal fees that the husband should not be required to pay.

CHILD SUPPORT

Having more overnights with children doesn't relieve father of paying child support

***Smisek v. DeSantis*, 174 N.Y.S.3d 139 (2d Dep't 2022)**[1]

Nassau Family Court granted the parties joint custody and split physical custody of their children, with a notably convoluted parenting plan. The children's father had parenting time from Sunday mornings to Wednesday mornings, during some seasons, as well as alternating weekends. The mother had physical custody from Wednesday to Friday, during some seasons, along with extended stretches of parenting time over the summer.

This parenting time roadmap proved workable, but it sparked yet another legal battle, as the mother returned to family court and filed for child support. The mother was a dance instructor and the father was a highly compensated partner at a law firm. Given their 50-50 split of physical custody, the mother argued, she was entitled to child support from the father, who is the more monied parent. The father, in turn, argued that their split of physical custody was not exactly equal, that due to his having the majority of overnights with the children, he was the custodial parent, and as such, the mother's petition should be dismissed as a matter of law.

The court below agreed with the father and dismissed the mother's petition. The mother appealed, and the Second Department reversed and remanded.

In the landmark case *Baraby v. Baraby* (250 A.D.2d 203, 681 N.Y.S.2d 826), the Third Department ruled that when physical custody is truly equal, "the parent having the greater *pro rata* share of the child support obligation . . . should be determined as the 'noncustodial' parent." Other appellate departments have since followed the *Baraby* rule.

But what exactly is "equal" physical custody, especially in cases of such convoluted parenting time schedules? True, the father had more overnights, but the mother had more custodial days, along with more parenting time in the summer. True, the family court had designated the father the "custodial parent," but the court clearly stated that it was providing that label "solely for the purpose of determining the children's school district."

The appellate court concluded that the parenting time schedule was "as close to exactly 50/50 as the [Court] could devise." The court rejected the father's contention that status as the custodial parent must be determined based upon a strict counting of custodial overnights. While strict counting of overnights might have the advantage of ease of application, the approach would obscure "the reality of the situation," like the fact that the children were, in essence, spending equal time in each parent's home. As such, the Second Department concluded the *Baraby* rule applies.

Therefore, the appellate court reversed the lower court's ruling and remanded the case back to the family court, to determine the parties' incomes, and the father's child support obligation.

Enforcement

***Ruffino v. Serio*, 206 A.D.3d 775 (2d Dep't 2022)**

The parties divorced and the wife was granted a judgment against the husband for more than $286,000 in equitable distribution.

Some years later, the wife filed a petition against her ex-husband and his partner, alleging that he had partial ownership of significant real estate in Nassau and Suffolk counties and fraudulently transferred his ownership interest to his partner, to frustrate her efforts to collect on the judgment.

The ex-husband's partner filed a motion to dismiss pursuant to CPLR 3211(a), and the Nassau County Supreme Court granted the partner's motion without a hearing, based on documentary evidence that she purchased these properties from third parties, some of which were owned prior to the parties' divorce action. Soon after, the ex-wife appealed to the Second Department, which affirmed the lower court's ruling. The court held that the case was properly dismissed against the partner, since she presented sufficient documentary proof.

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Endnote

1. The decision in *Smisek* is the subject of this issue's editorial.