Recent Legislation, Cases and Trends in Matrimonial Law

By Wendy B. Samuelson

Recent Legislation

New bill could eliminate need to notarize affidavits

A new bill that would eliminate the need for notarizing affidavits has passed the state Senate and Assembly and, if signed into law, could dramatically alter the practice of matrimonial law.

The bill, S5162/A5772, would allow parties to submit their affidavits with an affirmation as a substitute for notarizing their statement. The affirmation would state that the signor acknowledges their affidavit may be used in a court action and that they are making their statement under penalty of perjury.

The bill was introduced in the Senate by Sen. Brad Hoylman-Sigal and in the Assembly by Assemblymember Charles Lavine. It sped through the two chambers' Judiciary Committees in early 2023 and was overwhelmingly approved by both houses at the end of May. However, inexplicably, it appears stuck, it has not been presented to Gov. Kathy Hochul for her signature.

The change would align New York with the federal law, which allows unnotarized declarations under 28 U.S.C. § 1746, and with 22 other states which have already nixed the notarization requirement.

Eliminating the notarization requirement would fundamentally reshape the path of most divorces, custody battles, and family offense cases, just as the introduction of virtual court appearances reshaped our daily schedules. Getting affidavits notarized is the bane of every matrimonial attorney's existence, especially when a tight court deadline is fast approaching. Some clients do move swiftly, finding their local UPS Store — printing, signing, notarizing, scanning, and emailing their affidavits back within the same day. But others dawdle, needlessly stretching out litigation.

Dissolving the notarization requirement could simplify the legal process for low-income clients as well, including those living in neighborhoods where notaries are scarce or those who can't easily secure the transportation, time off work, and childcare required to seek out a notary.

The legal community has not been unanimous in its embrace of the bill. At a July meeting of the NYSBA Family Law Executive Committee, Kings County Supreme Court Judge Jeffrey Sunshine voiced the concerns of many judges nervous about setting notaries aside because it could open the door to fraud.

We will keep the reader posted regarding any new developments.

China joins Apostille Convention, simplifying authentication of foreign documents

For decades, China stood apart from the international community of nations, rejecting the Apostille Convention, a 1961 international agreement that simplified authentication for international documents.

Under the convention, to authenticate a legal document from another nation, all that a party needed was an apostille, an official document stamped or sealed by the nation of origin confirming an item's authenticity. An apostille eliminates the need for further certification by embassy officials, streamlining cases that require foreign documents. More than 120 countries and territories ratified the agreement.

In March 2022, after rejecting the accord for 61 years, China reversed course and affirmed the convention. The new policy will go into effect on November 7, 2023.

While China's new embrace of the accord will significantly simplify many matrimonial cases, the driving force behind the change was industrial, as Chinese corporations sought to eliminate red tape for acquiring patents and shipping goods. The move was a signature policy of Chinese Premier Li Keqiang, who said the change would remove unreasonable restrictions on international enterprises and promote faster, simpler online clearance of documents.

Custody

Father granted full custody despite violent attack on child's mother years prior

Matter of Joshua XX. v. Stefania YY., 218 A.D.3d 893 (3d Dep't 2023)

The parents never married and separated soon after their son's birth. After years of legal battles, in November 2019, the court found that the father had harassed the mother and strangled her, committing the family offense of harassment in the second degree and criminal obstruction of breathing during a fight in November 2017. In consideration of the father's violent tendencies, the court granted the mother full physical and legal custody, with substantial visitation for the father. The court directed the parties not to disparage one another in front of their child.

The mother ignored the court's direction, alienating the child from his father by badmouthing the father to their son,

telling the son that his father was "dangerous." She urged the son to call her new boyfriend "Daddy." She denied the father basic information about their son's life, like which extracurricular activities she had enrolled him in. When the COVID-19 pandemic hit, the mother further strained the father-son bond by refusing to tell the father in which of her three homes she and the son would be quarantining.

Blocked off from basic contact and information about his son, the father filed a modification petition in March 2020 seeking sole legal and physical custody.

To modify a custody order, a party must show that there has been a change in circumstances and that modifying custody would serve the child's best interests. Here, the court ruled that the father had proven the change in circumstances, based on the mother's unyielding efforts to alienate the child from his father, as well as the radical improvement in the father's housing, moving from his own grandmother's basement to a new home suitable for a child.

As the parties' ongoing animosity made co-parenting impractical, the court granted the father full custody. The mother appealed, but the Third Department affirmed the lower court's ruling.

The appellate court recognized the harm that the mother was inflicting through her campaign of alienation and the dramatic improvement in the father's housing, though the court also spotlighted its lingering concern about both the November 2017 incident in which the father choked the mother and threatened to kill her and his continued lack of remorse for that violent outburst. Nonetheless, the father mitigated the court's concern by taking an anger management course, getting treatment from a therapist, and making the prudent decision to ask his family to perform the custody exchanges to avoid the possibility of a contentious encounter with the mother, despite a carveout in the custody order that would have allowed him to pick up their son himself. The father's mother, aunt, and next-door neighbor also testified to the happy, healthy relationship between father and son, and made clear that in their view, the father posed no danger to the son.

"Domestic violence does not preclude an award of custody," the appellate court explained. (*See Matter of Aimee T. v. Ryan U.*, 173 A.D.3d at 1379, 105 N.Y.S.3d 558; *Matter of Austin ZZ. v. Aimee A.*, 191 A.D.3d 1134, 142 N.Y.S.3d 112 [3d Dep't 2021].) In consideration of the mitigating factors and the three years of time since that apparently isolated violent incident, there was a "sound and substantial basis in the record to support the transfer of custody to the father," the appellate court ruled.

De facto change in custody does not alter father's child support obligation

Vaysburd v. Vaysburd, 217 A.D.3d 723 (2d Dep't 2023)

The parties sought an amicable resolution to their divorce proceedings, but were only able to reach a partial resolution, agreeing that they would have joint legal custody of their son and daughter, and the mother would have physical custody of the two kids. The Kings County Supreme Court was left to determine child support. In June 2019, the court ordered the father to pay $2,096 per month in support.

Before the court issued its order, the son moved in with his father, leaving him with the additional financial burden that comes with residential custody. The father appealed, arguing that the $2,096 figure was based on calculations for two children, not one. Given that he now had de facto custody of his son, his child support burden should be lowered from 25% of his monthly earnings to 17%, the statutory standard for one child, the father argued.

The Second Department disagreed and affirmed the lower court's order.

"Without a modification of custody, the defendant's obligations remain the same despite a de facto change of custody of the parties' son." (*See Listokin v. Listokin*, 188 A.D.3d 862, 136 N.Y.S.3d 64; *Cassidy v. Cassidy*, 66 A.D.3d 941, 888 N.Y.S.2d 141.) The lower court properly applied the 25% standard, given that there had been no motion for a change in custody and no court order officially altering the mother's physical custody of both children.

Child Support

Husband jailed for not paying $40/month in child support

Matter of Benson v. Sherman, 217 A.D.3d 1174 (3d Dep't 2023)

A failure to pay child support can provoke more than a mere slap on the wrist. The court can send the respondent to jail, no matter how small his flouted financial obligation is.

The father in this case learned that lesson the hard way, after the Courtland County Family Court held that he had willfully violated an order of child support, which had required him to pay $40 a month. The court committed him to jail for six months.

He appealed. But the Third Department affirmed the Family Court's order.

The parties had married, had a baby in 2009, then divorced a decade later. The 2020 support order directed the father to pay $40 a month in child support. He defaulted, and by the time the mother initiated the default hearing, he owed more than $380 in arrears. The father failed to appear at the hearing, and the support magistrate ruled that he had willfully violated the support order and recommended six months in jail. The

Family Court judge thereafter confirmed the magistrate's findings and imposed the imprisonment.

At the confirmation hearing, the father appeared and argued that because he had been hospitalized for back surgery, he couldn't perform the manual labor that had been his financial bread and butter and, thus, he had no way to comply with the support order. He was so injured, he asserted, that he eventually applied for Social Security disability benefits. The court accepted his proof of hospitalization but dismissed the notion that manual labor was his only means to earn a living. The court also pointed out there was no proof that he was actually disabled or that the Social Security Administration had approved his application. As such, the court concluded that he had willfully violated the support order.

On appeal, the father disputed the Family Court's finding of willful violation. The appellate court was unmoved. "The record," it wrote, is "devoid of proof that the father was only capable of obtaining employment involving physical labor, lacked other options in which to generate income, or attempted to find work accommodating his health limitations." (*See Matter of Amanda Y.Y. v. Faisal ZZ.*, 199 A.D.3d at 1257; *Matter of Welt v. Woodcock*, 185 A.D.3d 1172.)

To the appellate court, the fact that his obligation was so small was not an indication that the punishment was too harsh but a sign that the father clearly, willfully intended to violate the court order, given that such a minuscule amount of money could so easily have been paid.

Father must continue paying child support despite allegation of interference with visitation

Zinger v. Robertson, 217 A.D.3d 471 (1st Dep't 2023)

By 2022 Christian Robertson had had enough of sending money to his ex-wife, as he felt that she had been persistently frustrating his efforts to visit with their twins. The ex-husband had plenty of money on hand — his Net Worth Statement showed approximately $3 million in net assets, the Kings County Supreme Court had imputed to him an annual income of $600,000, and by his own claim, he had spent more than $1.6 million in legal fees for his divorce — but he did not want a single additional dime to go to his ex-wife.

He filed a motion to terminate his child and spousal support obligations, arguing that the wife's ongoing interference with his parenting time with their twins obviated the need to pay spousal or child support. The court denied his motion. He appealed. The First Department affirmed the lower court's ruling.

A party's deliberate effort to frustrate or actively interfere with the other party's custody and visitation rights can be legitimate grounds for altering support. (See *Rodman v. Friedman*, 112 A.D.3d 537, 978 N.Y.S.2d 127 [1st Dep't 2013]; *Matter of Thompson v. Thompson*, 78 A.D.3d 845, 910 N.Y.S.2d 536 [2d Dep't 2010].) But in this case, in the husband's motion, the court found that it is unclear how his ex-wife violated his parenting time since he had spent a good stretch of August 2021 with his children. The lower court properly denied the ex-husband's motion because of conclusory allegations, without proof of interference.

Enforcement

Wife granted money judgment after ex-husband dies without life insurance required by parties' agreement

Matter of Edelen v. Edelen, 219 A.D.3d 93 (2d Dep't 2023)

In 2001, the parties signed a Separation Agreement, which was incorporated into the parties' Judgment of Divorce that required the husband to maintain three life insurance policies: one for $25,000; one for $100,000; and one for $148,575 (or a total of $273,575), naming the wife as beneficiary until the children were emancipated. The stipulation specified that if the husband died without having those policies in effect, his estate would be liable for the face value of the policies.

Fourteen years later, the ex-husband died with only the $100,000 policy in place. When the husband's estate refused to pay the remaining funds, the ex-wife sued the estate. The Surrogate Court ruled in her favor on summary judgment, ordering the husband's estate to pay her the remainder, plus legal interest and counsel fees.

The estate appealed. The Second Department affirmed the Surrogate Court's ruling.

The estate argued that it had no obligation to pay the wife because the separation agreement describes the decedent's death as an "emancipation event." The appellate court scoffed at such logic, noting that the settlement had made clear that the obligation [to maintain the insurance policies] was to continue until such time that both children are emancipated.

The estate also contended that the wife had abandoned her right to collect on the life insurance provision because the husband did not have two of the policies for years, and she never objected. The appellate court rejected that argument as well, explaining that for a court to declare a right abandoned, after it was guaranteed in a contract, it must be shown that both parties engaged in conduct that was "unequivocal" and "inconsistent" with the intent of the original contract. (*See EMF Gen. Contr. Corp. v. Bisbee*, 6 A.D.3d 45, N.Y.S.2d 39; *Rosiny v. Schmidt*, 185 A.D.2d 727, 587 N.Y.S.2d 929). Here, the wife was not specifically advised that the decedent was not complying with his obligations, but had she known this, and failed to enforce her rights, the court may have made a different determination. In addition, since the decedent maintained one of the policies, it was clear that there was no abandonment of the contract.

Wife who submitted some of her legal bills in Hebrew without translation did not receive an award of counsel fees for those bills

Yakobowicz v. Yakobowicz, 217 A.D.3d 733 (2d Dep't 2023)

The Second Department refused to order a husband to pay his ex-wife's entire legal bill after she submitted some of her bills in Hebrew.

The Nassau County Supreme Court issued a Judgment of Divorce in their case in April 2014, based on a Stipulation of Settlement. The nine years following the judgment have been replete with further legal wrangling. First, they battled over ownership of the husband's apartment in Israel. Their settlement agreement directed the husband to transfer title of the apartment to his wife as part of her distributive award. Months later, the husband filed a plenary action to alter their settlement, requesting that the court direct him to pay a sum certain to his ex-wife, rather than transferring the property.

The wife moved to hold the husband in contempt for failing to transfer title to the apartment and for $50,000 in legal fees for the enforcement proceedings. Given the husband's relative wealth, the court granted her $25,000 in legal fees. When the husband refused to pay, she moved to hold him in contempt for refusing to comply with that order. The court granted the contempt motion, then purged it after the husband paid the $25,000.

After yet another year of legal wrangling, in both New York and Israel, the wife filed for $200,000 in additional legal fees to enforce the title transfer. The court granted her $50,000. The wife, unsatisfied, appealed. The appellate court modified the order, granting her approximately $71,000 — that is, $96,000 minus the $25,000 already provided by the husband.

As the appellate court explained, there is a "rebuttable presumption that counsel fees shall be awarded to the lesser-monied spouse," but the court's discretion in whether it should issue that order, and for how much, is "broad," and in reviewing the award, the appellate court's "discretionary authority is as broad as that of the trial court." (*See Tuchman v. Tuchman*, 201 A.D.3d at 993, 157 N.Y.S.3d 775; *Silvers v. Silvers*, 197 A.D.3d 1195, 153 N.Y.S.3d 548.)

In granting a lesser amount, the appellate court concluded, the court was acting on obvious flaws in the wife's motion, including submitting legal bills from her Israeli attorney that were in Hebrew, without translation, and that lacked itemized detail establishing the precise services that her Israeli attorney rendered.

Wendy B. Samuelson is a partner of the boutique matrimonial and family law firm Samuelson Hause & Samuelson, LLP, located in Garden City, New York. She has written literature and lectured for various law and accounting firms and organizations. Ms. Samuelson is listed in The Best Lawyers in America, "The Ten Leaders in Matrimonial Law of Long Island," and a top New York matrimonial attorney in Super Lawyers. She has an AV rating from Martindale Hubbell. The firm is listed as a Top Tier Matrimonial Law firm by U.S. News & World Report. Ms. Samuelson welcomes your feedback at (516) 294-6666 or WSamuelson@SamuelsonHause.net. The firm's website is www.SamuelsonHause.net.

A special thanks to **Joshua Kors of Kors Law Group PLLC** for his assistance in writing this article, and to **Michael Angelo** for his editorial assistance.