Recent Legislation, Cases and Trends in Matrimonial Law

By Wendy B. Samuelson

RECENT LEGISLATION

New York Increases Income Caps for Maintenance and Child Support

The Child Support Standards Act (CSSA) and the Maintenance Guidelines Act (MGA) have been updated in response to increases in the Consumer Price Index, published by the U.S. Department of Labor.

On March 1, 2022, the combined income cap under the CSSA was increased from $154,000 to $163,000. The income cap for maintenance under the MGA was raised from $192,000 to $203,000.

The revised legislation also increases the Self-Support Reserve from $17,388 to $18,346.50 and raises the Poverty Income Guidelines Amount for a single person from $12,880 to $13,590.

CASES OF INTEREST

Custody

Mother Who Prevented Her Children's Vaccinations Loses Decision-Making Authority Over Children's Medical Care

***Matter of Soper v. Soper*, __A.D.3d__ (2d Dep't 2022)**

When the parties divorced in July 2019, the parties agreed to joint legal custody. The parties listed trusted pediatricians to treat their three children and to defer medical decisions to those doctors.

Then the COVID-19 pandemic hit, along with the tidal wave of medical misinformation, and soon the children's mother felt pressured enough to go off-script, seeking medical care for the kids from pediatricians who weren't on the agreed-upon list. When the listed pediatricians recommended that the children get vaccinated, the mother refused, which prevented the youngest child unable to attend school in-person.

In response, the father petitioned for a modification of custody, seeking sole decision-making power over the children's medical care. Suffolk County Family Court granted the father's petition, citing the mother's violation of the medical terms of the so-ordered Stipulation of Settlement.

The mother appealed. The Second Department affirmed the lower court's ruling. The youngest child's inability to attend school, due to the mother's violation of the medical provisions, constituted a sufficient change in circumstances to warrant a modification.

Unvaccinated Father Barred From In-Person Contact With Daughter

***C.B. v. D.B.*, 155 N.Y.S.3d 727 (Sup. Ct., N.Y. Co. 2021)**

The New York County Supreme Court issued a temporary retraining order against an unvaccinated father, barring him from in-person contact with his three-year-old daughter. While it's too early to tell, Judge Matthew Cooper's October 7, 2022 ruling could prove pivotal for the state at large, setting a precedent for the way New York courts approach the ongoing battle between public health and antivaxxers' cries of individual liberty.

In September 2021, the mother made an emergency oral application to halt the father's in-person visits due to his refusal to take the COVID-19 vaccine. The AFC supported the mother's motion. Judge Cooper granted the motion and issued a TRO suspending the father's in-person access to his daughter until he took the vaccine or agreed to regular COVID-19 testing. The father, in turn, rejected both options.

Judge Cooper acknowledged that there is a "rebuttable presumption that visitation by a non-custodial parent is in a child's best interest and should be denied only in exceptional circumstances (*Matter of Josephine F. v. Rodney W.*, 168 A.D.3d 486 (1st Dep't 2019). But the father's refusal to be vaccinated or tested created an exceptional circumstance, the court concluded.

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The danger of voluntarily remaining unvaccinated during access with a child while the COVID-19 virus remains a threat to children's health and safety cannot be understated. Although some children infected with the virus experience mild symptoms, others are subject to serious illness and longterm health effects. Currently, children under age 5 have not yet been approved to receive COVID-19 vaccines, so they are dependent upon the vaccination and health status of the adults around them. The danger extends beyond this child and includes a risk of serious infection to any person with whom the child comes into contact, including plaintiff, the child's classmates, and their families.

The court admonished, the father "professes to love his daughter with all his being, . . . he adamantly refuses to do what his daughter's schoolmates' parents have all been required to do—be vaccinated."

In opposing the wife's motion, the father presented four justifications for his refusal to vaccinate: (1) that "any vaccination requirement [is] an unreasonable intrusion into his rights as an American citizen"; (2) that he believed he had sufficient antibodies to the virus after having contracted COVID-19 earlier in the pandemic, a medical hypothesis that has been thoroughly studied and rejected by top immunologists; (3) that he would provide the court with testimony from a medical expert explaining why he did not need to be vaccinated, an argument he later dropped, presumably after failing to find such an expert; and (4) that his "religious beliefs as a Roman Catholic" precluded him from receiving the vaccine, a position the court mocked in its decision, "given that Pope Francis, the head of the Catholic Church, is vaccinated and has encouraged Catholics everywhere to be vaccinated for 'the common good.'"

The father rejected the alternate option of regular testing, unless the vaccinated mother agreed to the same regimen, a position Judge Cooper ridiculed as "motivated by a desire to burden the [mother] as opposed to a commitment to keeping his child safe."

Thus, the court ruled, as an unvaccinated parent, the father presented exigent circumstances with the "risk of imminent harm to the child" requiring the immediate enforcement of a TRO.

Grandmother Granted Visitation With Grandchild Despite Objections From Child's Mother

Matter of Melissa X. v. Javon Y., 200 A.D.3d 1451 (3d Dep't 2021)

After giving birth, respondent Savannah Z. turned to her mother to provide childcare. Savannah and her daughter lived with the baby's grandmother for five months, during which time the grandmother took on a prominent maternal role. While Savannah battled postpartum depression, the grandmother-petitioner bathed the baby, changed her diapers, fed her, and played with her.

In August 2019, a bitter argument erupted between mother and grandmother, leading the grandmother to kick her daughter and granddaughter out of her apartment. In turn, the young mother cut off her mother's contact with her granddaughter. After a year of trying and failing to re-establish contact with her daughter and granddaughter, the grandmother filed for visitation with the Sullivan County Family Court.

The baby's mother and father vigorously opposed the petition, challenging the grandmother's standing, accusing her of being "toxic" and "mentally abusive," describing her residence as a "cluttered" apartment that "smelled strongly from dog urine and from the dirty tank that housed [her] turtle," and arguing that, one year later, the grandmother was essentially a stranger to their young child.

The court granted one monthly, seven-hour unsupervised visit with the grandchild and weekly contact by phone or video. The parents appealed. The Third Department affirmed the lower court's ruling.

Grandparents have standing to file for visitation when there is a "sufficient existing relationship with their grandchild" and continuation of that relationship is frustrated by the parents' actions, the court explained. Courts consider the nature and extent of the grandparent/grandchild relationship and the basis for the parents' objection to visitation.

Given her extensive commitment to her granddaughter in those critical first months of her life, the grandmother-petitioner had standing. While the acrimony between the mother and grandmother was unfortunate, acrimony alone isn't sufficient to dissolve a party's visitation rights.

Most notably, the appellate court found the mother's claims that the grandmother's apartment was messy and unsanitary to be unbelievable since she did not voluntarily leave the apartment when she was living there and the argument that led to her leaving was sparked by her desire to sleep with the baby's father in the grandmother's home.

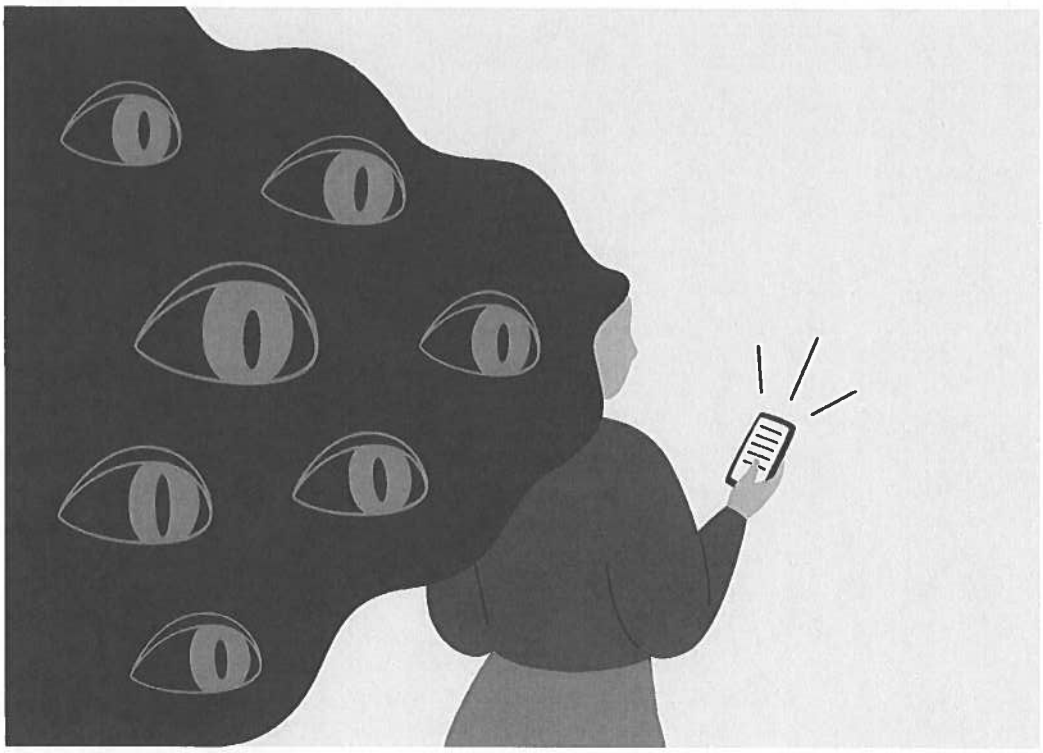
Inmate Father Wrongfully Denied Hearing on His Custody Modification Petition

Rigdon v. Close, 200 A.D.3d 1562 (4th Dep't 2021)

In 2021, the petitioner-father—incarcerated and battling a drug addiction—found himself cut off from his children. Beyond the physical separation, he also faced a court order that prevented him from communicating with his kids while in prison.

In an effort to re-establish contact, the father petitioned the Family Court to modify the custody order, seeking to regain the right to write to his children and call them from prison. The court dismissed his petition without granting a hearing, asserting that, according to the custody order, the father needed to complete substance abuse treatment before filing for modification.

The father appealed, and the Fourth Department reversed the lower court's order and reinstated the father's petition.



As the appellate court noted, the custody order did not require the father to complete substance abuse treatment but merely to "consistently engage" in mental health and substance abuse treatment. The custody order further stated that completing a parenting program and consistently engaging with treatment programs would constitute a change in circumstances. While the father hadn't completed any treatment programs, he had consistently engaged in them and he also completed a parenting program, thereby fulfilling the requirements set by the custody order.

It clarified, however, that just because the father had the right to a modification hearing didn't mean that he'd emerge victorious and reacquire the right to contact his children. The mother would have to prove at a hearing that communication in writing and by phone would be detrimental to the children. Thus, the appellate court remitted the father's modification petition back to the Family Court for such a hearing.

Evidence

Husband Faces Stiff Sanctions After Installing Spyware on Wife's Phone

C.C. v. A.R., 192 A.D.3d 654 (2d Dep't 2022)

During the parties' divorce proceedings, the wife discovered that her husband had installed spyware on her cell phone. The spyware, identified by forensic experts as OwnSpy, included a wiretapping feature that gave the husband access to his wife's trial strategy, by allowing him to eavesdrop on her confidential conversations with her attorney. Kings County Supreme Court directed the sheriff to confiscate the husband's computing devices and enjoined him from destroying records relating to his use of spyware.

The husband attempted to evade responsibility for his spying by claiming that he couldn't remember the passwords to several of the locked devices. Experts examining the devices determined that the husband had purchased data-destroying software and, one day after the court issued its order precluding the destruction of evidence, wiped one of his devices clean, leaving the data unrecoverable. In his deposition, pressed by the wife's attorney about his use of spyware, the husband repeatedly invoked his Fifth Amendment right against self-incrimination.

The court, concluding that the husband had knowingly and purposely violated the wife's attorney-client privilege, granted the wife's motion to hold the husband in contempt for spoilage of evidence and imposed fierce sanctions, striking the causes of action in the husband's complaint seeking financial relief beyond child support and precluding him from introducing evidence at trial regarding spousal support, equitable distribution, and counsel fees.

The husband appealed, and the appellate court affirmed the lower court's sanctions. "[The] striking of pleadings is a drastic remedy," the appellate court acknowledged, but purposely compromising an opposing party's right to confidential communications with counsel is a drastic violation, and the "Supreme Court is empowered with 'broad discretion in determining the appropriate sanction for spoilation of evidence,'" including precluding proof favorable to the spoliator, requiring that the spoliator pay costs, applying an adverse inference to the evidence and testimony presented, striking the spoliator's pleadings, and even dismissing his petition altogether. (*See Utica Mut. Ins. Co. v. Berkoski Oil Co.*, 58 A.D.3d 717, 872 N.Y.S.2d 166; *De Los Santos v. Polanco*, 21 A.D.3d 397.)

Equitable Distribution

Husband Received 1% of Retirement Funds That Wife Accrued After Parties Physically Separated

***Cuomo v. Moss*, 199 A.D.3d 635 (2d Dep't 2021)**

The parties married were married for 26 years and had no children. They shared a home until 2011, when the wife moved from New York to Tennessee for a job opportunity. While living and working there, the wife accrued significant retirement funds. Meanwhile, the husband, living alone in the marital home in New York, paid the remaining balance due on their mortgage ($68,000).

In Suffolk Supreme Court, the husband argued that for asset distribution to be equitable, he should be granted a large portion of his wife's retirement funds and a $34,000 credit for his contributions to the couple's mortgage.

The husband was granted the $34,000 credit for his mortgage payments, but he was only entitled to 1% of his wife's retirement funds. The wife appealed, and upon consideration, the Second Department partially modified the trial court's ruling, essentially granting the wife a full victory.

The appellate court affirmed the lower court's ruling that the husband was only entitled to 1% of the wife's retirement assets because those benefits accumulated while the parties were separated, and therefore the husband effectively made no contributions to the defendant's retirement accounts.

The husband paid $64,000 of the mortgage before he filed for divorce, and therefore the court determined that it should not look back and try to compensate one party for a reduction in marital debt.

Wife's Pension Award Short-Circuited by Undelivered QDRO and Statute of Limitations

***Mussmacher v. Mussmacher*, 200 A.D.3d 1702 (4th Dep't 2021)**

The parties' divorce agreement equally divided the husband's pension pursuant to the Majauskas formula, which was incorporated but not merged into the Judgment of Divorce. But for reasons unknown, the couple's QDRO was never sent to the husband's employer, a company where he worked for 32 years. When he retired in 2003, the husband elected to begin distributions in 2010, and the lump sum amount of his pension was distributed to him in $25,000 increments, until it was depleted in 2018.

A year later, the wife filed a motion seeking arrears for the pension funds she never received. The court awarded her more than $75,000—her Majauskas share of the lump sum distribution, plus interest. The husband appealed, and the appellate court modified the order, dropping her distribution to just $52,300 plus interest.

The trial court erred in calculating the wife's portion of the pension, the appellate court ruled, because the court failed to take into account the statute of limitations. A stipulation of settlement is a contract, and an action seeking money damages for violation of an agreement is subject to the six-year statute of limitations for breach of contract actions. Therefore, the wife could only be compensated for her portion of the pension payments within the six-year time span prior to her 2019 motion, with interest.

Wife's Mother's Lottery Jackpot Construed as Marital Property Subject to Equitable Distribution

***Hughes v. Hughes*, 198 A.D.3d 1170 (3d Dep't 2021)**

In 2014, when the wife's mother won a $7.5 million lottery jackpot, the winnings were accepted by the mother and each of her five children ($1.25 million each). Six years later, the wife found herself in Saratoga County Supreme Court, in divorce proceedings, locked in a bitter battle with her husband to retain possession of her share of the jackpot.

The wife argued that her mother gave her $1.25 million from the jackpot as a parental gift not subject to equitable distribution. The court rejected that argument and labeled her portion of the winnings as marital property to be equitably divided between the parties. The wife appealed. The Third Department affirmed the lower court's ruling.

As the appellate court indicates, the lottery jackpot was actually won by the wife's mother and the mother's five children, including the appellant wife. State Gaming Commission records identify all six family members as winners, and the giant check that was delivered to them as part of a publicity spectacle featured all six of their names. Given that the wife was one of the winners, the notion of the winnings being gifted to her becomes a logical impossibility—a mother cannot give to her child something the child already possesses.

With their 2014 tax filings, the husband, the wife and the wife's mother all verified the husband's position that the lottery winnings were marital property. The wife's mother didn't file any gift tax returns related to the lottery, and the husband and wife claimed their $1.25 million portion of the jackpot as income that they acquired by gambling.

Courts "cannot, as a matter of policy, permit parties to assert positions in legal proceedings that are contrary to declarations made under penalty of perjury on income tax returns." (*See Mahoney-Buntzman v. Buntzman*, 12 N.Y.3d 415, 881 N.Y.S.2d 369 [2009]; *Gianmuzzi v. Kearney*, 160 A.D.3d 1080.) "By claiming the lottery winnings as income on their joint tax returns, the husband and wife necessarily represented that such winnings were not a gift," the appellate court ruled.