Recent Legislation, Decisions and Trends in Matrimonial Law

By Wendy B. Samuelson

Same-Sex Marriage Update

Jurisdictions That Permit Same-Sex Marriage

June marks the one-year anniversary of the landmark Supreme Court decision of *Windsor v. United States*, 133 S. Ct. 2675 (2013), which struck down the core of the federal Defense of Marriage Act (DOMA) and held that married same-sex couples are eligible for federal benefits, although the justices stopped short of a ruling endorsing a fundamental right for same-sex couples to marry. It also marks the ten-year anniversary of the first state to permit same-sex marriage, Massachusetts. Since then, we have a total of 19 states that permit same-sex marriage. While the United States still remains divided, with some states respecting same-sex marriages and others discriminating against these couples, the landscape in the campaign to win marriage equality has changed immeasurably. However, some same-sex married couples live in states that don't respect their marriage, while the federal government does, which creates grave legal uncertainty and chaos for these families.

There is a snowball gaining speed down the mountain for the Supreme Court to take up another same-sex marriage case to rule that same-sex marriage should be federally permissible. In June, 2014, the United States Conference of Mayors reaffirmed its support of the freedom to marry for same-sex couples and found that "there continues to be an untenable patchwork imposing great legal uncertainty and hardship on committed same-sex couples in the 31 states that deny their freedom to marry and refuse to respect their lawful marriages, even as the federal government rightly treats these couples as married for federal programs and purposes" and urged the federal courts, including the U.S. Supreme Court, to "speedily bring national resolution by ruling in favor of the freedom to marry nationwide." The conference noted that as of June 17, 2014, every one of the 15 federal district court judges who has ruled in a same-sex marriage case has found that state marriage discrimination violates the U.S. Constitution.

Since my last column, two more states have permitted same-sex marriage, including Oregon (May 19, 2014) and Pennsylvania (May 20, 2014), where a federal judge in each state struck down the ban on same-sex marriage.

Seventeen additional states (19 total) recognize same-sex marriage: Hawaii, Illinois, New Mexico, New Jersey, California, Rhode Island, Delaware, Minnesota, Washington, Maine, Maryland, New York (as of July 24, 2011 when it passed the Marriage Equality Act) (DRL §§ 210-a, 210-b), Massachusetts, Connecticut, Iowa, Vermont, and New Hampshire, plus the District of Columbia.

The following countries permit same-sex marriage: Argentina, Belgium, Brazil, Canada, Denmark, France, Iceland, Luxembourg, Netherlands, New Zealand, Norway, Portugal, Spain, South Africa, Sweden, United Kingdom, and Uruguay, and Mexico City, Mexico.

Recent Legislation

Surprisingly, there has been no recent legislative changes affecting matrimonial and family law since my last column. As a reminder, as of January 31, 2014, the combined parental income to be used for purposes of the CSSA changed from $136,000 to $141,000 in accordance with Social Services Law § 111i(2)(b), and in consideration of the Consumer Price Index. Agreements should reflect the new amounts. The CSSA chart for unrepresented parties will change to reflect that amount as well. In addition, the threshold amount for temporary maintenance is now $543,000 rather than $524,000. The self-support reserve is now $15,512.

Cases of Interest

Custody and Visitation

Addiction treatment or counseling cannot be a condition precedent to visitation

Matter of Welch v. Taylor, 115 A.D.3d 754 (2d Dept. 2014)

The Family Court awarded the mother sole custody of the parties' child and conditioned the father's visitation upon his enrollment in a medical facility where random drug-testing is required and his compliance with maintaining a certain medical prescription, directed him to provide a copy of his prescription to the mother, and allowed the mother to suspend his visitation if he failed to supply proof of his prescription. The appellate court modified, holding that "a court may not order that a parent undergo counseling or treatment as a condition of future visitation or reapplication for visitation rights, but may only direct a party to submit to counseling or treatment as a component of visitation." *Id.* at 756 (quoting *Matter of Smith v. Dawn F.B.*, 88 A.D.3d 729, 730 (2d Dept. 2011). The court noted that directing the father to enroll

in a random drug-testing program does not improperly make the ordered treatment a prerequisite to his access to the child. In addition, it is the court's responsibility, not the parent's, to supervise and enforce this therapeutic component of its visitation order.

Child's behavioral problems in school warranted a modification of an existing custody order

***Matter of Mack v. Kass*, 115 A.D.3d 748 (2d Dept. 2014)**

The parties agreed to joint legal custody with residential custody to the mother. Two years later, the father petitioned for modification of the custody order because the mother was not adequately dealing with the child's behavioral problems in school, the child was being suspended from school often, and the mother was permitting the child to be absent from school. The lower court granted the petition and awarded the father sole legal and residential custody of the child, which was affirmed on appeal based on the extensive testimony offered at the hearing, which included testimony from the parties, the child's paternal grandmother, the forensic evaluator, a child protective specialist from the Administration for Children's Services, and school personnel.

Joint legal custody awarded

***Johanys M. v. Eddy A.*, 115 A.D.3d 460 (1st Dept. 2014)**

The appellate court reversed the lower court's award of sole custody of the child to the mother and granted the parties joint custody, with the mother having primary physical custody. The court held that it is in the child's best interest for the parties to have joint legal custody because the parties had a similar ability to financially provide for the child, the child spent an equal amount of time with each party, both parties had an emotional bond with the child, and the parties' relationship was not acrimonious or distrustful. Noting that the lower court had based its decision on the fact that the mother no longer worked outside the home, and thus, was better available to look after the child, the appellate court explained that the father "should not be deprived of a decision-making role in the child's life because he is unable to care for the child full-time." *Id.* at 461. Although sharing physical custody was not possible, because the parties resided in different boroughs and the child was starting school, there was no evidence to suggest that the father should be denied the right to participate in decisions concerning the child.

Father equitably estopped from denying paternity

***Matter of Shawn H. v. Kimberly F.*, 115 A.D.3d 744 (2d Dept. 2014)**

The court below properly equitably estopped the father from challenging an order of filiation where the child was 15, the father paid child support, sporadically exercised his visitation rights, attended some school functions and parent-teacher conferences, had telephone contact with the child, and visited her on some of her birthdays. The child considered the man to be her father, justifiably relied on the man's representations, and would be harmed if she learned otherwise.

Initial custody determination/relocation

***Quistorf v. Levesque*, 117 A.D.3d 1456 (4th Dept. 2014)**

The court properly denied the father's petition seeking sole legal and residential custody of the parties' children on the basis that the mother relocated with the children to Maine without the father's permission. Since this is an initial custody determination, the *Tropea* factors do not apply, and instead, relocation is just one of many factors to consider regarding the children's best interests. The mother was awarded sole custody since she was the children's primary caretaker since birth. Although acknowledging that the children's relocation would negatively impact the children's relationship with the father, the court stated that "relocation is not a proper basis upon which to award primary physical custody to [the father]...inasmuch as the children will need to travel between the parties' two residences regardless of which parent is awarded primary physical [residency]." *Id.* at 1457.

Relocation granted

***Caruso v. Cruz*, 114 A.D.3d 769 (2d Dept. 2014)**

The parents of 9-year-old twins entered into a stipulation of settlement, which provided the parties with joint legal custody, the mother with physical custody, the father with liberal visitation, and that neither party would relocate beyond 100 miles without the other's written consent.

After the mother was unable to negotiate a reasonable renewal of her lease at her current residence, she sought to obtain a new residence in New Rochelle, 57 miles from the father. The father brought an application to change sole custody to him because the relocation would disrupt his visitation. The lower court granted the father's motion. The appellate division reversed, reasoning that the relocation would not deprive the father of meaningful access to the children, particularly where the mother is directed to drive half the distance for the father to have visitation twice per mid-week and alternate weekends. The court below improperly gave undue weight to particular instances of conflict between the parties and the mother's failure to consult with the father before determining to move with the children. Also, the court below failed to give sufficient weight to the fact that the mother had been the primary care-giver of the children for their entire lives, and had almost single-handedly addressed their medical and educational needs. In addition, if the father

had custody, the children would be separated from their younger brother from the mother's second marriage.

It is not clear from reading this case what facts support that the move will serve the children's best interests or that the move was necessary, other than losing a lease.

Relocation denied

***Yaddow v. Bianco*, 115 A.D.3d 1338 (4th Dept. 2014)**

The court below properly denied the father's petition to relocate with the parties' eight-year-old son from central New York to Maryland to live with his new wife. The father failed to offer any proof that he received a teaching job offer in Maryland or that he had made any effort to secure a teaching position in the surrounding New York counties. The court found that the relationship between the child and the mother, who lives in New York, would be negatively impacted by such a relocation.

Award of custody to non-parent

***Campbell v. January*, 114 A.D.3d 1176 (4th Dept. 2014), *rearg. dismissed*, 117 A.D.3d 1507 (4th Dept. 2014), *appeal denied*, 23 NY3d 902 (2014)**

Affirming the decision of the lower court, the Fourth Department declined to grant the father custody of his child where the petitioner, a non-parent, had established that extraordinary circumstances existed to warrant an award of custody of the child to the petitioner. Noting that the child was placed with the petitioner just days after his birth, the father disputed that he was the father of the child even after receiving the results of a DNA test confirming that he was, the father neglected to seek custody of the child until the child was almost one year old, the father only visited with the child seven times, and the father demonstrated no interest in learning about the child's significant medical conditions and special needs, the court determined that the father had relinquished his right to custody due to "surrender, abandonment, persisting neglect, unfitness or other like extraordinary circumstances." *Id.* at 1176-77.

Child Support

Child deemed emancipated where he lived with non-custodial parent during college

***Lacy v. Lacy*, 114 A.D.3d 500 (1st Dept. 2014)**

The parties' settlement agreement defined emancipation as a permanent residence away from the residence of the mother. When the parties' son was in college, he resided with the father, and also lived with him during at least one summer vacation, received mail at his father's residence, obtained a New York City driver's license listing his father's address, and only made sporadic visits to the mother's home in Connecticut during portions of his college vacations. Therefore, the child was deemed emancipated under the terms of the parties' agreement. The court pointed out that the child living with the father during college was not the same as a child living in a college dorm.

Equitable Distribution

Credit card debt

***Diaz v. Gonzalez*, 115 A.D.3d 904 (2d Dept. 2014)**

The court below improperly refused to admit evidence offered by the wife of alleged marital debt on the ground that the credit card statements related to credit cards in her sole name, despite her testimony that the credit card accounts were opened during the marriage to pay the parties' expenses. The appellate court remanded the case for a new trial on the issue of equitable distribution of the marital debt.

Payments made by one spouse during the pendency of the action to reduce marital debt credited to both parties equally

***Turco v. Turco*, 117 A.D.3d 719 (2d Dept. 2014)**

In modifying the trial court's decision to award the husband a credit against the sale proceeds of three marital properties for 100% of the amount he paid to reduce the mortgage principals during the pendency of the action, the Second Department relied on the long-standing rule that marital debt is to be shared equally between the parties. The court, noting that "generally, it is the responsibility of both parties to maintain the marital residence during the pendency of a matrimonial action," held that the husband was only entitled to a 50% credit for the reduction in mortgage principal during the pendency of the action. *Id.* at 722. Additionally, the court clarified that following the date of the judgment of divorce until the sale of the marital residence, during which time the wife will have exclusive occupancy of the residence, the wife will be required to pay all of the carrying charges on the marital residence. However, unlike payments made during the pendency of the action, the wife will be entitled to a 100% credit against the proceeds of the sale of the marital residence for her reduction in mortgage principal following the date of judgment.

Enforcement

Willful violation of divorce judgment where party elected retirement option in contradiction of divorce judgment

***O'Connor v. O'Connor*, 116 A.D.3d 1155 (3d Dept. 2014)**

The parties' divorce agreement provided that each party's teacher pension shall be divided according to the *Majauskas* formula with an election of survivorship benefits.

After the divorce, the husband filed a DRO regarding the wife's pension, but the wife failed to file a DRO on the husband's pension. When the husband retired, he

selected "an alternative option per DRO" as a retirement option, but was immediately notified by the plan administrator via telephone and follow-up letter that this option was not available to him due to the wife's failure to file a DRO. The follow-up letter encouraged the husband to notify the wife of the issue and consult with his attorney before finalizing his option. The husband, however, without speaking to the wife or his attorney, proceeded to select the maximum retirement option, which would not provide for the wife's survivorship benefits. Upon the wife's retirement four years later, she learned of what the husband had done and moved by order to show cause for, *inter alia*, contempt.

Agreeing with the lower court, the appellate court held that the husband willfully violated the judgment of divorce by immediately selecting the maximum retirement option when he was notified of the issue three months prior and failed to consult with the wife or his attorney before making his final selection. Therefore, the wife was awarded a credit for the past due payments, pre-judgment interest, and counsel fees.

Order directing a liquidation of property to pay arrears

Theophilova v. Dentchev, 117 A.D.3d 531 (1st Dept. 2014)

The husband was directed to pay $653,000 of his enhanced earnings over the course of 5 years, with $130,600 due within 30 days of the divorce judgment, and $22,616 in child support arrears. The wife moved for a money judgment pursuant to DRL § 244 for his failure to pay same. The court directed the husband to liquidate securities in his separate account sufficient to pay the arrears, but directed the wife to pay the capital gains tax on the amount the husband was directed to liquidate in order to pay the arrears. The First Department reversed, holding that the wife should not be responsible for the capital gains tax.

Exclusive Occupancy

Exclusive occupancy granted

McCoy v. McCoy, 117 A.D.3d 806 (2d Dept. 2014)

The court below erred by directing the custodial parent of the parties' children to either buyout the husband's interest in the marital residence or sell the home and equally divide the proceeds. The appellate court held that the wife was entitled to exclusive occupancy of the marital home until the parties' youngest child reaches age 18, in light of the educational needs of the parties' two children and the financial circumstances of the parties. (The decision does not report the ages of the children.) However, the custodial parent is responsible for paying the carrying charges for the home, including the first mortgage payments, property taxes, utilities, and upkeep costs. In determining whether the custodial parent should be granted exclusive occupancy of the marital home, the trial court should consider, *inter alia*, "the needs of the children, whether the non-custodial parent is in need of the proceeds from the sale of that home, whether comparable housing is available to the custodial parent in the same area at a lower cost, and whether the parties are financially capable of maintaining the residence." *Id.* at 807.

Maintenance

An overall chock-full-of-facts case regarding maintenance and equitable distribution

Alexander v. Alexander, 116 A.D.3d 472 (1st Dept. 2014)

The wife was properly awarded $7,500 per month in maintenance for 12 years in light of the wife's age of 56, her lack of work history, her inability to support herself after being a homemaker throughout the parties' almost 25 -year marriage, raising two now emancipated children, and the wife's equitable distribution award of the marital home valued at $2,000,000 and $750,000 in liquid assets. The court also credited the expert testimony that the husband could work for another 12 years, until age 67, with an earning capacity of $275,000 to $320,000 per year.

The court held that the wife was properly awarded a 35% interest in the husband's corporate stock shares and credited the neutral appraiser's valuation based on the formula in the shareholders' agreement. The court rejected the wife's expert's valuation, which was significantly higher and did not consider the stock transfer restrictions contained in the shareholders' agreement. The neutral appraiser's report, on the other hand, was based on the price in the shareholders' agreement, which was the only evidence in the record of the actual value of the shares.

The court declined to award the wife counsel fees in addition to the $135,000 interim counsel fees she had already received.

Kudos to the appellate division for reciting the pertinent facts of the case, so that this case may be used as legal precedent.

Counsel Fees

The sequel to the "skin in the game" case

Sykes v. Sykes, 43 Misc.3d 1220(A) (Sup. Ct. N.Y. County 2014)

In my Spring 2014 column, I reported on *Sykes v. Sykes*, 973 NYS2d 908 (Sup. Ct. N.Y. County 2013), a mid-trial motion, where the court relieved the wealthy hedge fund husband of his obligation to pay further interim counsel fees after he had already paid the non-monied spouse's counsel fees of $750,000. The court ordered each party to proceed with "skin in the game" and be responsible for their own interim litigation costs by directing each party to receive a $1,000,000 advance from equitable

distribution to pay for their respective counsel fees, subject to reallocation, if any, at trial.

After trial, in considering the reallocation of the $1,000,000 in counsel fees advanced to each party, and despite the wife's receipt of $11,500,000 in equitable distribution, the court concluded that the husband should be responsible for an additional $400,000 of the wife's unnecessary litigation fees that resulted from the husband's litigious behavior with regard to property that he aggressively argued was his separate property throughout trial, but conceded was marital property in his post-trial brief, and a motion which the husband withdrew only after the wife was required to submit voluminous papers in opposition. This left the wife responsible for only $600,000 of the $1,000,000 in advanced fees, and the husband with a total payment of $1,150,000 for the wife's counsel fees.

Along with the extensive discussion of counsel fees, this after-trial decision also dealt with issues of equitable distribution, maintenance, and child support. With regard to equitable distribution, the parties agreed upon the values of most of their assets and to equally distribute these assets, but disagreed on the percentage of the husband's business that the wife was entitled to receive. Although stipulating that the business was worth $8,000,000 as of the date of commencement, the wife asserted that she was entitled to 50% of the business and the husband asserted that the wife was only entitled to 5%. The court awarded the wife 30%, acknowledging the significance of the indirect contributions of the wife, which included emotionally supporting the husband in his change from one financial firm to another prior to opening his own business, and handling the domestic duties of the household, whether through her own doing or the assistance of hired household staff.

Regarding maintenance, the court considered the length of the marriage (14 years), and determined that, post-marriage, the wife will no longer need to spend money on household help to fulfill her role of tending to the home nor will her travel expenses be comparable to the travel expenditures made by the couple during the marriage. Noting that the husband would be responsible for 100% of the child support add-ons and that the wife would be receiving an after-tax income stream of $378,810 per year from her $11,500,000 equitable distribution award, the court ruled that the wife's marital standard of living could be maintained on an additional $415,474 in annual pre-tax maintenance ($228,095 after-tax), totaling $606,905 per year, for a period of eight years.

In computing the husband's child support responsibility for the parties' twelve-year-old son, the court, acknowledging that the husband agreed to pay 100% of the child's add-on expenses, which constitutes the child's most significant expenses, capped the husband's $10,000,000 income at $600,000 and calculated his annual child support obligation to be $102,000 per year.

Award of interim counsel fees was warranted where husband concealed his actual income

***Bykov v. Gevargiz*, 42 Misc.3d 1212(A) (Sup. Ct. Kings County 2014)**

Although the husband's tax returns reflected an annual income of only $30,000, extensive discovery and multiple day depositions revealed that $60,000,000 in credits passed through the husband's business accounts in the five years immediately preceding the husband's commencement of this divorce action. Due to the hundreds of thousands of dollars in unrecorded income from the husband's business and the tactics he used to delay the proceedings by concealing his income, which caused the wife to incur unnecessary counsel fees, the court granted the wife's motion for $40,000 in interim counsel fees.

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