Recent Legislation, Cases and Trends in Matrimonial Law

By Wendy B. Samuelson

Recent Legislation

Revisions to Statement of Client's Rights and Responsibilities for *Pro Bono* Cases, Effective June 1, 2019

In April 2019, the judicial departments of the Appellate Division of the New York Supreme Court issued significant revisions to the Statement of Client's Rights and Responsibilities ("Statement") under 22 CRR-NY 1400.2. The Statement, which went into effect on June 1, only applies to *pro bono* cases.

The changes offer broader warnings for clients who may mistakenly believe that securing an attorney *pro bono* means that pursuing a lawsuit is risk-free. The statement now indicates that clients, even those with *pro bono* attorneys, "may be responsible . . . to contribute to or pay the other party's attorney's fees and other costs if the Court has ordered you to do so." Similarly, the expanded Statement informs clients that if their "conduct . . . is found to be frivolous or meant to intentionally delay the case," they "could be fined or sanctioned."

The updated Statement also serves as a reminder to attorneys to review the basics of the DRL with each client. Attorneys are "required to discuss" the automatic orders; support guidelines of the Child Support Standards Act, if applicable; and the Maintenance Guidelines Statute, if applicable.

The full text of the updated Statement can be found at the following website: www.bit.ly/statementofclientsrights .

Recent Cases of Interest

Custody and Visitation

A Forensic Psychologist Report Was Properly Considered, Despite Containing Unredacted Hearsay

***Shali D. v. Victoria V.*, 172 AD3d 581 (1st Dep't 2019)**

The Family Court awarded the parents joint custody of their daughter, with specified spheres of influence, and granted the mother primary physical custody. The court also awarded the mother some of her attorneys' fees as sanctions against the father.

On appeal, the father challenged those sanctions and the Family Court's refusal to redact portions of the forensic psychologist's report which he claimed prejudiced his case. The appellate court unanimously affirmed the Family Court's holding.

The Family Court properly considered the report in context, balanced by multiple days of testimony and its *in camera* interview with the child. While the psychologist's report contained hearsay, the report was largely based on firsthand evidence gathered by the psychologist, including his examination of the child and observations of the child's interactions with her parents. The court acknowledged and detailed both parents' deficits, but reasonably determined that, on balance, the mother was less threatening to the child's best interests. In addition, the court did not have to abide by the child's stated preference to live with the father, since the child was not equipped to opine as to which of her parents could better address her learning challenges or mental health issues, and there was evidence that the father may have manipulated his daughter into stating that she would prefer to live with him. Notably, the decision does not state the age of the child.

The Mother of a Biracial Child Was Denied the Right to Change the Child's School District to a More Racially Diverse Population

***Verfenstein v. Verfenstein*, 171 AD3d 841 (2d Dep't 2019)**

When the parties separated, they agreed that their son, who is biracial, would live with the mother in Queens until he was ready for kindergarten, and there-

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Wendy B. Samuelson, Esq. 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.

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after, he would spend weekdays with the father in Port Washington and attend public school in that affluent, and primarily white, Nassau County hamlet. After the father filed for divorce, the parties entered into a so-ordered stipulation in which they agreed to joint legal and physical custody of their son. Subsequently, the mother had moved to Manhattan and filed a motion for their son to enroll in the United Nations International School (UNIS) in Manhattan. She argued that their son would be best served by attending a school replete with other mixed raced children.

The court held a hearing on the mother's motion, ordered a forensic examination of the child, and had an *in camera* interview of the child. It denied the motion, which ruling was affirmed by the appellate court. While the appellate court embraced the larger concept that a "multicultural environment" is "very important for a biracial child" (*Matter of Cisse v. Graham*, 120 AD3d 801, 805, 991), it concluded that the mother presented little evidence to demonstrate the necessity of attending UNIS. During her testimony, the mother conceded that she didn't know the percentage of biracial children attending UNIS, and she presented no evidence that attending school in Port Washington hindered her son's academic or personal growth. In fact, at his current school in Port Washington, the son had been thriving academically and had excellent grades. Therefore, it was not in the child's best interest to change schools.

Father's Midweek Overnights Suspended Based on "Separation Anxiety"

***Matter of Lela G. v. Shoshanah B.*, 172 AD3d 472 (1st Dep't 2019)**

The Petitioner-mother sought to eliminate the parties' son's Wednesday overnight visits with the Respondent-father. The Petitioner presented testimony from the child's psychiatrist, who asserted that the Wednesday overnights were creating "separation anxiety."

The New York County Family Court embraced that argument and ordered the midweek overnights eliminated. The Respondent appealed, arguing that the child's psychiatrist was not a neutral expert, given that he was hired by and paid by the Petitioner. The First Department affirmed.

The appellate court held that it was appropriate to hear from the child's treating psychiatrist for recommendations to the modification of the visitation schedule. In addition, it weighed testimony from an expert, hired by the Respondent, who rejected the psychiatrist's claims. But, while the child's psychiatrist performed a thorough evaluation of the child and interviewed both parents, the Respondent's expert did not.

Child Support

Father Incarcerated for 90 Days for Failure to Pay $5,000 in Child Support

***Matter of Twania B. v. James A.B.*, 172 AD3d 643 (1st Dep't 2019)**

The order of the Bronx County Family Court which directed that the father be incarcerated for 90 days for failure to pay child support was affirmed on appeal.

The father argued that it was error for the Family Court to refuse to give him an adjournment when his court appointed attorney was assigned to him one day prior to the hearing. The court below was justified in refusing to grant an adjournment because counsel did not request an adjournment or indicate that more time was needed to prepare her client's defense. In addition, counsel admitted that the father could have moved for a downward modification of child support, but failed to do so. It was therefore clear that the father had no reasonable excuse for his failure to pay support.

Equitable Distribution

Failure to Include "Gains or Losses" in the Directive to Transfer Retirement Funds by QDRO Precludes an Award of More Than the Principal Amount Stated

***Reber v. Reber*, 173 AD3d 1651 (4th Dep't 2019)**

The parties' Stipulation of Settlement in their divorce action provided that the husband would transfer to the wife approximately $71,000 from the husband's 401(k) account. Subsequently, the parties executed a QDRO. When the husband's employer transferred the funds to the wife, the employer rolled over the $71,167 specified in the QDRO plus $32,828 in gains that accrued on that amount since the divorce action commenced.

The husband moved for an order directing the wife to transfer back to him the gains of $32,828, which the court below denied. The appellate division reversed, and ordered the wife to return the gains to the husband.

As the appellate court explained, QDROs only have the power to provide each party with the rights explicitly stated in the agreement. Here, the stipulation of settlement did not include any provisions for the wife to receive gains on the amount specified, and therefore she is not entitled to the gains.

Counsel Fees

In Determining Poor Person's Status, the Court Cannot Impute Father's Income in a Custody Case Based on Earnings Imputed to Him in the Prior Divorce Action

***Dalton v. Dalton*, 63 Misc.3d 1222(A) (Sup Ct, Monroe County 2019)**

When the parties' divorce action was before the Monroe County Supreme Court, the court imputed $40,000 in income to the father. He had a college degree, had been

earning more than $100,000 per year, and bragged during the trial about his extensive earning capacity. Yet, during the divorce action he had been unemployed for several years, and had chosen to abdicate his responsibility to support himself and his four young children by spending his time competing in cycling races.

Two years later, the father filed for a downward modification of his child support obligations. Despite never paying a dime in child support and owing the mother more than $60,000 in arrears, the father subsequently sued the mother to gain residential custody of the children. In this custody proceeding, he moved the court to grant him poor person status in order for the filing fees to be waived.

The court, appalled to side with the recalcitrant father, explained in its ruling that its hands were tied by *Carney v. Carney*, 151 A.D.3d 1912 (4th Dep't 2017), in which the appellate court ruled that the "practical and real-world concerns for both the court and litigant [mother] . . . forced to finance family law litigation against a litigant with a publicly funded attorney" were completely reasonable but lacking in statutory justification. According to the statute governing poor person status (CPLR 1101), what determines a party's status is his current ability to pay an attorney to provide representation.

In the end, the court found itself in a terrible bind. "This court notes that there is no readily available procedure for court review of poor person applications. If the court does not accept the representations of the application, then the only alternative is to hold a hearing, which simply adds expense to the mother and seems an illogical use of public funds." Furthermore, "the court cannot—and should not—conduct an inquiry and quiz the applicant because . . . even questioning an indigent's application can be perceived as indicative of bias and require recusal or disqualification by the court." As a result, the court granted the father's request for poor person's status, and the filing fee was waived.

Maintenance

It Was Not Error to Grant a Percentage of the Payor's Bonus as Maintenance

Rogowski v. Rogowski, 171 AD3d 1230 (2d Dep't 2019)

In this maintenance case, the court awarded the wife maintenance for a period of five years in the amount of $2,500 per month plus 60% of the husband's annual employment bonus in excess of $14,200. The husband appealed, and the appellate court affirmed the lower court's ruling.

"The amount and duration of maintenance is a matter committed to the sound discretion of the trial court," as it considers the numerous factors in DRL § 236(B)(6). That spirit of broad discretion permits the court to include or exclude a party's annual bonus into its maintenance calculations. Because the lower court carefully considered the factors in the case, including the parties' education, employment, and earning capacity, the court's decision to include a portion of the defendant's annual employment bonus in its maintenance calculations did not constitute an improper, open-ended obligation. This case does not state any facts, including the ages of the parties, the duration of the marriage, nor the respective incomes of the parties. It only makes reference to the fact that the wife was a housewife and stay-at-home mother.

Procedure

Plaintiff's Notice of Discontinuance Vacated to Avoid Prejudice to Defendant

Verdi v. Verdi, 2019 NYLJ 1466 (Suffolk County Sup Ct 4/29/2019)

When a plaintiff submits a notice of discontinuance, that signals the end of a case in almost every instance. But, exceptions have been made in matrimonial cases.

The parties were married for 19 months, had no children, and the wife obtained a "stay away" order against the husband as a result of domestic violence. In the divorce action, the court was aware of the limited equitable distribution issues, and attempted to help the parties settle their dispute. The wife was unhappy with the judge's recommendation, and hired new counsel. On the eve of trial, around 4 p.m. on Friday before the Monday court date, the wife's counsel faxed a notice of voluntary discontinuance to the husband's counsel. The defendant's counsel moved to nullify the notice of discontinuance, vacate same, and restore the matter to the calendar.

The plaintiff had no intention of reconciling with the defendant, but rather intended to derail the divorce process, drain the defendant's time and legal funds, and prolong a resolution. The court found that the plaintiff's gamesmanship on the eve of trial to be counterproductive and frustrated the parties' ultimate goal to bring the matter to a close. Given the voluminous waste of time and resources involved in dismissing the case, thereby forcing the defendant to file for divorce from scratch, as well as the prejudice to the defendant of starting a new and later "cut off" date of marital assets by refiling, the court declared the plaintiff's notice a nullity, vacated it, scheduled a new date for the trial, and ordered the plaintiff to pay $1,970 in legal fees.