Family Law Review, Spring 2014

Recent Legislation, Decisions and Trends in Matrimonial Law

by Wendy Samuelson, Esq.

Same-Sex Marriage Update

Jurisdictions that permit same-sex marriage

Since my last column, three more states have been added to the roster of states that recognize same-sex marriage, including Hawaii (legislation approved on November 13, 2013), Illinois (legislation approved on November 20, 2013), and New Mexico (unanimous Supreme Court ruling on December 19, 2013).

The other states that recognize same-sex marriage are 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 U.S. Supreme Court in *Windsor v. United States*, 133 S.Ct. 2675 (2013) 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.

The Supreme Court ruling did not legalize gay marriage in every state. Rather, the states are still left to decide the issue. Since the landmark ruling, there has been a pandora's box of litigation in many states in an attempt to legalize same-sex marriage. Same-sex marriage litigation continues, with approximately 60 cases in 30 states. Federal appellate court cases include the states of Kentucky, Michigan, Nevada, Ohio, Oklahoma, Tennessee, Texas, Utah, and Virginia.

In Utah, a federal judge recently struck down the state's ban on same-sex marriage, declaring it unconstitutional and a violation of the equal protection clause and due process. The decision is currently stayed, pending a decision from the Court of Appeals.

On March 21, 2014, a federal judge ruled that Michigan's state law prohibiting same-sex marriage is unconstitutional, and did not grant a stay of the decision pending an appeal. More than 300 couples married prior to the Court of Appeals issuing a stay. The U.S. Department of Justice, on March 23, 2014 announced that the federal government will respect the marriages of the couples that have already taken place before the stay.

Since my last column, several countries have permitted same-sex marriage: Brazil, Uruguay, New Zealand, and the United Kingdom (England, Wales). Scotland will permit same-sex marriages effective October 2014. The other countries that permit same-sex marriage are the Netherlands, Belgium, Spain, Canada, South Africa, Norway, Sweden, Portugal, Iceland, Argentina, Denmark, France, and Mexico City, Mexico.

Recent Legislation

Child support and maintenance thresholds increased

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 §111-i(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.

Domestic Relations Law §§ 240(3)(b) and 252(2), Family Court Act §§ 155, 168(3), 446, 551, 656, 759, 842, 846 and 1056, and Criminal Procedure Law §§ 140.10(4) and 5301.2 amended, November 20, 2103: Orders of Protection and Temporary Orders of Protection

The above-mentioned sections of the Domestic Relations Law, the Family Court Act, and the Criminal Procedure Law were amended to protect victims of domestic violence from invalidating orders of protection issued in their favor by communicating with the party against whom the order of protection is granted. The violation of an order of protection by victims of domestic violence does not subject the victim to prosecution for that violation. The amended sections require that this notice be included in orders of protection and temporary orders of protection.

Family Offenses and Orders of Protection

Family Court Act§§812, 821, 446, 551, 656, 842, and 1055, Domestic Relations Law§§ 240 and 252, and Criminal Procedure Law §§530.11 and 530.12 amended, effective December 18, 2013

Recognizing economic abuse as a form of domestic abuse, and a family offense, the purpose of this amendment is to protect victims of domestic abuse from the economic tactics used by abusers to control the victim's finances and prevent them from leaving the relationship. By giving family courts concurrent jurisdiction over these crimes, it will make it possible for victims to address these crimes in family court and obtain relief in the form of orders of protection. In addition, the amendments permit courts to order the respondent of an order of protection to return to the protected party their respective documents and credit devices in order to prevent the perpetration of economic abuse.

The Release of Mental Hygiene Records: Mental Hygiene Law:

§33.25(b) amended, effective October 21, 2013

The Mental Hygiene Law was amended to provide clarification regarding the further dissemination of records obtained by parents or guardians relating to allegations of abuse and mistreatment of a loved one residing at a mental health facility. Prior to the amendment, the section simply prohibited the dissemination of these "highly confidential" reports, which made it unclear whether these records could be shared with health care providers, or in the event that a crime has been committed, an attorney representing the family. The amended section now makes it clear that the recipient of such records may share these reports with a health care provider, a behavioral health care provider, law enforcement, if the recipient believes that a crime has been committed, or the recipient's attorney. A cover letter including this information must accompany such records and reports when released to qualified family members.

Acknowledgments of Paternity by Minor Parents

Family Court Act §516-a and Public Health Law §4135-b amended, effective January 19, 2014

An acknowledgment of paternity, executed by an individual under the age of eighteen (the signatory), may be vacated by that individual up to sixty days after reaching the age of eighteen by filing a petition with the court to vacate their previous acknowledgment of paternity. If granted, the result is not an automatic vacatur of the parent's child support obligation, but rather a court will order a DNA test to establish paternity and child support. The purpose of this amendment is to account for the "judgmental limitations of minor parents" and provide them with a method of relief.

E-Discovery and Preliminary Conferences

22 NYCRR §202.12 amended, effective September 23, 2013

The section, as amended, provides a more comprehensive outline of the rules regarding electronic discovery. Along with requiring that counsel discuss any potential issues relating to electronic discovery prior to the preliminary conference, the amended section also sets forth a non-exhaustive list of considerations for determining whether a case is reasonably likely to include electronic discovery as well as a list of considerations for the court to use in establishing the method and scope of electronic discovery.

Supreme Court Round-up

Child's wrongful abduction does not require return where child is settled in his environment
***Lozano v. Montoya Alvarez*, 134 S. Ct. 1224 (2014)**

Pursuant to the Hague Convention on the Civil Aspects of International Child Abduction and the International Child Abduction Remedies Act (ICARA), the United States Supreme Court denied the petitioner-father's petition to return his child following respondent-mother's abduction of the child. The treaty, seeking to promote the best interests of the child and prevent against wrongful removal, sets forth that a court must order the return of a child upon receipt of a Petition for Return of Child filed within one year of the child's wrongful removal. If the petition is filed after the one-year period, then the court must order the return of the child, *unless* it is shown that the child has settled into their new environment.

In this case, the child, just over 3 years-old at the time of the abduction, was removed by the mother from her home in the United Kingdom and brought to New York to reside with the mother's sister. Unaware of his daughter's whereabouts, the father actively searched for the mother and his abducted child until discovering that the child was in the United States some 16 months later. Upon receiving the father's Petition for Return of Child after the one-year period, the United States District Court for the Southern District of New York determined that, although the child's habitual residence was the United Kingdom and the father had rightful custody of the child at the time of the abduction, the child's stability in New York merited the denial of the request for the child's return to the United Kingdom. The District Court further noted that, contrary to the father's argument, the one-year period set-forth in the treaty was not subject to equitable tolling. The United States Court of Appeals for the Second Circuit affirmed the decision of the District Court, and the United States Supreme Court granted *certiorari*.

Explaining that the doctrine of equitable tolling is an American principle applied to federal statutes of limitations, the Supreme Court declined to extend the application of this principle to an international treaty. Designed to protect defendants from endless exposure to liability, statutes of limitations do not contemplate the same purpose addressed by the expiration of the one-year period of the treaty, which is to consider the third-party child's interest in settlement. The court, looking to the text and

context of the Hague Convention, determined that the drafters did not intend equitable tolling to apply to the one-year period. Despite the fact that the child was concealed from the father during the one-year period, the treaty specifically states that the one-year period begins on "the date of the wrongful removal or retention," and neglects to provide for any extension of this period. *Id.* at 1235.

Author's notes: This appears to be an inequitable and alarming result, allowing child abducters free reign.

Other Cases of Interest

Child Support

Father's child support obligation terminated on the basis of constructive emancipation
***Jurgielewicz v. Johnston*, 114 A.D.3d 945 (2d Dept. 2014)**

The appellate division reversed the decision of the family court and granted the father's petition to terminate his child support obligation to his eighteen year old daughter on the basis of the child's constructive emancipation where she is of employable age. While the mother did not actively interfere in the relationship, the non-custodial father's regular calls to his daughter went unanswered and ignored, his repeated suggestions to attend counseling or have therapeutic visitation with the daughter were rejected, and gifts that he left for the daughter at the mother's home went unacknowledged.

The court noted that the deterioration of the relationship between the father and the daughter was through no fault of the father, which would have affected a finding of constructive emancipation.

Downward modification of child support *granted*

***Dimaio v. Dimaio*, 111 A.D.3d 933 (2d Dept. 2013)**

The parties' stipulation of settlement was incorporated but not merged into the parties' judgment of divorce, which was granted prior to the 2010 amendments to the Family Court Act §451. After the divorce, the father lost his job as a manager and head waiter at a restaurant, and subsequently, obtained a job at another restaurant as a manager. However, his salary decreased and he was unable to secure a position as both a manager and head waiter. Based on the father's lesser salary and his efforts to find new employment commensurate with his earning capacity, the appellate division found that the father satisfied his burden of proving a substantial change in circumstances, reversed the lower court's decision, and granted his petition for a downward

modification of child support. The court failed to state the efforts the father made to secure new employment commensurate with his prior income nor the actual change in his income.

A child's unanticipated receipt of benefits does not warrant a downward modification of a parent's child support obligation
***Matter of McDonald v. McDonald*, 112 A.D.3d 1105 (3d Dept. 2013)**

Pursuant to the parties' separation agreement, the legal father was required to pay $150/month in child support for the two children in excess of the amount required by the Child Support Standards Act due to his earning capacity. The legal father, claiming that he was now earning substantially less and that the son was receiving $859/month in Social Security survivor's benefits from his biological father, sought to reduce his child support obligation.

Although finding that the legal father had not demonstrated a substantial change in his earning ability, the lower court granted the petition on the basis of the son's receipt of monthly Social Security survivor's benefits. The appellate division reversed, holding that the son's receipt of those benefits do not affect the legal father's financial situation or result in any showing of need for modification. A child's assets are to be considered as a supplement to existing resources and not as a discharge of a parent's duty to support a child.

Custody

Modification of custody to split residential custody
***O'Connell v. O'Connell*, 105 A.D.3d 1367 (4th Dept. 2013)**

Petitioner-father brought an action to modify the parties' custody stipulation that was incorporated into the divorce judgment, which provided for joint custody of the parties' two daughters, ages 15 and 13, with the mother to have residential custody of the children and the father to have visitation. The Family Court determined that a change in circumstances had been shown, and that it was in the younger child's best interest to reside with the father, but the older daughter should continue living with the mother.

The appellate court affirmed, reasoning that based on the mother's testimony and demeanor at the hearing, the mother had become unable to adequately communicate with the youngest daughter and the relationship had become antagonistic. The court noted that this is one of those rare cases where a split residential custody arrangement is appropriate, particularly since the siblings attend the same school and will spend time with each other during the parental visitation throughout the week and every weekend.

Modification of custody where parental alienation

***Parchinsky v. Parchinsky*, 114 A.D.3d 1040 (3d Dept. 2014)**

The Family Court properly granted a change in custody of the parties' two sons, ages 13 and 15, from the mother to the father where the mother limited the sons' communication with the father by listening in on their telephone conversations, refused to rearrange the visitation schedule when the children's activities interfered with the father's scheduled visitation, failed to immediately notify him when one of the sons was diagnosed with cancer, neglected to inform him that the son was undergoing surgical treatment for cancer until after the surgery was completed, and refused to authorize the father's communication with the son's doctors.

Although a change in custody required the sons to move to Brooklyn and change school districts, the appellate division took into consideration the sons' preferences to reside with the father and the father's openness to helping maintain the sons' relationships with the mother. Based on the mother's hostility towards the father and her inability to foster the relationship between the sons and the father, the appellate division found that it was in the children's best interest to change custody.

Relocation denied

***Matter of Christy v. Christy*, 113 A.D.3d 848 (2d Dept. 2014)**

The Family Court properly denied the mother's petition to relocate to Arizona with the parties' children where she failed to prove that the it would serve the best interests of the children. Although the mother was an unemployed teacher, and received a pending job offer in Arizona, she failed to provide information regarding her expected salary. The mother's second husband, who has a stable job in New York with an income of $60,000 to $80,000 per year, had not yet found any job prospects in Arizona. Moreover, the children did not want to move to Arizona, and most importantly, their visitation with the defendant-father would be significantly decreased as a result of relocation.

New York has exclusive jurisdiction over a custody agreement executed in the state even where the child has resided outside of the state for more than six months

***Seminara v. Seminara*, 111 A.D.3d 949 (2d Dept. 2013)**

Pursuant to a separation agreement, the parties agreed that the mother would have primary physical custody of the child in Florida and the father would be entitled to a four-month visitation with the child in New York. After the mother failed to abide by the agreement, the father sought to modify custody by granting him sole legal and residential custody. However, on the basis that the child resided outside of the state of New York for more than six months, the court, pursuant to the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), dismissed the petition for lack of jurisdiction. Three months later, the father again petitioned for a change in custody, and the mother moved to dismiss for lack of jurisdiction. The Family Court denied the mother's motion.

The Family Court improperly granted the mother's oral application to dismiss the father's prior custody petition for lack of jurisdiction. The court failed, as required by Domestic Relations Law §76–a(1), to determine whether the child, or the child and a parent, had a significant connection to New York, or whether substantial evidence was available in this state, or to determine whether New York was an inconvenient forum based upon the factors set forth in Domestic Relations Law §76–f(2) .

The Family Court correctly determined that New York had exclusive, continuing jurisdiction to determine custody pursuant to Domestic Relations Law §76–a where the initial child custody determination was rendered in New York, and there is a significant connection of the child with New York since the father had extensive parenting time with the child in New York, the child has relationships with a half-sibling and extended family in New York, and the father has furthered the child's education and attended to her medical care in New York.

NYS Department of Education's policy of deferring education decisions to parent who has primary physical custody despite joint custody arrangement is not deemed arbitrary and capricious
***Jennings v. Walcott*, 110 AD3d 538 (1st Dept 2013)**

The petitioner-father, who, pursuant to a judgment of divorce, had joint legal custody but not primary physical custody of the child, brought a CPLR article 78 proceeding against the NYS Department of Education for a judgment declaring that its policy of deferring education decisions to the parent who has primary physical custody, unless otherwise ordered by the court, is arbitrary and capricious. The order granting the petition was reversed and dismissed because the Department of Education rationally adopted its policy to avoid becoming entangled in custody disputes, especially where the parents could not agree upon the child's course of education. The court determined that the petition's remedy is to pursue a modification of the judgment of divorce to provide for joint decision making with respect to education.

Author's note: Doesn't joint custody mean joint decision making on educational issues? Will this case require all joint custody agreements to specifically state that educational decisions are to be made jointly by both parents?

Equitable Distribution

Award of husband's medical degree and license reduced from 50% to 30%

Kim v. Schiller, 112 A.D.3d 671 (2d Dept 2013)

Although the wife did not make direct financial contributions to the husband's attainment of his medical degree and license, she made substantial indirect contributions. The wife worked full-time during the marriage, except during those periods when she was on maternity leave or collecting disability benefits due to her chronic lupus, was the primary caretaker of the parties' two children, contributed her earnings to the family, cooked the families' meals and participated in the housekeeping. However, because the husband made accommodations for the sake of the wife's career and her desire to remain near her family, and made financial contributions during his tenure at medical school, the court lowered the wife's entitlement from 50% to 30%.

Distribution of pension's death benefits and Enhanced Earnings Capacity

Lauzonis v. Lauzonis, 105 A.D.3d 1351 (4th Dept. 2013), *rearg. denied*, 107 A.D.3d 1647 (4th Dept. 2013)

The court below erred by distributing an investment account to the husband where title was held jointly by the parties during their marriage and the funds were derived from a refinance of their home just prior to the commencement of the action. The appellate court held that "an equal disposition of that property should be presumptively in order, with the burden on the party seeking a greater share to establish entitlement." *Id.* at 1352.

Additionally, the court below erred in failing to distribute the death benefit of the husband's teacher's retirement pension (although it properly equitably distributed the pension), and remitted the matter to the trial court to determine the value of the death benefit and the distribution of it.

The court below failed to award the wife a portion of the enhanced earnings of the husband's master's degree, which was earned partially during the marriage. The appellate court held that the wife made modest contributions to the husband's attainment of the degree, which requires some distribution to her, including that she worked during the marriage, performed household duties, helped the husband with his course work, took over the husband's responsibilities as a swim coach, put her own master's degree on hold, and took over various other responsibilities in order to assist the husband. The court's opinion did not include the length of the parties' marriage.

The court below did not err in imputing $20,000 of income to the wife to determine child support based upon her education, qualifications, employment history, past income, and demonstrated earning potential. The court failed to state the facts surrounding her work history and income.

Six-year statute of limitations governs enforcement of rollover of retirement funds
***Boardman v. Kennedy*, 105 A.D.3d 1375 (4th Dept. 2013)**

The decedent's ex-wife commenced an action against the decedent's widow for the enforcement of a matrimonial stipulation, which was entered into on November 15, 1990 and incorporated into their judgment of divorce on March 1, 1991. The ex-wife claimed that she never received the one-half interest in the decedent's IRA that she was entitled to receive pursuant to the stipulation. In response, the defendant-widow moved for summary judgment dismissing plaintiff's complaint, and the lower court granted the motion.

The appellate division affirmed, reasoning that the ex-wife's enforcement of the matrimonial stipulation is time barred, as it is governed by the six-year statute of limitations pertaining to contractual obligations pursuant to CPLR §213(1) and (2), rather than the twenty-year statute of limitations for an action to enforce a money judgment contained in CPLR §211(b).

Author's note: The ex-wife was immediately entitled to a rollover after the granting of the judgment of divorce. It appears that she failed to do her due diligence in following up with the rollover, and therefore, this does not even appear to be an enforcement matter. I cannot tell you the number of times I have had consultations with potential clients that report that their former divorce attorney failed to follow up on the retirement account transfer, DRO or QDRO. The client should be warned that they have a six year deadline, regardless of whether the attorney's retainer includes these services.

Ambiguity of life insurance provision construed against drafter
***DeAngelis v. DeAngelis*, 104 A.D.3d 901 (2d Dept. 2013)**

The separation agreement between the decedent and his first wife, which was incorporated but not merged into the judgment of divorce, provided that the decedent would maintain a $300,000 life insurance policy for the benefit of defendant-children, and that his subsequent failure to do so would entitle the children to a claim against the decedent's estate for that amount. Following the divorce and the emancipation of the defendant-children, the decedent remarried and named plaintiff-wife as the beneficiary of his life insurance policy. After the decedent's death, plaintiff-wife collected the proceeds from his life insurance policy and the defendant-children, who were no longer named as the beneficiaries of any life insurance policy, filed a claim for $300,000 against the decedent's estate. Thereafter, the plaintiff-wife filed this suit to bar the defendant-children's claim, and the lower court ruled in her favor.

On appeal, the appellate division reversed, relying on the doctrine of *contra proferentem*, which resolves contractual ambiguities against the drafter and in the light most favorable to the non-drafter. Although the separation agreement was ambiguous with regard to the decedent's obligation to maintain the life insurance policy beyond the emancipation of the defendant-children, the decedent's attorney drafted the separation agreement, so the ambiguity must be resolved in the defendant-children's favor. Therefore, the court ruled that the defendant-children do indeed have a claim against the decedent's estate for his failure to maintain the life insurance policy for their benefit.

Author's note: The practitioner should be mindful to state when the obligation to maintain life insurance is terminated. To me, the agreement does not appear to be ambiguous in this case because it did not have a cutoff date.

Wife entitled to 50% credit of marital funds used to pay husband's restitution of money judgment for arrears in support of former wife that accrued prior to second marriage
***Levenstein v. Levenstein*, 99 A.D.3d 971 (2d Dept. 2012)**

The husband was convicted in a Virginia federal court for failure to pay his child support obligations and was ordered to pay restitution in the amount of more than $132,000. After failing to pay the restitution amount and not fully divorced from his first wife, the defendant-husband proceeded to marry the plaintiff-wife. Over the course of their marriage, the restitution owed by the husband was paid.

After an annulment of her purported marriage to the husband on the ground of bigamy, the wife sought recoupment of 50% of the marital funds used to satisfy the husband's restitution. The lower court, relying on *Mahoney-Buntzman v. Buntzman*, 12 N.Y.3d 415 (2009) (payments made to a former spouse for child support and/or maintenance cannot be recouped), denied the wife's request.

On appeal, the Second Department modified the judgment, holding that the wife was entitled to recoupment of 50% of the payments that were made during the marriage to satisfy the defendant-husband's criminal judgment. The appellate court distinguishing this case from *Mahoney-Buntzman*, since the maintenance payments made in that case had become due during the parties' marriage, whereas here, the wife sought a credit for amounts that were due before the marriage took place.

Ex-spouse cannot be disgorged of assets obtained from divorce due to the alleged fraud of the other spouse where the ex-spouse provided fair consideration for the assets
***Commodity Futures Trading Comm'n v. Walsh*, 2014 WL 847900 (S.D.N.Y. Feb. 28, 2014)**

The Commodity Futures Trading Commission ("CFTC") and the Securities Exchange Commission ("SEC") brought suit against the ex-wife of an alleged Ponzi-schemer to disgorge her of the funds she obtained via the terms of a separation agreement and divorce decree. The United States District Court for the Southern District of New York entered preliminary injunctions against the defendant-wife precluding her from transferring, disposing of, or encumbering any of her assets. The wife appealed and the Second Circuit Court of Appeals certified questions to the New York State Court of Appeals.

Tasked with deciding whether the proceeds of fraud can constitute marital property and whether forfeiting a claim to the proceeds of fraud constitutes fair consideration, the New York Court of Appeals held that

> [P]roceeds of fraud can constitute marital property, and that, monies obtained by fraud cannot be followed by the original owner into the hands of an innocent former spouse who now holds them (or assets derived from them) as a result of a divorce proceeding where that spouse in good faith and without knowledge of the fraud gave fair consideration for the transferred property. *Id.* at 1.

As a result, the Second Circuit vacated the preliminary injunctions and remanded the case to the District Court to determine whether the wife provided fair consideration and qualified as a *bona fide* purchaser for value based on the terms of the separation agreement. On remand, the wife moved for summary judgment dismissing the claims of the CFTC and the SEC.

The District Court, in deciding whether the wife was a bona fide purchaser for value, looked to the elements of fair consideration, including that the transferee conveyed property or discharged an antecedent debt in exchange, the exchange was for a fair equivalent, and the exchange was made in good faith. Since the wife conveyed to her ex-husband her interest in one of their homes, waived her right to any further equitable distribution, maintenance, or inheritance, and was unaware of the "tainted nature of the particular assets," the District Court found that the wife was indeed a bona fide purchaser for value. The District Court further noted that the state has a "strong public policy of ensuring finality in divorce proceedings" and that the alleged fraud on the part of the ex-husband was not revealed until three years after the settlement was finalized. *Id.* at 7. For these reasons, the District Court granted defendant-wife's motion for summary judgment dismissing the agencies' claims against her.

See the Editor's front page article for a more in-depth analysis of this case.

Judgment of Divorce and Grounds

Foreign divorce upheld where it was not challenged by the ex-spouse until more than two years later
***Siddiqui v. Siddiqui*, 107 A.D.3d 974 (2d Dept. 2013)**

The parties, married in Pakistan, moved to the United States, and thereafter, the husband commenced divorce proceedings in New York. According to the plaintiff-wife, while the divorce proceedings were pending in New York and unbeknownst to her, the defendant-husband obtained a divorce in Pakistan by performing "talaq." Talaq, a tradition under Pakistan's Muslim Family Ordinance, involves declaring or writing that the man is divorcing his wife three times, notifying a specific Pakistani governmental official of this pronouncement in writing, and providing the wife with a copy of the notice. Following the expiration of 90 days from the day that the notice is delivered to the governmental official, the divorce is given effect and becomes official.

Thereafter, the husband withdrew the divorce pleadings in New York and remarried. Two years after the Pakistani divorce was official, the wife moved to have the divorce declared void and the husband's remarriage illegal on the ground of bigamy. The lower court denied the wife's motion, and the appellate division affirmed based on evidence that the wife was notified of the foreign divorce weeks prior to it taking effect in Pakistan. The appellate division, noted that the wife did not object to the Pakistani divorce until more than two years had passed and the husband relied upon this divorce to remarry. In addition, the wife did not suffer any prejudice since all other issues such as child custody, maintenance, and child support were currently being addressed in Family Court.

Transmission of herpes more than 20 years ago not considered egregious fault
Foti v. Foti, 114 A.D.3d 1207 (4th Dept. 2014)

The court below properly determined that the defendant's allegation that the plaintiff infected her with genital herpes more than 20 years prior to her motion was insufficient to warrant discovery of the plaintiff's confidential medical records, and was not considered egregious fault.

Counsel Fee Corner

Each column, I continue to update the reader with large counsel fee awards in matrimonial litigation.

Guzzo v. Guzzo, 110 A.D.3d 765 (2d Dept. 2013)

The appellate court modified the court below's award of only $35,000 of the requested $161,000 of legal fees and awarded the wife $100,000 based on the significant disparity in the parties' income (although no facts were

provided) and the husband's egregious tactics that prolonged the litigation and caused the wife to incur additional legal fees.

"Skin in the game"

Sykes v Sykes, 973 N.Y.S.2d 908 (Sup. Ct. N.Y. County 2013)

The husband was a hedge fund manager with income in the millions and the wife was unemployed and receiving $75,000 per month in *pendente lite* child support and maintenance. During the 3 years of litigation, the husband had paid his own counsel fees and the wife's fees, totaling approximately $1 million. Before and during the first eight days of trial, the wife requested the husband to pay an additional $668,000 of legal fees. The wife had three attorneys regularly appear for her on the case at hourly rates of $900, $700, and $500. The parties are expected to divide $20 million in marital assets, and the wife is expected to receive $10 million.

The court held that the *pendente lite* counsel fees of both parties should be paid equally out of their $2 million in marital funds, subject to reallocation at trial, rather than continuing to be paid solely by the husband out of his separate property. Requiring the wife to contribute to her own counsel fees would ensure that she has "skin in the game," meaning that she would have an incentive to negotiate settlement terms in good faith. The inquiry into the parties' financial circumstances should not be restricted to their respective income alone, but should instead be based upon their respective assets and entitlement to equitable distribution.

***Chusid v Silvera,* 110 A.D.3d 660 (2d Dept. 2013)** An award of $100,000 interim counsel fee to the wife was reduced by the appellate court to $75,000. No explanation was given.

Rivacoba v Aceves, **110 A.D.3d 495 (1st Dept. 2013)**
Award of more than $60,000 in interim counsel fees was affirmed. Although the wife received one bill within an 18 month period, she did not object to the billing statement and waived her right to receive a statement every 60 days. Under 22 NYCRR 1400.2 The court noted that it is the client's right, not the adversary spouse's right, to raise the objection that the bill was not provided every 60 days.

Kessler v Kessler, **111 A.D.3d 894 (2d Dept. 2013)**

Award to the wife of $141,000 in counsel fees after the divorce, which was half the amount requested.

****

Wendy B. Samuelson is a partner of the boutique matrimonial law firm of Samuelson, Hause & Samuelson, LLP, located in Garden City, New York. She has written literature and lectured for the Continuing Legal Education programs of the New York State Bar Association, the Nassau County Bar Association, and various law and accounting firms. Ms. Samuelson was selected as one of the Ten Leaders in Matrimonial Law of Long Island, was featured as one of the top New York matrimonial attorneys in Super Lawyers, and has an AV rating from Martindale Hubbell.

Ms. Samuelson may be contacted at (516) 294-6666 or WSamuelson@SamuelsonHause.net. The firm's website is www.SamuelsonHause.net.

A special thanks to Carolyn Kersch, Esq. and Nicole Savacchio, Esq. for their editorial assistance.