Recent Legislation, Decisions and Trends in Matrimonial Law

By Wendy Samuelson

Recent Legislation

New Maintenance Guidelines Legislation Signed into Law

On June 25, 2015, the New York State Legislature passed the Office of Court Administration's Maintenance Guidelines legislation. Governor Cuomo signed the bill into law on Friday, September 25, 2015. The temporary maintenance provisions become effective 30 days thereafter (i.e., Sunday, October 25, 2015 but effective Monday October 26, 2015), and the permanent maintenance provisions and balance of the law (i.e., eradication of valuing degrees and licenses) is effective 120 days after signing (i.e., Saturday, January 23, 2016, but effective January 25, 2016).

The new legislation changes the way temporary maintenance is calculated, provides a formula for post-divorce maintenance, different calculations for households with and without children, as well as advisory guidelines as to the duration of support based on the length of the marriage. It caps income at $175,000 with bi-annual CPI increases (reduced from the current cap of $543,000), although the court has discretion to go above the cap. The court will no longer distribute the value of the enhanced earnings of a license, degree, or celebrity goodwill, but shall consider the direct or indirect contributions of one spouse to the enhanced earning capacity of the other spouse for purposes of equitable distribution. Actual or partial retirement is now a grounds for modification. Temporary and post-divorce maintenance shall be calculated prior to child support, because the amount of temporary maintenance shall be subtracted from the payor's income and added to the payee's income as part of the calculation of the child support obligation.

Social Services Law § 111-i amended, effective October 14, 2015: Calculating Child Support Orders

Beginning in 2016, Social Services Law § 111-i was amended to provide that the Combined Parental Income Amount (CPIA), as set forth in the Child Support Standards Chart for the purpose of calculating child support, will be updated on March 1st every two years, rather than January 31st. The purpose of this amendment is to coordinate the effective date of the updated CPIA with the effective date of annual updates to the Poverty Level and Self-Support Reserve. This modification will promote increased accuracy and consistency in the calculation of support obligations.

Family Court Act Article 5-B repealed and amended, effective January 1, 2016: Uniform Interstate Family Support Act

Family Court Act Article 5-B was repealed and amended, such that the 2008 Uniform Interstate Family Support Act (UIFSA) will replace the 1996 version of UIFSA presently contained in Article 5-B. In summary, the 2008 UIFSA further clarifies issues relating to the duration of support orders, choice of law considerations, order determinations, telephonic testimony, and redirection of support payments.

E-filing

On August 31, 2015, Governor Cuomo signed into law Chapter 237 of the Laws of 2015 (Chapter 237) in relation to E-filing. For matrimonial cases in the Supreme Court, the chief administrator shall consult with the county clerk of each county before the use of electronic means is to be authorized. If authorized, e-filing in matrimonial cases will take place only upon consent of all parties of the action. This program shall be strictly voluntary. Consent will also be required by all parties to participate in E-filing of appeals in the Appellate Division.

In Family Court, the chief administrator, with the approval of the administrative board of the courts, may set forth rules authorizing a program in E-filing for (1) the origination of proceedings and (2) the filing and service of papers in pending proceedings. Participation in this program shall be strictly voluntary and will take place only upon consent of all parties. The chief administrator may eliminate the requirement of consent in a petition to determine abuse or neglect pursuant to Article 10 of this act by a child protective agency.

Cases of Interest

Child Support

Suspension of child support for parental alienation

***Coull v. Rottman*, 15 NYS3d 834 (2d Dept. 2015)**

The father petitioned the Family Court to suspend his child support obligations based on the mother's alienation of the 13-year-old child and her interference with the father's regular visitation schedule. The mother petitioned to suspend the father's visitation. The Family Court granted the mother's petition to suspend the father's visitation but denied the father's petition to suspend his child

support obligations. After participating in therapy with the father for months in an attempt to repair their broken relationship, the child still fervently objected to all visitation with the father. As a result of the child's maturity, the court determined that the child's adamant opposition to visitation would be given great weight. The Appellate Division affirmed the suspension of visitation but modified by terminating the father's obligation to pay child support to the mother.

Upward modification of *pendente lite* child support with new proof of father's income

***Finn v. Piesco*, 127 AD3d 525 (1st Dept. 2015)**

The trial court providently exercised its discretion in imputing income of $75,000 to the wife and denying her motion for temporary support and counsel fees since her income was the same as the husband's reported income. The wife, who was an experienced attorney with a valid real estate license as well as a master's degree in public administration, failed to adequately explain her failure to earn any income in the previous year.

However, the trial court erred in denying the wife's request for an upward modification of the husband's temporary child support obligation of $153 per week for two children—an amount that was agreed upon by the parties in a separate Family Court proceeding. There was a substantial discrepancy in the $30,000 of income used to determine child support in the Family Court proceeding and the $75,000 of income reported by the husband on his income tax returns in the instant proceeding. The wife submitted evidence that she and the children were receiving food stamps, and that she had substantial outstanding bills for household necessities and the children's expenses. Therefore, the case was remanded to the trial court for recalculation of the husband's obligation.

Author's note: Given that the wife was on food stamps, was it a proper exercise of discretion to deny her maintenance and counsel fees? Then again, the re-calculation of child support may make up the difference and will provide tax-free support.

Gambling addiction not sufficient excuse for failure to pay support

***Matter of Elyorah E. v. Ian E.*, 127 AD3d 449 (1st Dept. 2015)**

The Appellate Division affirmed the trial court's holding that the husband willfully violated the child support order. The father argued that he demonstrated his inability to pay by establishing that he suffers from a mental illness and gambling addiction. However, the father failed to establish that his gambling addiction impacted his ability to work, since he often gambled away his earnings and his mother largely contributed to his child support payments and living expenses.

No downward modification of child support where agreement contemplates possibility of children changing households

***Zaratzian v. Abadir*, 128 AD3d 953 (2d Dept. 2015)**

Prior to the October 2010 effective date of the modification of child support amendments to Domestic Relations Law §236(B), the parties entered into a separation agreement setting forth their child support obligations, which was incorporated, but not merged, into the parties' judgment of divorce. Thereafter, a change in custody occurred, resulting in an award of sole custody of two of the parties' three children to the father. Thereafter, the father petitioned for an upward modification of the mother's child support obligation.

Explaining that modification of an agreement executed prior to the 2010 amendments requires a showing of an unanticipated and unreasonable change in circumstances resulting in a concomitant need, the court below properly denied the father's request on the basis that the parties' separation agreement expressly contemplated a potential change in custody, and allowed the father to seek a downward modification of his own child support obligation, but did not allow him to seek child support from the mother. Also, the father's annual income was four times that of the mother, which enabled him to provide for the needs of the children without modification of the mother's child support obligation.

The father's request that he be reimbursed for the mother's one-third share of the children's private school tuition, summer camp, and after school programs was properly denied since he failed to obtain the mother's consent prior to incurring such expenses.

Child Custody

New York not a convenient forum 12 days after child moved to another state

***Matter of Luis F.F. v. Jessica G.*, 127 AD3d 496 (1st Dept. 2015)**

The order of the Bronx Family Court, which granted the mother's motion to dismiss the modification of a custody petition on forum non-conveniens grounds, was unanimously affirmed. Twelve days after the mother moved from New York to Connecticut with the parties' child, the father, who lived in Pennsylvania, commenced a proceeding to modify a New York order granting the mother sole custody of the child. Although Connecticut was not the "home state" of the child, the Appellate Division found that substantial evidence relating to the child's care, protection, and personal relationships was no longer available in New York. Since the child's school, doctors, and residence were now located in Connecticut, the court determined that Connecticut was the more convenient forum.

Parental alienation by the mother warrants custody to the father

***Matter of Viscuso v. Viscuso*, 129 AD3d 1679 (4th Dept. 2015)**

On two appeals from the decision of the Family Court, the Fourth Department affirmed the award of sole custody of the parties' child to the father and counsel fees to the father's attorney. In the first appeal, the mother challenged the Family Court's decision to grant the father's petition for sole custody of the parties' daughter, with specified visitation to the mother. The court found that the mother's persistent pattern of alienating the child from the father "is likely to result in a substantial risk of imminent serious harm to the child." The alienation consisted of "blatantly and repeatedly violating the court's directive not to discuss the litigation with the child, attempting to instill in the child a fear of the father, and encouraging the child to medicate herself before going to visit the father." The attorney for the child did not violate her ethical duty to advocate zealously for the parties' child by taking a position that was contrary to the expressed wishes of the child. The court rejected the mother's argument that the alleged history of domestic violence by the father warranted an award of primary custody to her because there was no evidence in the record to support a finding that the domestic violence existed beyond an isolated incident nor that there were negative repercussions to the child. In the second appeal, the Fourth Department found that an award of counsel fees to the father was proper and supported by the mother's consistent and lengthy delays in litigation by repeatedly replacing her attorneys.

Award of custody to non-parent

***Matter of Wilson v. Hayward*, 128 AD3d 1475 (4th Dept. 2015)**

In 2008, while a child neglect proceeding was pending against the father, the father asked the non-parent family friend to take custody of the children. Thereafter, the non-parent petitioned for and was granted custody of the four children, with visitation to the father. Following the Family Court's issuance of an order containing a finding of neglect against the father, the Family Court ordered that the father's visitation with the children be supervised by the Department of Social Services.

In April of 2013, the father filed a petition to modify the 2008 custody order by granting him custody of the children. The non-parent cross-petitioned for a reduction in the frequency and length of the father's supervised visitation with the children. The court properly found that extraordinary circumstances existed to warrant custody to the non-parent where the father voluntarily surrendered custody of the children to the non-parent seven years ago, only attended supervised visitation with the children on an intermittent basis, behaved inappropriately during his visitation time with the children, and did not know the children's birth dates, ages, or grade levels at school.

Relocation to London granted without a hearing

***Lecaros v. Lecaros*, 127 AD3d 1037 (2d Dept. 2015)**

The parties' stipulation, which was incorporated but not merged into the judgment of divorce, provided that the parties have joint custody of their three children, with the mother having primary physical custody, and the father having liberal visitation. The father moved to restrain the mother from relocating to London with the children, which was denied without a hearing, but the court stated that a post-relocation visitation schedule should be established for the father. The father appealed and the Second Department affirmed. The mother established by a preponderance of the evidence that the move was economically necessary, the children's lives would be enhanced emotionally and educationally by the relocation, the move would not have a negative impact on the quality of the contact between the father and the children, and that the father's relationship with the children could be preserved through a suitable extended visitation schedule. The relocation was the children's stated preference and the position of the attorney for the child. The court found that extended visits during school vacations and the summer would permit the father to maintain a meaningful relationship with the children. The matter was remitted to the trial court for a determination as to an appropriate post-relocation visitation schedule for the father.

Maintenance

Downward modification of maintenance where father lost job

***Kaplan v. Kaplan*, 130 AD3d 576 (2d Dept. 2015)**

The parties were married for 20 years and there were two unemancipated children of the marriage. The parties' judgment of divorce, which incorporated, but did not merge, the parties' separation agreement, awarded the husband sole legal and physical custody of the parties' children, set the wife's child support obligation to the husband at $25 per month, and granted the wife maintenance in the sum of $16,666 per month for a period of 10 years. The parties' respective maintenance and child support obligations were based on the husband's 2009 income of $1.8 million and the wife's status as unemployed.

In 2012, two years after losing his job, the father moved to modify the maintenance and child support provisions of the parties' separation agreement. In turn, the mother moved for an award of child support from the husband for the period commencing after the parties' youngest child began to reside with her.

The court below properly granted the father's motion for downward modification of his maintenance

obligation because enforcing the award would create an extreme hardship since the father's loss of employment was unavoidable and he made diligent efforts to secure employment commensurate with his qualifications and experience. Thus, the court imputed income to the father of $450,000/year and modified his maintenance obligation to $6,375/month.

However, the trial court erred in directing that the father recoup the overpayment of his maintenance obligation made since the filing of his motion as a credit against his future maintenance obligation since it is against public policy to do so.

Also, the trial court erred in granting that branch of the father's motion which was for an upward modification of the wife's child support obligation. A party seeking to modify the support provisions contained in a stipulation of settlement incorporated, but not merged, into a judgment of divorce which was executed prior to the effective date of the 2010 amendments to Family Court Act § 451 has the burden of establishing a substantial, unanticipated, and unreasonable change in circumstances resulting in a concomitant need. In that case, the husband failed to show that he was unable to support the children during the five months prior to his making the motion.

It was improper for the trial court to direct that the cost of the children's college tuition, room and board, and unreimbursed medical expenses be divided between the parties based on their pro rata share of the combined income because the parties' agreement provided for a specific division of these responsibilities.

Finally, the trial court also erred in directing that the parties' youngest child could become emancipated in any manner recognized under New York law because the parties' separation agreement contains its own distinct definition of emancipation that permits, under certain circumstances, for the child to remain unemancipated until his 22nd birthday.

Equitable Distribution

Spouse entitled to life insurance proceeds where other spouse violates automatic restraint against change of beneficiary

Reliastar Life Ins. Co. of N.Y. v. Cristando, 129 AD3d 701 (2d Dept. 2015)

After the husband commenced the divorce action and prior to the start of the divorce trial, the decedent wife changed the primary beneficiary of her life insurance policy from the husband to her brother. Following the conclusion of the divorce trial, but before entry of the judgment of divorce, the wife died. Thereafter, the husband and the brother both filed claims for the proceeds of the decedent wife's life insurance policy. The plaintiff life insurance company commenced this action and the trial court, finding that the change of beneficiary was a violation of the automatic restraining orders, directed that the full proceeds of the life insurance policy be paid to the husband. Upon appeal by the decedent wife's brother, the appellate court affirmed.

Discovery

Husband ordered to turn over electronic devices where he "bugged" wife's iPhone

Crocker C. v. Anne R., 2015 WL 5664299 (Sup. Ct. Kings County 2015)

In a decision by Judge Jeffrey Sunshine of Kings County Supreme Court, a husband was ordered to turn over his iPhone and computers after the wife's computer expert discovered that the husband installed spyware on the wife's phone prior to his commencement of the divorce action in order to intercept confidential communication between her and her attorney. This specific spyware provided the husband with information regarding the wife's physical GPS location as well as all of the iPhone's e-mails, call history, and text messages. In order to ensure that the husband did not access confidential and privileged communications between the wife and her attorney during the three-month period that the spyware was unknowingly present on the wife's iPhone, the court ordered that the husband's iPhone and computers be examined by a referee either agreed upon by the parties or else selected by the court. In addition, the parties may either select a neutral data forensic expert to assist in the task or else each hire their own expert. The court denied without prejudice the husband's request that the wife, as the monied spouse, be ordered to pay $350,000 of attorney's fees (where she already paid her attorney approximately $950,000) since the husband failed to submit a net worth statement and retainer agreement

Facebook postings

A.D. v. C.A., 16 NYS3d 126 (Sup. Ct. Westchester County 2015) (Ecker, J.)

In a hotly contested matrimonial action and bitter child custody dispute of a four-year-old child, the husband requested that the court order the wife to produce printouts of all pictures, posts and information posted on her Facebook page over the last four years, or alternatively, all computer hard drives, data storage systems, flash drives, CD/DVDS created by the wife, and a copy of the SD card of the wife's iPhone. The husband alleged that these items contain pictures and information relating to the wife's whereabouts and travel without the child and would demonstrate the lack of time she spent with the child and that the husband was the primary caretaker.

The court, noting that the wife's time spent away from the child would be relevant to its ultimate custody determination, ordered the wife to produce all Facebook postings relating to her travels outside of the New York City area in the last four years (whether alone or with the

child) to the court for an *in camera* review, and to submit an authorization permitting the court to have access to her Facebook postings during the applicable time frame. However, in view of the husband's failure to rebut the wife's argument that her computer hard drives, data storage systems, flash drives, and CD/DVDS do not contain copies of her Facebook postings and that her iPhone does not contain an SD card, the court denied this request as an overly broad fishing expedition.

Pendente Lite Support and Counsel Fees

Kaufman v. Kaufman, 2015 WL 5125433 (2d Dept. 2015)

The wife was a homemaker and stay-at-home mother of the parties' teenage children and the father was a partner in a national law firm. The parties and their two children enjoyed an affluent standard of living which included, *inter alia*, numerous vacations, luxury automobiles, live-in domestic help, an expensive home, and expensive clothing. The trial court determined that the husband's adjusted gross income was $522,729, based upon gross annual income of $774,729, which was reflected in the husband's unfiled K–1 statement, less federal and state taxes reported, and did not consider the wife's allegations that the husband had approximately $200,000/year in prerequisites from his firm. The husband failed to file a tax return for the prior year, or explain his drastic decrease in income from the prior year.

The wife was awarded combined *pendente lite* child support and maintenance of $4,000/month and directed that the husband pay certain carrying charges on the marital home.

The appellate court reversed and remitted for a recalculation of child support and maintenance, finding that the court did not have sufficient evidence of the husband's income and that the award did not support the wife and children's pre-separation standard of living. In calculating the presumptively correct amount of *pendente lite* maintenance, the court was presented with insufficient evidence to determine the husband's gross income and, therefore, the court should have ordered temporary maintenance based upon the needs of the wife, or the standard of living of the parties prior to commencement of the divorce action, whichever was greater. The court deviated from the presumptively correct amount of *pendente lite* maintenance, but failed to explain the reasons for the deviation, nor did it compute the wife's living expenses.

In awarding *pendente lite* child support, the court failed to provide any reason for declining to perform the calculation in accordance with Child Support Standards Act (CSSA), nor did it provide any explanation as to how it determined the amount of the award.

The award of interim counsel fees to the wife of $25,000 was considered insufficient and the appellate court modified the award to $75,000, where there was a significant disparity between the financial circumstances of the parties, the litigation had already become contentious, and there was a likelihood that the litigation would be protracted, and there were complex issues including the valuation of the husband's law practice.

Correction

Evgeny F. v. Inessa B., 127 AD3d 617 (1st Dept. 2015)

In the Summer 2015 edition of my article, I incorrectly referred to the parties in the above-cited case as "husband" and "wife," when in fact, the parties to the child custody proceeding were never married. In that case, the court found that an award of interim counsel fees in the sum of $525,000 and expert fees in the sum of $38,000 to the mother was appropriate based on the financial circumstances of the parties and the father's litigious conduct throughout the parties' child custody dispute. In appealing this award, the father argued that Domestic Relations Law § 237(b), which provides for a rebuttable presumption in favor of awarding counsel fees to the less monied party, only applies when it is a spouse seeking attorney's fees. The Appellate Division rejected this contention and explained that the statute expressly authorizes the court to award counsel fees to a "spouse or parent" in custody proceedings.

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