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Family Law Review

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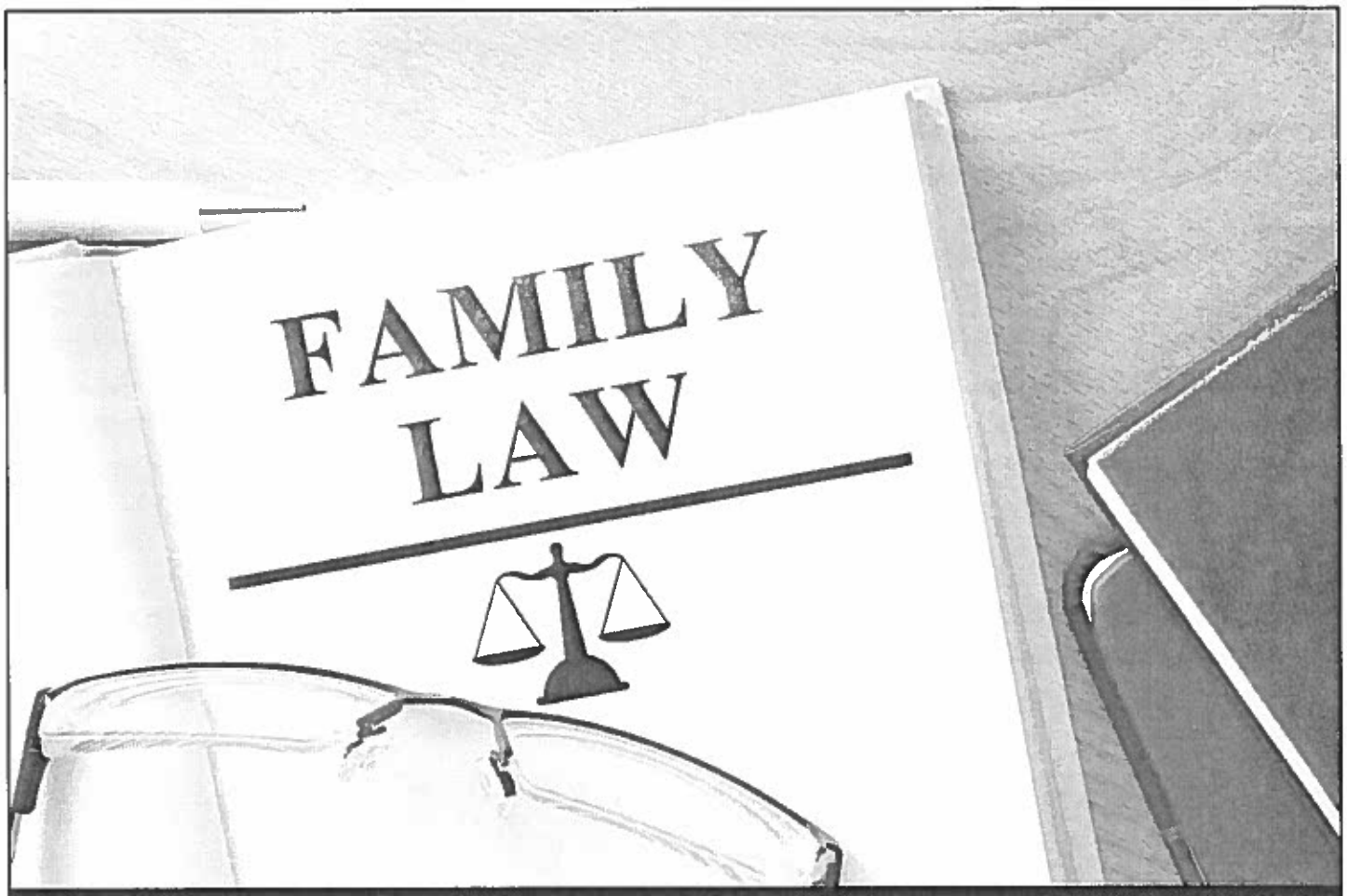

The End of the "Alimony" Deduction

By Lee Rosenberg, Editor-in-Chief

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Recent Decisions and Trends in Matrimonial Law

By Wendy B. Samuelson

Recent Legislation

22 N.Y.C.R.R. 1500.22(a), amended, effective January 1, 2018

The CLE Board issued two updates to the CLE program rules pursuant to 22 N.Y.C.R.R. 1500.22(a), including the addition of a new category of CLE credit.

In addition to ethics and professionalism, skills, law practice management, and areas of professional practice, a new category was added for diversity, inclusion and elimination of bias courses. This category of credit is effective January 1, 2018, and attorneys must complete one hour of such credit within a two-year reporting cycle.

These courses must include, among other things, implicit and explicit bias, equal access to justice, serving a diverse population, diversity and inclusion initiatives in the legal profession, and sensitivity to cultural and other differences when interacting with members of the public, judges, jurors, litigants, attorneys and court personnel.

In an effort to assist attorneys with compliance with the new rules, the NYSBA is offering free CLE programs for NYSBA members, including live webcasts, on diversity, inclusion and elimination of bias topics.

Tax Cuts and Jobs Act

In one of the most sweeping overhauls since 1986, the President has signed the $1.5 trillion tax reform law. Among the 500 pages of the law, it repeals the ability to deduct alimony (maintenance) payments made to a spouse and, conversely, does not require the addition to income of these payments received for any divorce decrees granted after 2018.

In New York, this will cause havoc to the maintenance and child support statutes. Maintenance is currently considered as income to the payee spouse, and is included as income for purposes of determining child support. New York may need to revise its definition of income for purposes of child support and maintenance.

Recent Cases

Agreements

Modification of Child Support Based on Payment of Maintenance

***Toscano v. Toscano*, 153 A.D.3d 1440 (2d Dep't 2017)**

The parties' separation agreement, which was incorporated but not merged into their judgment of divorce, provided that the mother would pay the father $4,000/month as spousal support for three years and thereafter $2,083/month for two years. The father, who had no income, would pay $25/month child support, unless there was an adjustment circumstance, which included "(i) December 31st of any year in which the Father's earned income exceeds $25,000; (ii) December 31st of any year in which the Father's gross income from all sources exceeds $45,000; (iii) The date on which each child becomes emancipated." The parties also did not opt out of the child support modification statute.

A year later, the mother brought a motion seeking a modification in the father's child support obligation, claiming that since she paid the father $45,000 in maintenance in a calendar year, the father's gross income from all sources exceeded $45,000, thereby triggering a mandatory adjustment. The father opposed, contending that there was no indication in the agreement that the spousal support paid to him was intended to be included in the calculation of his child support obligation and that it was illogical that he would accept spousal support from the mother, only to immediately pay her back with her own money.

The court below denied the mother's motion, concluding that the parties' agreement did not intend for the spousal support to be included as income to the father. The Second Department reversed and remanded for further determination. The parties' agreement clearly distinguished between "earned income" and "income from all sources," and spousal support is included as income from all sources.

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Contempt

Spouse Not in Violation of TRO by Not Paying for Whole Life Insurance Policy Where Other Term Life Insurance Existed and Whole Policy Considered Investment

***Savel v. Savel*, 153 A.D.3d 172 (2d Dep't 2017)**

The husband commenced the divorce action by summons with notice, accompanied by the automatic restraining order of DRL § 236(B)(2)(b), which requires, *inter alia*, that the parties maintain their existing life insurance policies in full force and effect. Thereafter, the husband moved to hold the wife in civil and criminal contempt for failure to pay the premiums on his whole life insurance policy. The wife conceded that she stopped paying for the policy, but claimed that the husband was not prejudiced because the parties maintained $12 million in term life insurance for their children in addition to their $7.6 million whole life insurance policies. She argued that the whole life insurance policies were intended as savings vehicles that should not be subject to the automatic orders, and she should not have to contribute her post-commencement earnings to a savings vehicle for the husband.

For civil contempt, the movant must establish that (1) a lawful order of the court, clearly expressing an unequivocal mandate, was in effect, (2) the order was disobeyed and the party had knowledge of its terms, and (3) the movant was prejudiced by the offending conduct. See, Judiciary Law § 753[A][3). Prejudice is shown where a party's actions were calculated to or actually did defeat, impair, impede, or prejudice the rights or remedies of a party. In criminal contempt, the movant must prove willful disobedience, but no prejudice needs to be shown, as the purpose of criminal contempt is to vindicate the authority of the court.

The court below properly denied the husband's motion for contempt, finding that the whole life insurance policy was a savings vehicle and not life insurance subject to the automatic restraining order, particularly where the parties had $12 million in term life insurance and an additional $7.6 in whole life insurance, and the husband admitted that the whole life policy was used as a savings plan.

Child Support

Child Support Reduced by Extraordinary Travel Expenses for Visitation

***Decillis v. Decillis*, 152 A.D.3d 512 (2d Dep't 2017)**

The mother filed a petition for child support of the parties' child. The Support Magistrate determined that the father's basic child support obligation would be $572 biweekly, and imputed $43,000 of income to the mother when determining this sum. The father was granted a credit against his child support obligation of $168 biweekly for the "extraordinary expenses" associated with his visitation, including $67 for travel expenses and additional deductions for the cost of meals and entertainment during those visits. The mother appealed, claiming that these deductions were improper.

The Second Department determined that the Support Magistrate properly imputed $43,000 of income to the mother based upon her prior income, her choice to engage in only part-time employment, and her current living arrangement, in which she did not pay rent or related housing expenses.

> *"Prejudice is shown where a party's actions were calculated to or actually did defeat, impair, impede, or prejudice the rights or remedies of a party."*

With respect to the father's credits for travel and entertainment expenses, the appellate court reduced the credit to $33 biweekly for travel expenses only and not for meals and entertainment. The court must direct the noncustodial parent to pay his or her *pro rata* share of the child support obligation, unless it finds that the *pro rata* share is "unjust or inappropriate" (Family Ct. Act § 413[1][f]), upon considering factors such as the "extraordinary expenses incurred by the non-custodial parent in exercising visitation." (Family Ct. Act § 413[1][f][9]. At bar, the appellate court determined that there was no basis for the trial court to conclude that the father's *pro rata* share was so "unjust or inappropriate" as to warrant a credit against his child support obligation to cover meals and entertainment during visits with the child. Extensive travel expenses, however, are a different matter and can be counted as a credit.

The lower court properly rejected the mother's petition for paternal support for private school tuition and expenses. According to the record, the couple never agreed to share the child's education costs, and the child had no specialized, scholastic need to justify such high-cost schooling.

The lower court properly denied the mother's request for the father to contribute a *pro rata* share of the child's extracurricular activities.

Imputation of Income

***Volkerick v. Volkerick*, 153 A.D.3d 885 (2d Dep't 2017)**

The parties were married 18 years and have two children. The decision fails to state the ages of the parties. The parties submitted the issues of maintenance and child support to the trial court on affidavits, affirmation

and financial exhibits. The wife was a high school graduate, and earned approximately $10,000-$15,000 year as a cashier. The husband was a college graduate with many years of experience working as an estimator for various construction companies. From 2005 until 2009, the husband's annual salary was approximately $130,000. In 2010, the year that determined the husband's income under the CSSA, the husband was unemployed for part of the year, and earned only $47,000, which was supplemented by unemployment compensation and withdrawals from retirement accounts, and therefore his total income was $186,582. The husband worked for most of 2011 and had an annual income of $130,000 from a combination of earnings and unemployment compensation.

The trial court awarded the wife $1,500/month maintenance for four years and $248.41/week in child support based on the husband's imputed income of $130,000/year. The husband appealed, and the appellate division affirmed, since the trial court did not abuse its discretion in considering the husband's earning history.

Equitable Distribution

Appreciation of Separate Property Whole Life Insurance Policies as a Result of Premiums Paid During the Marriage Deemed Marital Property

***Seale v. Seale*, 149 A.D.3d 1164 (3d Dep't 2017)**

The parties were married approximately 12 years, and had two children. The husband owned motels, car washes and other real property

During the marriage, the husband exchanged one of his car wash businesses and lot that he owned prior to the marriage for another car wash business, and did not use any additional funds for the purchase. The trial court properly found that the new car wash business and lot was the husband's separate property despite that he negotiated the exchange during the marriage. Negotiation, on its own, does not equate to active management of the business, and there was no evidence that the husband made unusual efforts to negotiate the transaction. In addition, the wife failed to establish that the original car wash business appreciated in value from the date of the marriage to the date of the exchange, as the court discounted the wife's expert's report.

In a battle of the experts, the trial court credited the husband's expert's testimony that three of his car wash businesses did not appreciate in value during the marriage.

In addition, the trial court also determined that the wife failed to establish an appreciation in the husband's separate property shopping mall and resort. The appellate court held that even if the wife could have established an appreciation, she failed to show that the appreciation was due to active management as opposed to market forces. Her expert testified that she could not form an opinion as to the degree that the properties appreciated in value due to active management as opposed to market forces because the properties consisted of actively run businesses and real estate.

The trial court erred in concluding that all of the insurance policies purchased by the husband were entirely his separate property due to the fact that he took out the polices prior to the marriage or, for policies taken out after the marriage, in exchange for his separate property. The husband owned the policies prior to marriage, but rolled them over into another policy during the marriage and paid the premiums with income earned during the marriage. The appellate court determined that the insurance policy increased in value by approximately $57,000 as a result of the premium payments made during the marriage, and awarded the entire amount to the wife. By doing so, the wife was awarded 45 percent of the entire marital assets and the husband was awarded 55 percent.

The trial court properly imputed $50,000 of gross annual income to the wife despite her being a substitute teacher, particularly where she had a Master's degree in reading and had taught at various times prior to and during the marriage, and in 2000, she earned between $45,000 and $50,000 as a teacher.

75% of Marital Assets Awarded to Wife Where Husband Incarcerated for White Collar Crimes

***Linda G. v. James G.*, 64 N.Y.S3d 17 (1st Dep't 2017)**

The parties were married for more than two decades and have two children. In 1991, the husband worked at one of Wall Street's major financial services companies, made partner by 1996, and by 2007 was earning $1.25 million a year. The wife worked at a prominent Wall Street bank, with annual earnings of $700,000, a job she quit in 2000 to care for their children.

In October 2007, the Securities and Exchange Commission began investigating the husband's financial dealings, and in 2010 he was indicted on charges of conspiracy and insider trading. At the criminal trial, the husband maintained his innocence, blaming his mistress for using his phone without his knowledge to conduct illegal activity. The SEC investigation and criminal trial sapped the married couple's assets. The husband was found guilty and served over a year in federal prison. The parties were unemployed from 2007-2010. The wife began divorce proceedings in January 2010, four months before his prison time began. After the husband was released from prison, he was only earning $226,000/year. The children suffered emotionally, both were suicidal and had other behavioral issues, and were expelled from their schools.

The parties' co-op on Park Avenue was valued at more than $4 million. The Supreme Court allotted 75 percent of the marital home to the wife and 25 percent to the husband, ruling the lopsided apportionment justified due to the damage caused by the husband's "behaviors

and activities." In addition, the wife was credited with 50 percent of the legal fees expended in the criminal action.

The First Department affirmed. The husband's insider trading, and ensuing criminal trial, conviction and incarceration caused the family to undergo financial losses and a substantial decrease in the standard of living. During the three-year period from the investigation to the trial, the couple was forced to spend down their assets since the husband was forced to resign from his employment, and the husband refused to take a plea bargain and instead blamed his girlfriend for his insider trading. These events also significantly disrupted the family's stability and well-being. Therefore, the appellate court found that pursuant to DRL § 236(B)(5)(d)(14), (any other factor the court finds just and proper), it was proper to consider the husband's criminal activity and an award of an unequal division of the home.

Nonetheless, the appellate court reduced the 75 percent/25 percent split to 60 percent/40 percent since it was improper to consider the husband's extramarital affair, which was not considered so egregious or shocking to warrant considering marital fault.

Custody

Nonbiological and Non-Adoptive Father of Child Born of Surrogacy Has Standing as Parent to Vacate Adoption by Another Man

***In re Maria-Irene D.*, 153 A.D.3d 1203 (1st Dep't 2017)**

Two gay men entered into a legal marriage in the UK. Intent on becoming parents, they executed an egg donor and surrogacy agreement, with both appellant and respondent contributing sperm. Ultimately, a baby girl was born with the appellant's sperm.

The couple was intent on co-parenting the baby; the fathers named the baby after their mothers, and they lived together as a family in Florida. Nonetheless, the Missouri court awarded the appellant "sole and exclusive custody," as only the appellant had a genetic link to the child.

Thereafter, the appellant began a relationship with a new partner, and two years later, the respondent left to return to England. After the respondent left the country, the appellant moved to New York with his new partner and his new partner commenced a petition in New York to adopt the baby. The respondent's role in the surrogacy was not disclosed to the Family Court nor that a divorce action was commenced by the respondent in Florida in which the respondent sought joint custody of the child.

Lacking this critical information, the Family Court granted the adoption petition in May 2016. When the respondent learned of the adoption, he moved to vacate it on the ground that relevant facts had not been disclosed to the court and that he was entitled to notice of the adoption and an opportunity to be heard. Family Court granted his motion and vacated the adoption in accordance with DRL § 114(3), concluding that appellants' failure to disclose the respondent's role in the surrogacy or the respondent's motion for joint custody amounted to material misrepresentations.

The First Department affirmed, as the appellant and respondent were legally married at the time of the surrogacy process, making the baby a child "born in wedlock." That distinction means the respondent was entitled to notice of the adoption proceeding. See DRL § 111[1][b] and the Court of Appeals' most recent decision concerning parental standing, *Brooke S.B. v. Elizabeth A.C.C.*, 28 N.Y.3d 1 (2016).

In addition, a second ground to vacate the adoption was that the adoption petition required petitioner to give a sworn statement that the child was not the subject of any other proceeding affecting her custody or status. The petitioner falsely alleged that there was no other proceeding pending.

Appellate Court Remanded Custody Determination Where the Family's Circumstances Changed After the Divorce, Rendering Record Outdated

***Bruzzese v. Bruzzese*, 152 A.D.3d 563 (2d Dep't 2017)**

The husband filed for divorce and ancillary relief, and the wife counterclaimed for a divorce. Before trial, the parties agreed to a divorce on the ground of an irretrievable breakdown of the marital relationship pursuant to DRL § 170(7), leaving other issues such as custody, equitable distribution, and child support to be resolved at trial. The trial court awarded a divorce to the wife but did so on the ground of cruel and inhuman treatment by the husband. The court also made an equitable distribution of the couple's assets, granted custody of the couple's minor children to the wife, and ordered the husband to pay child support and 75 percent of the children's future medical expenses, and directed the husband to pay the wife's attorney's fees.

The appellate court overturned virtually every aspect of the Supreme Court's ruling, chief among them the lower court's discarding of the couple's agreed-upon grounds for divorce. "Parties by their stipulations may in many ways make the law for any legal proceeding to which they are parties, which not only binds them, but which the courts are bound to enforce" (*In re New York, Lackawanna & W. R.R. Co.*, 98 N.Y. 447, 453). "[S]tipulations of settlement are judicially favored and are not lightly cast aside absent cause sufficient to invalidate a contract" (*Lewis v. Lewis*, 183 A.D.2d 875, 876). Therefore, the court below erred by not granting a judgment of divorce based on irretrievable breakdown of the marriage.

The lower court erred in calculating the husband's share of the children's future unreimbursed healthcare expenses. Domestic Relations Law § 240(1-b)(c)(5)(v) establishes that children's health care expenses not covered

by insurance is to be paid by both parents in proportion to their pro rata share of the combined parental income. Here, the husband's income was 65.4 percent of the combined parental income, and therefore his share of medical expenses should be 65.4 percent, not 75 percent.

The lower court awarded the wife custody of both minor children. However, the attorneys for the children advised the appellate court that the family's circumstances changed significantly since the judgment of divorce was entered, as the parties' son moved into the father's residence and refused to communicate with the mother. The appellate court found that the lower court's custody ruling was outdated and required reevaluation (*In re Michael B.*, 80 N.Y.2d 299, 318; *Bosque v. Blazejewski-D'Amato*, 123 A.D.3d 704, 705). Therefore, it remanded the custody matter back to the trial court for further determination and issued a temporary custody arrangement with the couple's son living with the husband and their daughter living with the wife. (It is unusual that the appellate court would require a re-hearing on custody, rather than requiring the parents to make a motion for a modification of the custody order.)

The lower court did not abuse its discretion in awarding the wife $84,038 in attorney's fees, as a result of the disparity of incomes of the parties and the husband's conduct that delayed the proceedings.