

# Recent Legislation, Cases and Trends in Matrimonial Law

By Wendy B. Samuelson

## New CPLR 4540-a, Effective Jan. 1, 2019

The new CPLR 4540-a establishes a rebuttable presumption of authenticity for any documents that one party produces for the other during discovery. Under this new provision, discovery documents are presumed authentic when a party requests the discovery documents from the opposing party, and then offers those documents into evidence.



## CPLR 2305 Amended, Effective Aug., 2018

CPLR 2305 has been amended to allow attorneys who are subpoenaing materials for trial to have those materials delivered directly to them, rather than to the court.

*"The new CPLR 4540-a establishes a rebuttable presumption of authenticity for any documents that one party produces for the other during discovery."*

## Recent Cases

### Child Support

**Court Orders Father to Pay *Pro Rata* Share of Child's Private College Education Based on Child's Reliance on Father's Promise to Pay for Same**

***Manfrede v. Harris*, 162 A.D.3d 1035 (2d Dep't 2018)**

The child's mother sought judicial intervention for the father to pay his *pro rata* share of the child's private college education. The father requested a SUNY cap. The court below directed the father to pay his *pro rata* share of the parties' combined income of the child's private college education based on the child's allegation that the father promised to pay for private college and he chose to attend a private college in reliance on such promise. The appellate division affirmed.

**An Award of Carrying Costs on Marital Home and Direct Expenses on Vehicle in Addition to *Pendente Lite* Maintenance and Child Support Is Improper Without Further Explanation**

***Blake v. Blake*, 164 A.D.3d 1111 (1st Dep't 2018)**

On the wife's motion for *pendente lite* support, the court granted the relief, ordering the husband to pay *pendente lite* maintenance, child support, and 78 percent of child care, all school-related expenses, extracurricular activities, and 78 percent of the carrying costs of the marital residence and the wife's vehicle. The husband appealed, claiming that the court erroneously recorded his financial status. The court had attributed \$833,605 in annual income to the defendant, while he claimed that his income from his investment banking firm was actually only \$226,340.

While the appellate court refused to challenge the lower court's assessment of the defendant's income, the appellate court ruled that the Supreme Court erred in ordering him to pay carrying costs on the marital residence and vehicle expenses in addition to maintenance and child support, without any explanation. The court reasoned that such carrying costs are encompassed in the child support and maintenance award.

## Counsel Fees

**\$3.5M Interim Counsel and Expert Fee Award**

***Trafelet v. Trafelet*, 162 A.D.3d 518 (1st Dep't 2018)**

Midway through an epic legal battle between wealthy divorcing spouses, the wife brought a *pendente lite* motion for her husband to pay for her counsel and expert fees. The court awarded her \$3.5 million in counsel and expert fees, subject to reallocation at trial. The husband appealed, and the appellate court unanimously affirmed.

The case involved "expansive issues" including the validity of a \$150 million trust, the alleged commingling of

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marital and non-marital assets within the trust, and the scope and size of the parties' assets. This naturally called for the acquisition of legal experts, accounting experts, and property valuation experts. The appellate court held that the lower court had quite a firm grasp of the scope of the case after it presided over a seven-day *pendente lite* hearing and was therefore in a position to properly evaluate the necessity of each party's legal and expert services. In addition, the wife's expert accountant submitted an "exhaustive affidavit" detailing the complexities of the financial issues, including that substantial fees were incurred defending against the husband's separate property claims regarding the trust.

Beyond challenging the wife's need for large legal fees, the husband also questioned whether a large award would foster her "extreme litigiousness" and spur her to pursue "meritless" legal strategies meant only to drain his coffers. In dismissing those arguments, the appellate court noted that the wife had not yet made a "meritless" argument and that the husband had been channeling his own litigious spirit by initiating just as many motions as his wife. Moreover, the court noted that since the fees are subject to reallocation at trial, it provides her with little incentive to bring meritless claims.

#### **Changing Lawyers Nine Times Triggers Court Order to Pay for Opposing Party's Counsel Fees**

##### ***Behan v. Kornstein*, 164 A.D.3d 1113 (1st Dep't 2018)**

In this eight-year marriage, the trial court awarded the wife and the parties' child exclusive occupancy of the parties' marital apartment for three years, and ordered the husband to pay the mortgage, maintenance and assessments on the apartment as a form of maintenance. The court also ordered the husband to pay the wife 15 percent of the fair market value of his medical practice and 70 percent of her counsel fees. The husband appealed. In affirming the lower court's granting of exclusive occupancy to the wife, the appellate court cited the lower court's broad discretion in ruling on what is in the best interest of the child. However, the appellate court shortened the length of time that the mother and child would have exclusive occupancy to one year. The appellate court reasoned that the wife is a 49-year-old college educated professional, and \$80,000 of income was imputed to her based on her work history, even though she has earned \$175,000 in the past. The wife received a "substantial sum" in equitable distribution and had been receiving maintenance, both temporary and permanent, for eight years, which is equivalent to the length of the marriage.

The appellate court affirmed the award to the wife of 25 percent of the husband's brokerage account which he owned prior to the marriage, but commingled with marital assets. The appellate court also affirmed the court below's ruling on counsel fees. The plaintiff accumulated enormous counsel fees as the defendant dragged out the proceedings, changing attorneys nine times, failing to

comply with court orders, and needlessly extending the trial with what the court called "belligerent behavior."

The appellate court vacated the lower court's ruling on the husband's medical practice. The husband started the practice prior to the marriage, and the wife would be entitled to the appreciation of the practice during their eight year marriage. However, since the wife failed to establish a baseline pre-marital value of the practice, no appreciation could be determined, and therefore, the award was reversed.

#### **Child Custody**

##### **A Child's Witnessing of Domestic Violence Does Not Equal Neglect Without a Showing of Mental or Physical Impairment to the Child**

##### ***In re Nevin H.*, 164 A.D.3d 1090 (4th Dep't 2018)**

Two separate appeals were brought concerning custody and visitation of the parties' children, which were consolidated. In the first appeal, the Department of Children and Family Services (DOCS) alleged that the mother neglected the parties' children because the children witnessed their mother being physically abused by her boyfriend. The court ruled that the mother neglected the children. The mother appealed. In the second appeal, the father brought a motion for a change in custody of the parties' daughter to him, which was granted, based on the mother's loss of employment, inability to support the child, and the lack of suitable housing for the parties' daughter. The mother appealed this decision as well.

The appellate court reversed the finding of neglect. DOCS failed to present evidence that the children's "physical, mental or emotional condition has been impaired or is in imminent danger of becoming impaired" by witnessing the domestic violence. Merely establishing that the children were present during domestic violence is not sufficient to establish neglect. See also *Nicholoso v. Scopetta*, 3 N.Y.3d 357 (2004). The appellate court affirmed the custody ruling, since the mother's financial hardship severely impacted the child's best interests.

#### **Same-Sex Marriage**

##### **Divorcing Same-Sex Couple Must Equitably Distribute Property Obtained Since Civil Union**

##### ***O'Reilly-Morshead v. O'Reilly-Morshead*, 163 A.D.3d 1479 (4th Dep't 2018)**

In a case of first impression, the Fourth Department held that the property acquired during the parties' civil union and prior to their marriage should be equitably distributed based on comity of the Vermont civil union statute.

In June 2003, long before same-sex marriage was permitted in New York, a lesbian couple residing in New York traveled to Vermont to obtain a civil union. Three years later, in June 2006, they got married in Canada. By

2014, their relationship had become irretrievably broken. After the plaintiff filed for divorce in New York, the defendant counter-claimed, demanding that the couple's property be equitably distributed dating back to June 2003, the date of their civil union. The Supreme Court ruled that property acquired during the civil union is not subject to equitable distribution due to the court's lack of authority to distribute such property. The defendant appealed. In its ruling, the Fourth Department struck an intriguing middle ground. It embraced the lower court's reasoning that a civil union is not a marriage and should not be regarded as one. Nonetheless, the court ruled that the parties should equitably distribute the property they

had acquired dating back to their civil union in June 2003 due to the principle of comity. Under the Vermont civil union statute, the parties are to receive the same benefits, protections and responsibilities under the law that are provided to spouses in a civil marriage, which includes the rights to distribute property.

Taking into account that the expressed intent of the Vermont civil union statute was to set up a marriage equivalent, the court ruled that comity required New York to treat the parties' Vermont civil union in that spirit and enforce equitable distribution of the parties' property acquired during their civil union.

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