Recent Legislation, Cases and Trends in Matrimonial Law

By Wendy B. Samuelson

Recent Legislation

New York Legalizes Paid Surrogacy: The Child-Parent Security Act, effective February, 2021

For decades, New York has stood on a lonely legal island, alongside Louisiana and Michigan, as one of only three states barring paid gestational surrogacy. Those days are now drawing to a close, thanks to the Child-Parent Security Act (CPSA), a transformative piece of legislation signed by Governor Cuomo in April, 2020. The Act, which will go into effect in February, 2021, eliminates the current ban on paid surrogacy (see DRL Article 8), establishes new principles and procedures for establishing and absolving parentage, and may prove itself a blessing to thousands of New York families struggling with reproduction.

Before the CPSA, New York lacked a statutory definition for the term "parent." Courts identified a child's parents by looking at who gave birth, or signed the adoption contract, or through mere marital presumption — a stunningly outdated approach in a century where sperm and egg donation and gestational surrogacy are all quite common. The CPSA changes that, codifying parentage through the intent of the parties. Under the procedures outlined in CPSA Article 5-C, parents using assisted reproduction will now be able to petition the court before the child's birth for a judgment declaring them the child's legal parents. Likewise, under § 581-202, egg donors will be able to absolve themselves of parentage by declaring their non-parental intent.

The CPSA also speeds up the process of establishing and absolving parentage by requiring courts, upon the baby's birth, to issue a judgment of parentage declaring that the intended parents are the sole legal parents, provided that their agreement with the surrogate meets the CPSA's requirements. Article 5-C, Part 4, details those requirements and gives courts permission to rely on an attorney's certification that the parties' agreement meets the Act's requirements. When a surrogacy agreement falls short of those requirements, courts will be directed to determine parentage based on the parties' intent and to consider the best interests of the child.

The Act also grants parents broader control over their frozen embryos. Under § 581-306, a divorced spouse who doesn't object to a former spouse using their frozen embryos to create a baby, but doesn't want to parent the baby, will now be free to transfer all parental rights to the former spouse. The CPSA also establishes regulations for posthumous conception.

While the CPSA has yet to take effect, it has already elicited widespread acclaim from New York attorneys specializing in reproductive law. Readers interested in exploring this burgeoning field should check out reproductive attorneys Denise Seidelman and Alexis Cirel's in-depth exploration of the law's vast improvements on current regulations in the *New York Law Journal* ("The Child-Parent Security Act Is a Game-Changer: Here's What You Need to Know," NYLJ, 4-27-2020).

Recent Cases of Interest

Marriage Equality

Gay couples' matrimonial rights in danger, as conservative justices voice opposition to same-sex marriage

***Davis v. Ermold*, 592 U.S. ____ (2020)**

Will gay couples' Constitutional right to marry survive a reconstituted, more conservative U.S. Supreme Court? The answer to that critical question remains wholly unclear, as Supreme Court Justices Clarence Thomas and Samuel Alito indicated in a recent ruling on matrimonial rights, *Davis v. Ermold.*

The appellant, Kim Davis, a former county clerk in Kentucky, had drawn international attention in August, 2015, when she refused to issue marriage licenses to same-sex couples, citing a personal religious objection. Her refusal flew in the face of the Court's just-issued landmark ruling legalizing gay marriage. That ruling, *Obergefell v. Hodges*, 576 U.S. 644 (2015), established citizens' constitutional right to marry a partner of the same gender under the 14th Amendment's Equal Protection Clause.

For refusing to issue the licenses, Davis was cited for contempt of court and briefly jailed. Her case was later made moot when the newly elected Kentucky governor issued an executive order removing the names of county clerks from the state's marriage licenses.

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In its October, 2020 ruling, the Supreme Court declined to hear Davis' case, asserting that it did not "cleanly" present the conflict between matrimonial rights and religious liberty. Nonetheless, Justice Thomas used the opportunity to fire a ferocious warning shot at gay couples' matrimonial rights, a reminder to the LGBTQ community of the precarious status of *Obergefell*, a 5-4 ruling that benefited from the concurring vote of Justice Ruth Bader Ginsberg.

Writing for himself and Alito, Thomas called Davis "one of the first victims of [*Obergefell*'s] cavalier treatment of religion" and warned that "she will not be the last." "*Obergefell* enables courts and governments to brand religious adherents who believe that marriage is between one man and one woman as bigots, making their religious liberty concerns that much easier to dismiss," wrote Thomas. "[*Obergefell* suggested] that being a public official with traditional Christian values was legally tantamount to invidious discrimination toward gay couples." Thomas ended his decision with the following:

> This petition provides a stark reminder of the consequences of *Obergefell*. By choosing to privilege a novel constitutional right over the religious liberty interests explicitly protected in the First Amendment, and by doing so undemocratically, the Court has created a problem that only it can fix. Until then, *Obergefell* will continue to have ruinous consequences for religious liberty.

At the time of this writing, the Court currently stands at nine justices, with the recent confirmation of Justice Amy Coney Barrett. If Barrett joins *Obergefell*'s four dissenters, the Constitutional right to same-sex marriage may soon be eliminated, triggering a broad realm of disturbing new unknowns, including the legal status of thousands of current same-sex marriages.

Procedure

COVID-19-era virtual trial satisfies Constitution's Confrontation Clause, even in cases of criminal contempt

C.C. v. A.R., NY Slip Op 20245 (Sup Ct, Kings Co. 2020)

This is a proceeding continuing in the midst of an ongoing pandemic emergency to hold the husband in civil and criminal contempt after having been found to have engaged in spoliation of evidence and violation of automatic orders related to the installation of and attempted deletion of iPhone spyware, and to consider sanctions against the wife for alleged perjury for making a false affidavit to the court regarding her knowledge about that spyware.

In March 2020, during the first day of the evidentiary hearing, the court took possession of a notebook that the husband included on his evidence list, to evaluate its admissibility. Thereafter, the COVID-19 pandemic began, causing the case to be adjourned until late September 2020, when the court scheduled two virtual hearings to conclude the evidentiary issues.

Subsequently, the husband's new attorney objected to the court's continuing with the case, either in person or virtually. She argued that the case should not proceed until she had an opportunity to inspect all the evidence, including the notebook now held at the courthouse. She claimed that visiting the courthouse would be possible "only after I am satisfied that the best practices are in place at the courthouse to ensure my client's and my health." The husband's attorney also objected to virtual proceedings, given that her client is facing charges of criminal contempt, and that such a hearing would prejudice her client.

Judge Jeffrey Sunshine rejected these arguments as follows:

> (The husband) has every interest in seeking to delay the resolution of this matter inasmuch as he faces possible incarceration. . . . [In] *People v. Wrotten* [the Court of Appeals] ruled that the Court does not need the consent of the parties to fashion 'innovative procedures' where 'necessary' to effectuate the powers and jurisdiction of the Court (14 NY3d 33, 37 [2009]).

In *Wrotten*, noted Justice Sunshine, the defendant also faced the possibility of imprisonment, yet the Court of Appeals still found that there was no prejudice to defendant not being able to confront the complainant in-person where complainant appeared by live two-way television feed. The technology available to C.C. exceeds the technology available to defendant Wrotten, and, it's superior to the one-way live, closed-circuit television testimony that the U.S. Supreme Court affirmed was sufficient to satisfy the Confrontation Clause of the U.S. Constitution in *Maryland v. Craig*, 497 U.S. 836, 850 (1990).

The Court's current video conference technology allows for contemporaneous cross-examination, gives the opportunity for the judge and the parties to view the witness' demeanor, and preserves a record of the testimony, in accordance with *Wrotten* and *Craig*. As Judge Sunshine noted, the right to a fair trial does not necessarily equate to a perfect trial.

Judge Sunshine did offer one small compromise: delaying the evidentiary hearing one day, so the husband and his counsel could inspect the binder of evidence at the Kings County courthouse, where they can wear gloves, use the stairs instead of the elevator, and make use of the significant safety measures already in place, including newly installed hand sanitizers and a face mask requirement for all building occupants.

Child Support

Parent's earning capacity, not her actual income, establishes her support obligation

Drake v. Drake, 185 A.D.3d 1382 (4th Dep't 2020)

In their separation agreement, incorporated into their divorce judgment, the mother and her now ex-husband agreed that they would both contribute to their children's college expenses. After a hearing in Family Court, the

Support Magistrate calculated the parties' *pro rata* share of college expenses by imputing income to the mother, at a rate of $30 per hour for eight hours per week, representing the difference between the mother's parttime salary as a hygienist and the fulltime salary that she is capable of earning The mother filed objections to the magistrate's order. She claimed that she had not earned more than $55,000/year, she experienced difficulty in maintaining employment, and had been dealing with deteriorating health. She was also struggling with debts to both the state and federal government. She was unable to afford her share of the college expenses.

The appellate court disagreed. Courts "have considerable discretion to. . . impute an annual income to a parent." See *Lauzonis v. Lauzonis*, 105 A.D.3d 1351 (4th Dep't 2013). The court may calculate support based on a parent's ability to provide rather than her current economic situation.

Courts determine a parent's "ability to provide" by examining her past income, demonstrated earning potential, employment history, future earning capacity, and educational background. The court can also factor in the financial assistance she receives from friends and family. See *Belkhir v. Amrane-Belkhir*, 118 A.D.3d 1396 (4th Dep't 2014); *In re Deshotel v. Mandile*, 151 A.D.3d 1811 (4th Dep't 2017); *In re Rohme v. Burns*, 92 A.D.3d 946, 947 (2d Dep't 2012).

Here, the appellate court ruled the mother was receiving significant funds from others, including more than $14,000 from the father of her children, $5,000 from her second husband upon their divorce, and $20,000 in proceeds from the sale of her house in 2012.. She was also capable of doing dental work full-time but instead was working just 32 hours per week. In the past, when she did not have full-time employment as a hygienist, she would work as a waitress nights and weekends to supplement her income. Her "difficulty" finding work came not from a sour economy but from her repeatedly being fired for cause. Finally, the court dismissed the mother's claim of deteriorating health, given that she failed to corroborate that claim with any medical evidence.

It should be noted that the Appellate Division failed to state how much each parent was directed to pay toward college.

Grandparents' Rights

Parents' animosity towards grandmother insufficient to deny her visitation

Honeyford v. Luke, 186 A.D.3d 1049 (4th Dep't 2020)

Can a parent prevent a grandmother from seeing her grandchildren, citing enmity for the grandma as the sole justification? No, ruled the Monroe County Family Court, a decision affirmed by the Fourth Department.

DRL § 72(1) grants grandparents standing to seek visitation over the parents' objection when "conditions exist [in] which equity would see fit to intervene." A parent's barring a grandparent from visiting her grandchildren, motivated by nothing more than mere animosity, fits that narrow definition, concluded the appellate court.

In this case, the parents had not accused the grandmother of abuse or mistreatment, or denied that there had been an extended relationship between their children and grandmother. While affirming the lower court's ruling in favor of the grandmother, the appellate court explicitly recognized the steep mountain that a grandparent who has been denied visitation by a parent has to climb to secure visitation rights from a court. "The presumption that a fit parent's decisions are in the child's best interests is a strong one." See *In re Jones v. Laubacker*, 167 A.D.3d 1543, 1545 (4th Dep't 2018); *Troxel v. Granville*, 530 U.S. 57, 69-70 (2000).

When considering granting visitation to a shunned grandparent, the court applies three criteria: (1) whether grandparent visitation is in the best interest of the children; (2) whether the grandparent supports or undermines the children's relationship with their parents; and (3) whether there is animosity between the parents and grandparent. See *In re Hilgenberg v. Hertel*, 100 A.D.3d 1432, 1433 (4th Dep't 2012); *In re E.S. v P.D.*, 8 N.Y.3d 150, 157-158 (2007).

While the appellate court acknowledged the parents' obvious animosity for the grandmother, it ruled that this was outweighed by the ample benefits that would by enjoyed by the children if they were permitted to continue their long, nurturing relationship with their grandmother, particularly where there was no evidence in the record that the grandmother or her husband did anything to undermine the parents' relationship with the children.

Neglect

Mother's parental rights terminated after finding of derivative neglect

In re Khadijah S. v. Calondra A., 186 A.D.3d 1223 (2d Dep't 2020)

In 2018, the Administration for Children's Services investigated the mother, Calondra A., for negligently permitting her husband, the children's stepfather, to sexually abuse two of her daughters. Following an extensive fact-finding hearing, Kings County Family Court found overwhelming evidence that the mother knew of and failed to protect her daughters from years of sexual abuse at the hands of their stepfather beginning when they were in their early teens and lasting until their adulthood.

Seeking now to protect the mother's younger children, who are still minors, ACS filed charges of derivative neglect, to strip the mother of parental rights to her minor children.

The mother's failure to intervene and protect her older children from years of sexual abuse represented "a fundamental defect in the [mother's] understanding of the duties of parenthood," concluded the court. See *In re Andrew B.-L.*, 43 A.D.3d 1046, 1047; *In re Dutchess County Dept. of Social Servs. V. Douglas E.*, 191 A.D.2d 694, 694. As such, the court determined that the mother had committed derivative neglect of the minor children and stripped her of all paren-

tal rights. The children were removed from her custody and placed in the care of their adult sister.

The mother appealed the ruling on technical grounds, asserting that the Family Court improperly credited ACS's witness at the fact-finding hearing. The appellate court denied her appeal, clarifying that the "Family Court's assessment of credibility of the witness is entitled to considerable deference unless clearly unsupported by the record." See *In re Joseph L.* (Cyanne W.), 168 A.D.3d 1055. In this case, the appellate court concluded, the Family Court's credibility determination is supported by the record and, thus, need not be disturbed.

Custody

AFC failed to advocate for her clients' wishes, inappropriately substituting her own judgment for theirs

***Silverman v. Silverman*, 186 A.D.3d 123 (2d Dep't 2020)**

The parties settled their divorce action, entering into a so-ordered stipulation with joint legal custody of the parties' two children, residential custody to the mother, and visitation to the father. A few years late, the father moved to modify the stipulation to grant him residential custody. The Suffolk County Supreme Court granted the father's motion and transferred residential custody to him.

The mother appealed, contending that the Attorney for the Children (AFC) argued for the father to have residential custody, against the teenage children's explicit wishes to remain in the residential custody of the mother. The appellate court agreed, reversed the lower court's order, and remanded the case for a *de novo* hearing.

The appellate court expressed shock and disgust at the myriad ways in which the AFC aggressively labored in opposition to her own clients: She opposed the introduction of evidence that may have supported one child's claim that the father attempted to strangle her; she angled her cross-examination of the father to bolster his case, in direct opposition to her clients' wishes; and she objected to the introduction of evidence that would have benefited the mother's case.

An AFC is required is to "zealously advocate the child's position," noted the appellate court. See *In re Young v. Young*, 161 A.D.3d 1182; 22 N.Y.C.R.R. 7.2[d]. "[She] should be directed by the wishes of the child, even if the [AFC] believes that what the child wants is not in the child's best interests." An AFC is only justified in substituting her judgment for the child's when she is "convinced either that the child lacks the capacity for knowing, voluntary and considered judgment, or that following the child's wishes is likely to result in a substantial risk of imminent serious harm to the child." *See In re Mark T. v. Joyanna U.*, 64 A.D.3d 1092; *In re Dominique A.W.*, 17 A.D.3d 1038. Usually the exception to the AFC's duty to support the child's wishes and not supplant the child's judgment is in cases with young children or disabled children.

In this case, the children were honor roll students, clearly capable of "considered judgment." In addition, given her clients' allegations of paternal abuse, the AFC's advocating for paternal custody meant pushing the children towards "imminent serious harm," not protecting them from it.

Pre-teen child's desire to be part of his half-sister's life tips scales in favor of relocation with father from Rochester to Delaware

***Jeffrey H. v. Joy J.*, 67 Misc.3d 1240(A) (Monroe Co. 2020)**

The parties were divorced approximately five years ago, and agreed to joint custody of their son. The father, a postal service worker, subsequently was transferred by his employer from Rochester, New York to Delaware (a six-hour car ride each way), where he has now been living for several years with his new wife and their 4-year-old daughter. Seeking to bring his 12-year-old son to Delaware, the father petitioned the court for permission to relocate his son. In response, the mother filed for sole legal custody and confirmation of her status as the primary residential parent to keep their son in her Rochester residence, where he has been thriving.

Judge Dollinger of the Monroe County Supreme Court untangled what he called the toughest "Gordian Knot" in family law: custody/relocation cases in which both parents are equally loving, equally stable and financially fit, and equally connected to their child and committed to his well-being.

New York courts apply the *Tropea* test to resolve custody/relocation cases. See *Tropea v. Tropea*, 87 N.Y.2d 727 (1996). The test's factors include: (1) each parent's reason for seeking or opposing the move; (2) the quality of the relationships between the child and the custodial and noncustodial parents; (3) the impact of the move on the quantity and quality of the child's future contact with the noncustodial parent; (4) the degree to which the move would improve the custodial parent's and child's lives economically, emotionally and educationally; and (5) the feasibility of preserving the relationship between the noncustodial parent and the child through appropriate parenting time arrangements.

The hard truth, explained Dollinger, is that in this case, the *Tropea* test is essentially a wash, with answers of equal weight to support the varying factors. Consequently, the court moved beyond the test and gave significant weight to the voice of the son, who, through the AFC, expressed an equal love for both parents and an emphatic desire to move to Delaware with his father and be part of the life of his younger half-sister.

"The child's age, 12, gives the child's expressed preference some greater weight in his articulation of his own best interests," Dollinger wrote, while adding that "countless courts have directed, [the child's] views are not dispositive, nor should they be."

Accordingly, the court granted the father permission to move his son to Delaware; balanced the custodial shift by granting the mother significant visitation time during school breaks, holidays and the summer; and denied the mother's petition for full legal custody, maintaining equal decision-making power for both parties.