Recent Legislation, Decisions and Trends in Matrimonial Law

By Wendy B. Samuelson

Recent Legislation

Family Court Act § 651(1) and Domestic Relations Law § 240(1-a) amended, effective June 18, 2016: Custody and Permanency Hearings

Family Court Act § 651(1) and Domestic Relations Law § 240(1-a) were amended to provide that, where a child protective or permanency proceeding is pending in Family Court at the same time as a proceeding brought in the Supreme Court involving the custody of, or right to visitation with, the same child of a marriage, the Family Court may hear the child protective or permanency proceeding while the other proceeding is pending in Supreme Court. That is, consolidation is not mandatory. The Supreme Court, however, has the option to refer the custody proceeding to the Family Court.

Family Court Act § 153-c amended, effective April 1, 2016: Temporary Orders of Protection

Family Court Act § 153-c was amended by adding subsection (b), which authorizes the Chief Administrator of the courts to implement a pilot program for the filing of petitions of temporary orders of protection by electronic means and the issuance of such orders *ex-parte* by audio-visual means. The purpose of this addition is to accommodate litigants who are unable to attend court due to a potential risk of harm, but need to obtain emergency relief.

Civil Practice Law and Rules § 2103 amended, effective January 1, 2016: Service of Papers

CPLR 2103(b)(2) was amended to provide that, where papers are served on an attorney by mail and service is deemed complete upon mailing, five days shall be added to the prescribed service period if the mailing is within the state and six days shall be added to the period if the mailing is made outside of the state.

Court of Appeals Roundup

Prenuptial agreement that did not contain parties' net worth statement is valid

In re Fizzinoglia, 26 N.Y.3d 1031 (2015)

In a probate action, the wife sought to invalidate the prenuptial agreement that waived her elective share of the decedent-husband's estate. The wife argued that the omission of a statement of the parties' assets and liabilities nullified the agreement. The Surrogate's Court denied the wife's motion for summary judgment. The Appellate Division affirmed, and so did the Court of Appeals. The wife testified that she was aware when the agreement was signed that the statement regarding the parties' assets and liabilities was missing, and that the decedent-husband's finances didn't matter to her at that time. The wife failed to show that the prenup was the product of fraud, duress, or overreaching, or that the decedent attempted to conceal or misrepresent the nature or extent of his assets, and failed to present prima facie proof that "a fact-based, particularized inequality" existed at the time of the execution of the agreement.

Modification of custody from mother to father

Cisse v. Graham, 26 N.Y.3d 1103 (2016)

In my Winter 2014-2015 column, I reported on *Cisse v. Graham*, 120 A.D.3d 801 (2d Dept. 2014), a custody modification case, where the Second Department affirmed the Family Court's finding that a change of custody from the mother to the father was in the best interests of the parties' daughter. The court based its determination on evidence that the mother interfered with the father's visitation, failed to acknowledge the importance of the daughter's relationship with her father, worked hours that hindered her ability to spend quality time with the daughter, and the daughter's expressed desire to live with her father.

Thereafter, the mother moved for leave to appeal and the Court of Appeals granted the motion. *See Cisse v. Graham*, 24 N.Y.3d 1028 (2014). The Court of Appeals affirmed in a one-sentence decision.

Grandparents' visitation: extraordinary circumstances existed where extended disruption of mother's custody

Suarez v. Williams, 26 N.Y.3d 440 (2015)

The Court of Appeals held that grandparents may demonstrate standing to seek custody based on extraordinary circumstances where the child has lived with the grandparents for a prolonged period of time, even if the child had contact with, and spent time with, a parent while the child lived with the grandparents.

The child at issue lived with his paternal grandparents, beginning when he was less than 10 days old and continuing until he was almost 10 years old. The child's father moved out of state when the child was 2, and has had visitation since then. The child's mother lived approximately 12 miles from the grandparents for the child's first few years, until the grandparents moved the mother (and her daughters from a previous relationship) into a trailer that the grandparents purchased and situated in a trailer

park across the street from their residence. When the child was approximately 4, the parents obtained a consent order awarding them joint legal custody of the child; yet, the child continued to reside with his grandparents. When the child was 6, the grandparents moved with him to a new county. They continued to help the child's mother to move closer to them. This enabled the mother to see the child regularly as well as, stay overnight and take vacations with her child.

In 2012, after the father of the child sought custody from the mother and a termination of his child support payments to her, she refused to return the child to the grandparents relying on a 2006 court order granting her custody. Additionally, the mother told the grandparents that because they had the child for many years, it was her "turn now" to have custody, and they could no longer see him.

The grandparents brought a petition for custody of their grandchild. After a 10 day hearing, the Family Court found that there had been an extended disruption of custody between the mother and the child, and that the mother voluntarily relinquished care and control of him to the grandparents, and this amounted to extraordinary circumstances. After considering the child's best interests, the court granted joint custody to the grandparents and the father, with primary physical custody to the grandparents and visitation to each parent.

The Appellate Division reversed and dismissed the grandparents' petition finding that they lacked standing because they were unable to prove extraordinary circumstances. The court found the arrangement similar to joint custody, with the grandparents having primary physical custody and the mother having visitation.

The Court of Appeals reversed, finding that the grandparents proved extraordinary circumstances, despite the mother having some contact with the child.

DRL § 72(2)(a), provides that grandparents may apply for custody where extraordinary circumstances exist, including where there is an extended disruption of custody, which is defined to

> include, but not be limited to, a prolonged separation of the respondent parent and the child for at least [24] continuous months during which the parent voluntarily relinquished care and control of the child and the child resided in the household of the petitioner grandparent or grandparents, provided, however, that the court may find that extraordinary circumstances exist should the prolonged separation have lasted for less than [24] months." (Domestic Relations Law § 72[2][b])

The Court rejected the mother's contention that extended disruption of custody means no contact or very limited contact, because otherwise DRL § 72(2) would be rendered meaningless. The Court found that the key to determining whether the parent relinquished control is determining whether the parent makes important decisions affecting the child's life as opposed to merely providing routine care on visits. Here, the mother signed documents giving the grandparents permission to make medical and education decisions for the child, with no restrictions on whether or not the mother was available to make said decisions. The mother therefore allowed the grandparents to assume control over and responsibility for the child while he resided with them for many years, and the mother assumed the role of non-custodial parent. Therefore, the grandparents proved extraordinary circumstances and had standing to request custody. The Family Court determined that it was in the child's best interest to remain with his grandparents. However, since the Appellate Division did not reach that issue, the high court remanded to the appellate division to determine the child's best interests.

Other Cases of Interest

Child Custody

Relocation granted on initial custody determination

Matter of Yu Chao Tan v. Hong Shan Kuang, 136 A.D.3d 933 (2d Dept. 2016)

The parties were married in 2004 and have two unemancipated children. After residing in California from 2006 to 2011, the family relocated to New York and shortly thereafter, the parties separated. Both parties sought custody of their two daughters, and the mother further requested permission to relocate with the parties' children to California. The Family Court granted the mother's cross-petition to the extent of awarding her custody of the parties' children, but denied that portion of the mother's cross-petition seeking to relocate to California with the children.

On appeal, the mother argued that relocating to California would improve her and the children's economic situation and that she was willing to facilitate visitation between the father and the children. The Second Department reversed, noting that the strict application of the factors relevant to a relocation petition was not required in the context of an initial custody determination, and relocation is but one factor to be considered in determining what is in the child's best interests. The court held that a liberal visitation schedule with extended visits in the summer and over school vacations would enable the father to maintain a meaningful relationship with the children. The case was remitted to the Family Court to establish a post-relocation visitation schedule for the father.

No extraordinary circumstances exist warranting custody to the paternal grandmother where the mother was the victim of domestic violence, and left the child in the grandmother's care temporarily

***Elizabeth SS. v. Gracealee SS.*, 135 A.D.3d 995 (3d Dept. 2016)**

The subject child was born in 2007. The child's mother and father were married, but due to allegations of domestic violence, the mother left the marital residence and moved into a shelter in 2010. The mother left the child in the care of the child's paternal grandmother. In June 2010, the paternal grandmother was awarded legal and physical custody of the child with limited parenting time granted to the mother. Since that time, the mother's parenting time gradually increased, and in January 2011, joint legal custody was awarded to the mother, the paternal grandmother, and the father. Thereafter, in 2013, the mother submitted a petition seeking full custody of the child. The Family Court granted the mother physical custody, with joint legal custody to the mother and the father, and limited parenting time to the father and the paternal grandmother.

The paternal grandmother appealed the Family Court's decision, arguing that extraordinary circumstances existed to warrant an award of custody to her. The Third Department affirmed. Absent extraordinary circumstances, such as surrender, abandonment, persistent neglect, unfitness or an extended period of custody disruption, a parent has a claim of custody to his or her child superior to all others. The appellate court held that the mother's initial acquiescence to the grandmother's primary physical custody of the child in 2010 was a "temporary emergency situation," resulting from the fact that the child was not allowed at the domestic violence shelter. Over the course of the three years that followed, the mother strived to create a stable home environment for herself and the child near the home of her parents and attempted to regain custody of the child several times. This, coupled with the grandmother's hostility toward the mother's visitation with the child and unfounded allegations of the mother's unfitness, warranted a change of custody from the grandmother back to the mother.

Mother's repeated false allegations of sexual abuse against the child warranted a modification of custody to the father

***Kortright v. Bhoorasingh*, 137 A.D.3d 1037 (2d Dept. 2016)**

The Family Court awarded custody of the parties' 7-year-old child, born out of wedlock, to the mother and visitation to the father. Thereafter, the father filed a petition seeking to modify the order by granting him sole custody of the parties' child. The Family Court granted the father's petition, and the mother appealed. On appeal, the Second Department affirmed, citing the mother's numerous, baseless allegations of sexual abuse against the father, which resulted in the child undergoing various examinations by medical, law enforcement, Administration for Children's Services, and mental health personnel over several years. The mother's behavior directly interfered with the father's relationship with the parties' child and negatively impacted the child's overall well-being. Therefore, the mother was unfit as a custodial parent and that it was in the child's best interests to modify custody to the father.

Change in custody warranted where the father interfered with the mother's relationship with the child

***Ladd v. Krupp*, 136 A.D.3d 1391 (4th Dept. 2016)**

The mother petitioned the Family Court to modify the prior court order of joint custody of the child to sole legal and physical custody. Finding that a significant change in circumstances occurred since the entry of the custody order, the Family Court granted the mother's petition and awarded her sole custody of the subject child. The father appealed, arguing that the mother supported her petition with events that occurred between the date of the court hearing on the issue of custody, i.e., July 19, 2012, and the entry of the custody order on February 5, 2013, rather than with events that occurred after the entry of that order, and therefore failed to meet the burden of establishing that a significant change in circumstances occurred since the date of entry of the prior custody order.

The Fourth Department affirmed. The father's behavior toward the mother and the acrimony that existed between them made it impossible to continue with a joint custody arrangement. In particular, the court cited to evidence that the father interfered with the mother's relationship with the child by discussing the pending litigation with the child contrary to the court's order not to do so, limiting the mother's access to the child, and repeatedly telling the child that the mother was unintelligent and irresponsible. The court reasoned that the mother's showing of a "continued deterioration in the parties' relationship" was a significant change in circumstances justifying a change in custody.

Grandparent visitation

***Fitzpatrick v. Fitzpatrick*, 137 A.D.3d 784 (2d Dept. 2016)**

The paternal grandparents of the subject child petitioned for visitation with their grandchild, which was granted by the Family Court despite objection by the child's parents. The Second Department affirmed, finding that the grandparents had standing to petition for visitation under the equitable circumstances clause of the grandparent visitation statute, and that visitation was in the best interests of the child. Based on the evidence presented by the grandparents in the form of testimony and photographs, it was evident that the grandparents

enjoyed regular contact with the subject child and his siblings for several years before the parents refused to permit such contact. In determining whether visitation was in the best interests of the child, the Appellate Division explained that "an acrimonious relationship is generally not sufficient cause to deny visitation."

Child Support

Exceptional case of recoupment of child support overpayments

***Weidner v. Weidner*, 136 A.D.3d 1425 (4th Dept. 2016)**

Pursuant to the parties' judgment of divorce, the husband was directed to pay maintenance to the wife in the sum of $3,000 per month for three years, counsel fees to the wife in the sum of $5,000, and the wife was directed to pay child support to the husband in the amount of $142.53 per week. The wife appealed, arguing that the trial court abused its discretion by setting the amount and duration of maintenance, determining her child support obligation to the husband with the amount of maintenance awarded to her included in the income calculation, and awarding her only $5,000 in counsel fees.

The Fourth Department, in affirming and modifying the trial court's order, found that the trial court properly established the amount and duration of maintenance, explaining that the wife was capable of increasing her earnings and becoming self-supporting in the future. Additionally, the court affirmed the trial court's award of counsel fees in the sum of only $5,000, finding that the wife also engaged in dilatory and obstructionist conduct throughout the proceedings.

The court below erred in including the wife's maintenance award in the income calculation. When omitting the maintenance award, the wife's income falls below the poverty line, and therefore the wife's obligation was modified to $25/week. The court also directed that the wife be entitled to recoupment of her child support overpayments despite that there is a strong public policy against doing so. The court found it appropriate under the limited circumstances of this case, including the wife's very low income, the husband's high-income job, and the husband's repayment of child support to the wife would not detract from his ability to adequately provide for the children, while allowing the wife the ability to maintain a suitable home for the children.

Father's child support suspended because of mother's active interference with his visitation

***Argueta v. Baker*, 137 A.D.3d 1020 (2d Dept. 2016)**

The parties have a 12-year-old child born out of wedlock. Pursuant to a child support order stipulated to by the parties, the father was directed to pay $123.63 per week in child support to the mother, with $30 of that payment allocated toward child care expenses, and to maintain the child under his health insurance plan. When the mother relocated to Florida without the father's consent, the father petitioned the court to terminate or suspend his child support obligations. The petition was dismissed, and the father appealed. The Second Department reversed, holding that the father's child support obligations should be suspended because the mother deliberately frustrated and actively interfered with the father's visitation because the mother relocated to Florida with the child, failed to provide the father with the child's Florida address, declined the father's requests to visit the child in Florida, and neglected to notify the father when the child was in New York. Furthermore, the Appellate Division concluded that the father was entitled to an order terminating his obligation to pay child care expenses, because the evidence established that the mother was no longer incurring such expenses. Lastly, the court directed that the mother be responsible for the child's health care insurance because the mother unilaterally moved the child to Florida, the father's health insurance was ineffective in Florida, and the mother requested that the father cancel the insurance.

Equitable Distribution

Short-term marriage, high income case

***Doscher v. Doscher*, 137 A.D.3d 962 (2d Dept. 2016)**

The parties to this divorce action were married five years and have a 3-year-old child. The husband was employed as a bond trader on Wall Street, earning approximately $600,000 per year. The wife had only a high school diploma, and upon agreement of the parties, quit her job at a textile company to stay at home with the parties' child. The trial court awarded the wife non-taxable maintenance of $12,000 per month for five years, child support of $8,500 per month, 50% of the marital assets, counsel and expert fees, and 9% pre-judgment statutory interest on her distributive award. The husband appealed.

The appellate court upheld the maintenance award. However, it reduced the child support order from $8,500 to $5,100, and found that it was error to base the husband's child support obligation on his entire $600,000 of annual income. In high income cases, where the parental income exceeds the $136,000 statutory threshold (the threshold at that time), an award of child support should be based on the child's actual needs, rather than the wealth of either party. There was insufficient evidence in the record to support the wife's accounting of the child's expenses, and therefore the court capped the husband's income at $360,000 before applying the CSSA formula.

It was error to equally divide the marital assets in this short-term five year marriage especially considering the maintenance award and the wife's award of exclusive occupancy of the marital residence; therefore, the Appellate Division modified the trial court's order and

awarded 30% of the marital assets to the wife and 70% of the marital assets to the husband. The appellate court upheld the trial court's award of pre-judgment interest on the award, but found that a certain account should have been tax-impacted at 40%.

Lastly, the Second Department affirmed the trial court's award of counsel and expert fees to the wife, citing the husband's superior financial position and litigious behavior throughout the proceedings.

Counsel Fees

***Brody v. Brody*, 137 A.D.3d 832 (2d Dept. 2016)**

The parties in this action were married, divorced, remarried, and again divorced. Over the course of the most recent divorce action, the wife was awarded over $400,000 in interim counsel fees, which included $270,513 to the husband's counsel, and the remainder to the attorneys for the children as well as the neutral mental health professional. As a final award, the trial court awarded the wife $150,000 in counsel fees, and the wife appealed. The Second Department affirmed, finding that the trial court properly considered the husband's status as the monied-spouse and the wife's conduct in dissipating assets during the pendency of the action.

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