Recent Legislation, Cases and Trends in Matrimonial Law

By Wendy B. Samuelson

Recent Legislation

New income caps for support, effective March 1, 2024

Pursuant to increases in the Consumer Price Index for all urban consumers (CPI-U) as published by the U.S. Department of Labor, mandated as required by Social Services Law 111(i)(b) for the Child Support Standards Act, and by § DRL 236(B)(5-a)(b)(5) for temporary maintenance, and by § DRL 236(B)(6)(b)(4) for post-divorce maintenance, the statutory income caps for child support and maintenance will be adjusted on March 1, 2024. In addition, pursuant to § DRL 240(1-b) (b)(6), the Self-Support Reserve and the Federal Poverty Income Level for a single person will be adjusted as well.

The new caps and poverty levels are as follows:

- Child Support Standards Act – combined parental income cap: $183,000 (formerly $163,000)
- Maintenance Guidelines Act – income cap of payor: $228,000 (formerly $203,000)
- Self-Support Reserve: $20,331 (formerly $18,346.50)
- Federal Poverty Income Level for a single person: $15,060 (formerly $13,590)

New CPLR 2106, effective January 1, 2024: Governor Hochul signs law expanding access to affirmations, narrowing the need for notarization

New CPLR 2106 effective January 1, 2024, allows any person involved in a civil suit to provide a sworn statement by submitting an unnotarized affirmation with the following signature block:

> I affirm on this _____ day of _____ ,_____, under the penalties of perjury under the laws of New York, which may include a fine or imprisonment, that the foregoing is true, and I understand that this document may be filed in an action or proceeding in a court of law.

The new law transforms the Affidavit of Service, which required notarization, into an Affirmation of Service, and allows motion papers to be submitted on client affirmations.

Before the law's passage, the right to make notarization-free affirmations was limited to licensed legal and health professionals, including attorneys, doctors, dentists, and osteopaths, or to those located outside of the U.S. By expanding the affirmation right to all people, regardless of profession or location, the new law makes a commonsensical adjustment to legal practice, and saves the litigant time and money of having to find a notary.

Matrimonial attorneys should be warned that the new law also changes the requirements for attorney affiants, demanding that we use this same updated "perjury" and "fine or imprisonment" language in our affirmations.

The matrimonial attorney should also be aware that despite the amendment of CPLR 2106 to permit civil litigants to file affirmations instead of affidavits, several matrimonial documents must still be notarized, including but not limited to, the pleadings, Net Worth Statement, the removal of barriers to remarriage in order to comply with § DRL 211 (matrimonial pleadings must be verified); CPLR 3020 (verifications must be sworn); the no-fault ground must be sworn (§ DRL 170(7)); and § DRL 253 (Sworn Statement of Removal of Barriers to Remarriage), all of which statutes remain in effect. In addition, divorce-related agreements should still be notarized to be in compliance with § DRL 236(B)(3).

Cases of Interest

Agreements

Parties' unnotarized Mahr agreement declared unenforceable

***Khan v. Hasan*, 219 A.D.3d 1420 (2d Dep't 2023)**

In a Mahr agreement, a Muslim husband-to-be promises a sizable sum to his fiancé as reassurance that she will have resources to draw from if the marriage fails, a provision akin to lump-sum spousal support. The agreement is commonly woven into Muslim marriage certificates and regarded by the New York courts as enforceable as a standard, secular contract.

The parties were married in a civil ceremony in March 2016, and had a religious ceremony six months later. Their Mahr agreement, promising $50,000 to the wife if the marriage ended in divorce, was incorporated into the parties' religious marriage certificate. The certificate was signed by both parties, as well as two witnesses and an imam, but it was not notarized.

In 2021, in the midst of their divorce, the husband filed a motion in Nassau County Supreme Court demanding that the parties' Mahr agreement be set aside for lacking proper acknowledgment. Judge Jeffry Goodstein granted the husband's motion, concluding that the agreement was unenforceable. The wife appealed, but the appellate court affirmed the lower court's ruling.

In its ruling, the Second Department clarified that while the court cannot rule on religious matters (*see Schwartz v. Schwartz*, 153 Misc.2d 789, 583 N.Y.S.2d 716 [Sup. Ct., Kings County]), it can rule on "purely secular" matters made in a religious context, provided that the court's ruling is based on "neutral principles of law." The flaw in the parties' unnotarized agreement presents precisely such a "purely secular" matter, the appellate court ruled.

§ DRL 236(B)(3) provides that an agreement between spouses, made before or during marriage, is enforceable if the agreement is: (1) written; (2) signed by the spouses; and (3) "acknowledged or proven in the manner required to entitle a deed to be recorded." Given that the parties' unnotarized Mahr agreement fails the third requirement, the lower court did not err in declaring it unenforceable.

Contempt

Mother found in contempt for failure to abide by custody order

***John EE. v. Jalyssa GG.*, 222 A.D.3d 1219 (3d Dep't 2023)**

When the parties ended their relationship, they entered into a "so ordered" custody agreement regarding their four-year-old child, including joint custody, equal parenting time, and the father having final decision-making power. But, after their communication devolved into obscenity-fueled spats and their cooperation deteriorated to the point that police were needed to supervise custody exchanges, the father filed for modification of the custody order in Chemung County Family Court, alleging a substantial change in circumstances.

In March 2022, one day before their fact-finding hearing resumed, the mother requested to appear virtually for the upcoming hearing, claiming that she was unable to travel to the courthouse because she couldn't find a babysitter to care for their child. The court denied her request and informed her that if she didn't appear in person, it would draw a negative inference from her absence. Heedless of that blunt warning, the mother declined to appear, and the court, in turn, found the mother in violation of the court's custody order, including repeatedly failing to permit the father to exercise his parenting time, appearing late for the child's pick-ups and drop-offs, taking the child to Florida without the father's knowledge or consent, and enrolling the child in preschool without the father's knowledge or consent.

The court granted the father's motion for modification, giving him sole legal custody and primary physical custody. For willfully violating its custody order, the court found the mother in contempt and sentenced her to six months in jail, suspending the sentence provided that she began properly complying with the court's orders.

The mother appealed. The appellate court affirmed the Family Court's ruling.

A grave deterioration in the parties' ability to communicate constitutes a substantial change in circumstances, and the lower court had a sound and substantial basis for such dete-

rioration, as the mother persistently badmouthed the father to their child, repeatedly contacted Child Protective Services with false allegations of paternal abuse and participated in and/or orchestrated an assault on the father's girlfriend.

> To sustain a finding of civil contempt for violation of a court order, a petitioner must show by clear and convincing evidence that there was a lawful order in effect that clearly expressed an unequivocal mandate, that the person who allegedly violated the order had actual knowledge of its terms, and that his or her actions or failure to act defeated, impaired, impeded or prejudices a right of the moving party. (*See Matter of Beesmer v. Amato*, 162 A.D.3d 1260 [3d Dep't 2018].)

The Third Department found that given that the mother repeatedly impeded the father's custodial rights, in violation of the so-ordered agreement, the Family Court properly determined that the mother was in contempt of court.

Support Modification

Upward modification of child support based on substantial change in circumstances

***Matter of Srivastava v. Dutta*, 220 A.D.3d 949 (2d Dep't 2023)**

In October 2015, as part of the divorce judgment, the court ordered the father to pay $879 per month in child support. Seven years later, the mother petitioned the Family Court for an upward modification of child support, based on a claim of substantial change in circumstances pursuant to FCA 451[3](a) and that more than three years have passed since the order was rendered. The Family Court upwardly modified the father's child support obligation to $1,523/month while directing the father to pay 50% of the child's educational and tutoring expenses.

The father appealed. The appellate court affirmed the Family Court's ruling.

In his appeal, the father argued that the court failed to articulate a proper justification for extending its child support calculation beyond the child support cap. In affirming the lower court's ruling, the Second Department trumpeted several of the reasons presented by the Family Court to justify its beyond-cap modifications, including the child's specific needs, the father's "considerable current income," and the court's determination that the father lacked credibility when testifying about his finances.

It should be noted that the appellate decision failed to state either party's specific income and the children's expenses. It is unfortunate when the appellate court fails to recite the facts of the case, so that the bench and bar can fully understand the determination and to be able to use it as precedent.

Former wife's cohabitation in a jointly owned property with her boyfriend did not terminate maintenance under § DRL 248

***Cherico v. Cherico*, 222 A.D.3d 1156 (3d Dep't 2024)**

The parties' divorce agreement, which was incorporated into the parties' judgment of divorce, provided that the husband was ordered to pay the wife maintenance of $1,050 per month for 60 months, or to be sooner terminated pursuant to § DRL 248, i.e., the payee is habitually living with another person and holding herself out as the spouse of such other person, although not legally married.

Approximately a year later, the former husband moved to vacate the maintenance award pursuant to § DRL 248, claiming that the former wife had been living with her paramour for a year, they purchased a home together, and they asked the children to refer to her beau as their stepfather. In opposition, the former wife denied holding her beau out to be her spouse, stating that she does not refer to him as the children's stepfather, does not refer to him as her husband, and does not use his surname in any capacity. The former wife also explained that her beau maintains a separate property where he continues to receive mail and keeps most of his personal belongings. She was not engaged to be married to her beau, did not wear a wedding ring, had never filed joint income tax returns, maintained separate health insurance and bank accounts.

The Schenectady County Supreme Court denied the former husband's motion without a hearing, finding that the former wife's relationship with the other man was not tantamount to one contemplated by § DRL 248, and the former husband appealed. The appellate court affirmed the lower court's ruling.

New York's courts have set stringent standards for when the maintenance termination provision can be applied under § DRL 248. To trigger it, a former spouse and their new lover must cohabitate, "conform to the lifestyle of a married couple," hold themselves out to the public as spouses, and have engaged in "some assertive conduct" that goes beyond sharing a residence. (*See Northrup v. Northrup*, 43 N.Y.2d 566 [1978]; *Campello v. Alexandre*, 155 A.D.3d 1381 [3d Dep't 2017]; *Matter of Bliss v. Bliss*, 66 N.Y.2d 382 [1985].) Examples provided by the court included, but are not limited to, asking to be listed in a telephone directory as a spouse under the other individual's surname, or changing the payee spouse's name on a joint checking account to use the other individual's surname.

The appellate court reiterated that "evidence of cohabitation and comingling of resources does not establish that the wife is holding the other man out to be her spouse." The new paramour's being listed on the deed to the former wife's house

makes them tenants in common (i.e. two parties with "separate and distinct legal interests" who co-own a property), not tenants by the entirety, a form of ownership established by a husband and wife. (*See* 7 Warren's Heaton on Surrogate's Court Practice Sect. 92.06[3].)

Furthermore, a parent's reading a book on co-parenting is an act of responsible parenting, not a sign of violating a court order, and the children's decision to refer to their mother's new beau as their stepfather should not be held against her.

In this case, it seems that while perhaps the parties were sharing financial resources, there was no evidence that the former wife was referring to her beau as her husband. The court was quick to point out that § DRL 248 is antiquated, and that the parties could have, but did not, define a termination event simply as cohabitation for a period of time in their agreement.

When ex-husband lost his job and requested downward modification, court imputed income to him based on his new wife's contribution to his expenses

Matter of McFarlane v. McFarlane, 220 A.D.3d 1083 (3d Dep't 2023)

In May 2020, a husband who had lost his job and claimed to be short on cash turned to the Ulster County Family Court, seeking to lower his maintenance obligations, setting off several years of legal wrangling with his former wife, resulting in a mixed outcome that laid the path for further litigation.

The parties divorced in 2016. In their so-ordered stipulation, they agreed that the husband would pay $3,750 per month in maintenance over 10 years. In the husband's 2020 petition for modification, he argued that a dramatic reduction in his maintenance obligation was needed, as he was undergoing extreme financial hardship due to a shake-up in his employment, beginning with a COVID-19-related furlough, followed by his employer eliminating his position, then firing him altogether.

In consideration of his firing, the court paused his maintenance obligations for 14 months. In determining his maintenance obligations after that suspension of $1,500/month, the court ruled that it would be "unjust or inappropriate" to use no income for its calculations, given that the husband had significant funds in a Wells Fargo IRA and a pension, and therefore imputed income to him. The court also properly determined to impute to the husband his current wife's payment of his share of the household expenses and her payment of his charges on her American Express credit card since § DRL 240(1–b)(b)(5)(iv)(D) gives the trial court discretion to attribute and/or impute income to a party on the basis of money, goods or services provided by relatives and friends.

The court should not have considered the husband's additional income from the sale of his elliptical and his Honda all-terrain vehicle, as well as his vacation pay, since these are non-recurring one-time expenses.

The husband appealed. The appellate court embraced some of the husband's arguments, rejected others, and remitted the case back to the Family Court for recalculation.

The lower court did not err by considering the husband's IRA and pension in its income calculations. The statutory factors for deviating from a presumptive maintenance award "include marital property assets previously distributed to a party and the future earning capacity of the parties," and, as such, the court was right to consider how the husband "could utilize [his IRA and pension] to bolster payment of his maintenance obligation." (*See King v. King*, 202 A.D.3d 1384 [3d Dep't 2022].)

But the court misconstrued the maintenance regulations when it factored one-time gains to the husband's coffers, like funds from the sale of his elliptical and ATV and his vacation pay, into the calculations of his income. "There was no evidence that these payments will continue into the future and as such they artificially inflate the husband's income."

The appellate court remitted the case back to the Family Court to recalculate maintenance, taking into account the financial strength that the husband's IRA and pension afford him, while removing the one-time sale of his possession and one-time work-related benefits from the calculations of his income.

Paternity

Mother's former partner equitably estopped from pursuing paternity claim

Matter of Eddie G. v. Gisbelle C., 221 A.D.3d 600 (2d Dep't 2023)

After Eddie G.'s tryst with Gisbelle C., she became pregnant. Instead of stepping forward to support her, he moved to the Dominican Republic, right around the time she gave birth to the subject child. In his absence, the mother began a loving, long-term relationship with another man, and married him at the time the child was five years old.

In 2022, eight years after the boy's birth, the biological father petitioned the Westchester County Family Court to establish paternity rights. While acknowledging that the petitioner's paternity could be established with a simple DNA test, the court denied his petition, ruling that he was equitably estopped from seeking legal paternal status.

The biological father appealed. The appellate court affirmed the lower court's ruling.

"The doctrine of equitable estoppel may preclude a man who claims to be a child's biological father from asserting his paternity when he acquiesced in the establishment of a strong

parent-child bond between the child and another man," wrote the Second Department. (*See Matter of Yaseen S. v. Oksana F.*, 214 A.D.3d 883, 186 N.Y.S.3d 271; *Matter of Shondel J. v. Mark D.*, 7 N.Y.3d 320, 853 N.E.2d 610.) The doctrine is "used to prevent a biological father from asserting paternity rights when it would be detrimental to the child's interest to disrupt the child's close relationship with another father figure."

Such is the case here, ruled the appellate court, as the petitioner repeatedly displayed disinterest in the subject child, spending only a few days with the boy when the mother brought him to the Dominican Republic at the age of two months and making only one video call with him when he was age 3. In contrast, evidence was adduced at trial of the close and loving relationship between the boy and his mother's husband, and that the boy believed that he was his biological father.

Applying equitable estoppel to paternity cases "does not involve the equities between the two adults" but rather "turns exclusively on the best interests of the child," the appellate court noted. (*See Matter of Thomas T. v. Luba R.*, 148 A.D.3d 912, 49 N.Y.S.3d 507). In using the child's best interests as the sole determining factor in its ruling, and determining that fostering an ongoing father-son relationship with the mother's partner best served the child's interests, the court acted properly in denying the petitioner's claim for paternity.

Equitable Distribution

Court grants wife 100% of couple's known assets due to husband's egregious conduct in wastefully dissipating marital assets

***Mohamed v. Abuhamra*, 2023 N.Y. Slip Op. 06614 (4th Dep't 2023)**

After a series of devious maneuvers intended to retain his wealth and leave his wife destitute, a scheming husband finally received his comeuppance after the appellate court ruled that his behavior was so egregious that it shocked its conscience and justified the lower court's decision to tilt equitable distribution in the wife's favor.

When the Erie County Supreme Court issued its judgment of divorce, it awarded a significant amount of nondurational maintenance and child support to the wife, based on millions in income imputed to the husband. The husband had claimed he was only earning around $12,500 a year. In reality, he had several multi-million-dollar businesses which he had attempted to hide from both his wife and the court by emptying several safety deposit boxes, transferring bank accounts, and transferring control of his lucrative companies to his brother and friend. The court based his income on old tax returns, because it was the only evidence available of his true income.

To equitably distribute the parties' assets, in spite of the husband's aggressive efforts to cloak his assets, the court granted the wife 100% of an escrow account controlled by the parties, as it was their only known asset. (Unfortunately, the appellate decision does not state exactly the amount of the funds that the wife received.)

The husband appealed on multiple grounds, objecting to the imputation of income and the granting of all of the escrow account's assets to his wife as equitable distribution. The Fourth Department affirmed the lower court's ruling.

The lower court determined that the husband's actions "shocked the conscience" and that his multiple maneuvers to hide his assets were "so egregious or uncivilized as to bespeak of a blatant disregard of the marital relationship." (*See Socci v. Socci*, 186 A.D.3d 1289 [2d Dep't 2020].) When a party shows such disregard for the marriage and the law, and engages in financial gamesmanship that makes a truly accurate accounting of the assets impossible, the court is not erring to impute income and tilt the distribution of assets to the harmed party, the appellate court ruled. (*See Braun v. Braun*, 11 A.D.3d 423 [2d Dep't 2004].)

The appellate court ruled in the husband's favor on one slim component of his appeal, as the lower court had ordered him to pay his wife's legal fees. The appellate court reversed and vacated the judgment for legal fees, since the wife had been represented by Legal Aid of Buffalo and had only paid a pittance for representation. Recovery for legal fees "is limited to amounts actually paid or owing to an attorney," and given that the wife had not paid more than a $45 retainer fee and didn't owe anything further, the lower court erred in granting her additional funds.

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