JUDGE SHOULD NOT HAVE, SUA SPONTE, TERMINATED THE GUARDIANSHIP OF AN INCAPACITATED PERSON WITHOUT HOLDING A HEARING (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the judge should not have, sua sponte, terminated the guardianship of an incapacitated person (IP) without holding a hearing:

> In April 2016, Fanny K. commenced this proceeding pursuant to Mental Hygiene Law article 81 seeking to be appointed as the guardian to manage Angeliki K.'s property located in Greece. After a hearing, the Supreme Court determined that Angeliki K. (hereinafter the IP) was incapacitated within the meaning of Mental Hygiene Law article 81 and appointed Fanny K. (hereinafter the guardian) as the guardian of her property. In September 2018, due to the IP's health problems and resultant inability to communicate in English, the IP was admitted to an assisted living and rehabilitation facility in Athens, Greece. In November 2018, the guardian moved for leave to change the IP's place of abode from New York to the assisted living and rehabilitation facility, with the IP continuing to maintain her permanent residence in New York. The court, without a hearing, denied the motion and, sua sponte, terminated the guardianship due to a lack of a continuing nexus between the guardianship and New York.
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> The Supreme Court should not have, sua sponte, terminated the guardianship, without a hearing, as a guardianship may be terminated "only on application of a guardian, the incapacitated person, or any other person entitled to commence a proceeding under Mental Hygiene Law article 81 with a hearing on notice" (... see Mental Hygiene Law §§ 81.36[b], [c] ...). Matter of Angeliki K. (Fanny K.), 2020 NY Slip Op 02786, Second Dept 5-13-20

FAMILY COURT SHOULD NOT HAVE, SUA SPONTE, TERMINATED MOTHER'S PARENTAL RIGHTS ON MENTAL-ILLNESS GROUNDS IN THE ABSENCE OF THE STATUTORILY-REQUIRED PSYCHOLOGICAL EVALUATION (THIRD DEPT).

The Third Department, reversing Family Court, determined Family Court should not have terminated mother's parental right on mental-illness grounds without the results of the statutorily-required examination. The psychologist appointed to evaluate mother (Horenstein) did not do so and rendered his opinion based upon a review of records of her hospitalization:

> Pursuant to Social Services Law § 384-b (6) (e), the court is required to order the parent, alleged to be mentally ill, to be examined by a qualified psychiatrist or psychologist and shall take testimony from the appointed expert ... . Significantly, paragraph (c) of subdivision 6 prohibits a determination as to the legal sufficiency of the proof until such testimony is taken ... . An exception exists "[i]f the parent refuses to submit to such court-ordered examination, or if the parent renders himself [or herself] unavailable . . . by departing from the state or by concealing himself [or herself] therein" ... . In such instance, "the appointed psychologist or psychiatrist, upon the basis of other available information, . . . may testify without an examination of such parent, provided that such other information affords a reasonable basis for his [or her] opinion" ... . * * *
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> ... [W]e conclude that Family Court erred in proceeding with the termination of respondent's parental rights without the statutorily-required examination. Horenstein pointed out that there was no basis to find that respondent refused to be evaluated. Nor did respondent make herself unavailable "by departing from the state or by concealing [herself] therein" ... . To the contrary, her placement in CDPC was involuntary and, despite her release by December 1, 2017, no further attempt was made to schedule an evaluation. Because the statutory exception does not apply, Family Court lacked authority to determine the legal sufficiency of the proof without a contemporaneous evaluation ... . Even though respondent raised no objection at the hearing, this statutory mandate requires that we remit the matter to Family Court for a new hearing and determination ... . Matter of Rahsaan I. (Simone J.), 2020 NY Slip Op 01212, Third Dept 2-20-20

ALTHOUGH CONSENT ORDERS ARE GENERALLY NOT APPEALABLE, HERE THERE WAS A QUESTION WHETHER MOTHER WAS ABLE TO CONSENT IN THIS CUSTODY PROCEEDING; THE ATTORNEY FOR THE CHILD CANNOT VETO THE CONSENT OF THE PARTIES (THIRD DEPT).

The Third Department, reversing Family Court, determined the consent custody order, involving mother, aunt and great-aunt, may have been invalid because mother may have been unable to consent due to some unspecified disability, The Third Department noted that consent orders are generally not appealable, but here there was a question about the validity of the consent. The Third Department also noted that

the attorney for the child (AFC), who disagreed with the consent order, does not have the power to veto a the consent of the parties:

> We must first note that, as a general rule, no appeal lies from an order entered on consent … . Further, although Family Court cannot relegate the AFC to a meaningless role, the AFC cannot veto a proposed settlement reached by the parties, particularly after the AFC, as here, was given a full and fair opportunity to list objections to the proposed arrangement on the record … .
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> Here, however, we find substantial cause to question the validity of the mother's consent to Family Court's order. In the course of the appearances, the parties all appeared to acknowledge that the mother lacks the ability to care for the child on her own due to some disability, although the mother's attorney objected to such a characterization in the absence of a legal determination. The AFC expressed concern about the effect of this disability on the mother's "ability to . . . consent to anything." Further, Family Court stated that "[the mother is] not in a position to make decisions." In our view, this statement directly and expressly calls into question the mother's ability to consent to the modification order … . In this context, the troubling allegations of inappropriate sexual contact raised by the AFC are particularly serious and significant. Our limited record thus does not demonstrate that the mother's consent to the order was valid and, if not, that the court had "sufficient information to undertake a comprehensive independent review of the child's best interests" … . Accordingly, in these highly unusual circumstances, we remit for a hearing and further development of the record on the issue of the mother's ability to consent, and, if necessary, as to whether the custody proposal meets the requisite standard of promoting the best interests of the child. Matter of Erica X. v Lisa X., 2020 NY Slip Op 01224, Third Dept 2-20-20

EVIDENCE OF VOYEURISTIC DISORDER SHOULD NOT HAVE BEEN CONSIDERED IN THIS SEX OFFENDER CIVIL COMMITMENT PROCEEDING; THE HARE PSYCHOPATHY CHECKLIST-REVISED (PCL-R) WAS PROPERLY RELIED UPON (SECOND DEPT).

The Second Department, affirming the finding that appellant sex offender required civil management, found that the expert's (Charder's) testimony about appellant's voyeuristic-disorder diagnosis should not have been credited. The Second Department further held the Frye hearing demonstrated that the Hare Psychopathy Checklist-Revised (PCL-R) is widely accepted and used in the psychological and psychiatric communities:

> … [W]e agree with the appellant that Charder's testimony regarding her diagnosis of a voyeuristic disorder should not have been credited. Charder admitted that her diagnosis of a voyeuristic disorder was inconsistent with the diagnostic criteria contained in section 302.82 of the Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition. Although her decision to apply an alternative definition of voyeuristic disorder does not necessarily render this diagnosis insufficient to establish a mental abnormality … , Charder failed to clearly set forth the diagnostic criteria that she utilized in diagnosing the appellant under this alternative definition of voyeuristic disorder … , and she otherwise failed to explain the basis of her opinion that certain conduct attributed to the appellant was "voyeuristic," thus rendering such testimony conclusory … . * * *
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> … [T]he evidence adduced at the Frye hearing demonstrated that the PCL-R has enjoyed long and widespread use within the psychological and psychiatric communities as a tool to measure psychopathy. Even the expert witness called by the appellant to testify at the Frye hearing acknowledged that the PCL-R is generally accepted for this purpose. Although there was evidence adduced at the hearing indicating that the PCL-R has been criticized for a lack of "inter-rater reliability" and having an "allegiance effect," the evidence adduced at the hearing showed that such problems could be effectively mitigated through proper training. Similarly, although there was evidence indicating that the PCL-R was not designed to function as a direct and stand-alone test of whether an individual has a mental abnormality within the meaning of the statute, expert testimony established that it could nevertheless "contribute to an assessment of the presence of mental abnormality." Matter of State of New York v Marcello A., 2020 NY Slip Op 01067, Second Dept 2-13-20

DEFENDANT NEED NOT BE INFORMED AT THE TIME OF THE PLEA TO A SEX OFFENSE THAT HE OR SHE MAY BE SUBJECT TO A MENTAL HYGIENE LAW ARTICLE 10 CIVIL ACTION AS THE RELEASE DATE APPROACHES (THIRD DEPT).

The Third Department determined defendant, a sex offender who was found to suffer from a mental abnormality after Mental Hygiene Law Article 10 trial, was not entitled specific performance of his plea agreement, which made no mention of the of potential Mental Hygiene Law proceedings:

> Respondent next challenges Supreme Court's denial of his pretrial motion to dismiss the petition inasmuch as his 1997 plea

agreement is a legal and binding contract — one that entitled him to specific performance. Proceedings pursuant to the Sex Offender Management and Treatment Act "are expansive civil proceedings, which are entirely separate from and independent of the original criminal action" … . Moreover, "[i]t is well settled that trial courts are required to advise defendants who plead guilty regarding the direct consequences of such plea, but they have no obligation to iterate every collateral consequence of the conviction" … . As relevant here, "the potential for either civil confinement or supervision pursuant to [the Sex Offender Management and Treatment Act] is a collateral consequence of a guilty plea and, therefore, the current state of the law does not require that defendants be informed of it prior to entering a plea of guilty" … . As such, we discern no error in Supreme Court's denial of respondent's request for specific performance. Nor are we persuaded by respondent's assertion that specific performance is appropriate because the Mental Hygiene Law article 10 litigation ensued following the expiration of his sentence, as the article 10 proceeding commenced upon the date that the petition was filed, prior to respondent's release date … . Matter of State of New York v Robert G., 2020 NY Slip Op 00009, Third Dept 1-2-20

NO APPEAL LIES FROM THE DENIAL OF A MOTION TO WITHDRAW A PLEA OF NOT RESPONSIBLE BY REASON OF MENTAL DISEASE OR DEFECT (SECOND DEPT).

The Second Department determined that no appeal lies from the denial of a motion to withdraw a plea of not responsible by reason of mental disease or defect:

> … [A] motion pursuant to CPL 220.60 seeking to withdraw a plea to an indictment is part of a criminal action or, at the least, "related to a . . . completed criminal action," so as to come within the statutory definition of a "[c]riminal proceeding" (CPL 1.20[18]; …). Moreover, in light of the nature of the relief sought in the motion, the motion is, by its nature, criminal, rather than civil … . Accordingly, proper statutory authority under the Criminal Procedure Law must exist in order for the defendant to appeal from the denial of the motion … .
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> Such statutory authority does not exist. CPL 450.10 only provides that a defendant may appeal as of right from a judgment, sentence, or order made pursuant to specified provisions of CPL article 440, and thus, does not provide for appellate review, as of right, from an order denying a motion pursuant to CPL 220.60, to withdraw a plea of not responsible by reason of mental disease or defect. Nor does CPL 450.15 allow for such an appeal by permission, as that statute only permits an appeal from orders made pursuant to specified provisions of CPL article 440, and "[a] sentence . . . not otherwise appealable as of right" (CPL 450.15[3]). Finally, there is no avenue for appeal through CPL 330.20, which permits a party "to proceedings conducted in accordance with the provisions of this section" to appeal, by permission, from certain orders rendered under CPL 330.20 (CPL 330.20[21]). The orders specified do not include an order denying a motion pursuant to CPL 220.60 to withdraw the plea … . People v Delano F., 2019 NY Slip Op 07089, Second Dept 10-2-19

DAUGHTER'S PETITION TO BE APPOINTED GUARDIAN FOR HER MOTHER, WHO HAS DEMENTIA AND ALZHEIMER'S, SHOULD NOT HAVE BEEN DENIED WITHOUT A HEARING (THIRD DEPT).

The Third Department, reversing Supreme Court, determined the petition by one of respondent's daughters, seeking to be appointed guardian, should not have been denied without a hearing. Respondent is 89 and has been diagnosed with dementia and Alzheimer's disease and lives with her other daughter, Elizabeth ZZ. Petitioner alleged that Elizabeth had been prohibiting communication and visitation with her mother:

> Given the record before us, we find that the allegations set forth in the subject petition, as supplemented by the supporting affidavits affixed to the parties' motion papers and the court evaluator's report and subsequent status updates, create a genuine question of fact as to respondent's alleged incapacity, her ability to understand and appreciate the nature and consequences of her condition and functional limitations and whether the arrangements that have been put in place for her personal and property needs were the product of Elizabeth ZZ.'s undue influence such that petitioner adequately established her entitlement to a hearing (see Mental Hygiene Law §§ 81.02 [a] [2]; 81.11 [a], [b] …). Matter of Elizabeth TT. (Suzanne YY.–Elizabeth ZZ.), 2019 NY Slip Op 06667, Third Dept 9-19-19

NO PRIVATE RIGHT OF ACTION FOR A DEVELOPMENTALLY DISABLED CHILD HOUSED FOR MORE THAN FIVE WEEKS IN A HOSPITAL EMERGENCY ROOM BECAUSE NO APPROPRIATE RESIDENTIAL FACILITY WAS AVAILABLE (THIRD DEPT).

The Third Department, in a full-fledged opinion by Justice Garry, considering the appeal under an exception to the mootness doctrine, determined a 16-year-old developmentally disabled child (Olivia) did not have a private right of action against Champlain Valley Physicians Hospital (CVPH), the Office for People with Developmental Disabilities (OPWDD) or the Department of Health (DOH) for housing her in the CVPH emergency room when no appropriate residential facility was available. The opinion is too comprehensive and covers too many substantive issues to be fairly summarized here:

> In 2018, Olivia CC. (hereinafter the child), a minor with complex developmental disabilities, was stranded in the emergency room of respondent Champlain Valley Physicians Hospital (hereinafter CVPH) for more than five weeks while she waited for a residential school placement. The child was not in need of medical or psychiatric care. However, neither her family nor the Office for People with Developmental Disabilities (hereinafter OPWDD) — the agency legislatively charged with protecting the welfare of persons with developmental disabilities — could provide her with safe interim housing. CVPH thus retained the child in the emergency room, where she could not attend school, participate in community activities or go outdoors, and CVPH was forced to use scarce medical resources to provide for her nonmedical needs. Unfortunately, the child is not the first minor with special needs to be marooned for weeks or months in an emergency room, as hospitals find themselves serving as the last resort for providing shelter to children in crisis … . The difficult legal issues presented here call into question the extent of the responsibilities of the legislative and administrative functions of government to some of our society's most vulnerable members, and the limitations on the power of courts to protect them. * * *
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> Our conclusion that the amended petition/complaint provides this Court with no grounds to intervene in respondents' operations should not be misunderstood as condonation of the child's prolonged and unnecessary hospitalization or of respondents' failure to provide her with appropriate assistance. Nevertheless, this record does not permit a determination of the propriety of constitutional or equitable relief, and relief grounded in the statutory provisions relied upon here must come from the Legislature or from respondents' policy choices. Thus, we will not disturb Supreme Court's judgment. Matter of Mental Hygiene Legal Serv. v Delaney, 2019 NY Slip Op 06119, Third Dept 8-8-19

STATE DID NOT DEMONSTRATE APPELLANT SEX OFFENDER WAS UNABLE TO CONTROL HIS BEHAVIOR, AS OPPOSED TO HAVING DIFFICULTY CONTROLLING HIS BEHAVIOR; THEREFORE RELEASE WITH STRICT SUPERVISION, AS OPPOSED TO CIVIL COMMITMENT, WAS ORDERED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the expert testimony offered by the State did not demonstrate the appellant sex offender was unable to control his behavior, requiring civil commitment, as opposed to having difficulty controlling his behavior, requiring strict supervision. Therefore appellant should be released under a regimen of strict and intensive supervision and treatment:

> … [T]he State failed to present clear and convincing evidence that the appellant has an "inability to control sexual misconduct" … . In this regard, the State relied on, inter alia, the testimony of Dr. Stuart Kirschner, a psychologist, at the mental abnormality trial; a "dispositional addendum" report that Kirschner submitted; and a report from a psychologist for the New York State Office of Mental Health, Dr. Trevor Floyd. While Kirschner testified that the appellant had difficulty controlling his actions due to certain impulse control problems, Kirschner also testified that it was "very difficult" to ascertain whether an individual committed a crime because he or she was unable to control his or her conduct or because he or she chose not to control it, and that the distinction between the two was largely "irrelevant." This testimony, considered in conjunction with the other evidence presented by the State, was not sufficient to support a finding, by clear and convincing evidence, that the appellant had an "inabilityto control sexual misconduct" … . Furthermore, Floyd's report, which was based on his own interview with and psychological testing of the appellant, opined that there was insufficient evidence to conclude that the appellant had an inability to control his behavior such that he was a danger to others. The appellant's expert reached a similar conclusion, opining that the appellant was a "good candidate for release under conditions of strict and intensive supervision and treatment." Matter of State of New York v Ted B., 2019 NY Slip Op 05550, Second Dept 7-10-19

EVIDENCE THAT DEFENDANT SEX OFFENDER SUFFERS FROM UNSPECIFIED PARAPHILIC DISORDER (USPD) MAY BE ADMISSIBLE IN AN ARTICLE 10 TRIAL, THE EVIDENCE WAS EXCLUDED BELOW, VERDICT VACATED AND PETITION REINSTATED (FIRST DEPT).

The First Department, reversing Supreme Court, determined that evidence of unspecified paraphilic disorder (USPD) can be admitted in a sex offender civil management trial. The evidence was excluded at the Mental Hygiene Law article 10 trial. The verdict that defendant does not suffer from a mental abnormality was vacated and the petition was reinstated:

> In Matter of State of New York v Hilton C. (158 AD3d 707 [2d Dept 2018] ...), the 2nd Department held that the evidence in the record before it, which is similar to the evidence in the record presently before us, failed to establish that "the diagnosis of unspecified paraphilic disorder [USPD] has achieved general acceptance in the psychiatric and psychological communities so as to make expert testimony on that diagnosis admissible" ... . In the absence of any other New York State appellate authority, Supreme Court ... that USPD was precluded as a diagnosis in article 10 proceedings.
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> However, we find, contrary to the 2nd Department, and consistent with the decision in Matter of Luis S. v State of New York (166 AD3d 1550 [4th Dept 2018]) that the type of evidence presented at the Frye hearing ... in this case — such as the evidence concerning the inclusion of USPD as a diagnosis in the Diagnostic and Statistical Manual of Mental Disorders (DSM-5), which signals its general acceptance by the psychiatric community — is sufficient to satisfy the State's burden of showing that the USPD diagnosis meets the Frye standard.
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> Accordingly, the verdict that respondent does not suffer from a mental abnormality, rendered after the article 10 trial, from which USPD evidence was excluded, must be vacated, the petition reinstated, and the matter remanded for further proceedings, including a determination whether the evidence meets the threshold standard of reliability and admissibility ... . Matter of State of New York v Jerome A., 2019 NY Slip Op 03531, First Dept 5-7-19