NEW YORK APPELLATE DIGEST,LLC

Family Law 2019

An Organized Compilation of Summaries of Selected Decisions and Opinions Addressing Family-Law Issues Released by Our New York State Appellate Courts in 2019 and Posted Weekly on the New York Appellate Digest Website. The Entries in the Table of Contents Link to the Summaries and the Case Citations Link to the Decisions on the Official New York Courts Website. Click on "Table of Contents" in the Header of Each Page to Return There.

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The record demonstrates that the mother presented a valid and specific reason for her inability to attend the hearing well before the hearing date and supported her request for an adjournment, which was her first, with a letter from her inpatient provider. Further, although the mother's counsel appeared on her behalf at the hearing, the record supports the mother's contention that she was prejudiced by her inability to provide testimony at the hearing. The court denied the adjournment based on its general desire to effect a quick and efficient resolution of this matter. There was, however, no evidence that the child would have been harmed by an adjournment. Matter of Sullivan v Sullivan, 2019 NY Slip Op 05289, Fourth Dept 6-28-19

ADJOURNMENTS.

FATHER WAS 40 MINUTES LATE FOR A HEARING, FATHER'S PETITION SHOULD NOT HAVE BEEN DISMISSED (SECOND DEPT).

The Second Department, reversing Family Court, determined father's petition should not have been dismissed because he was 40 minutes late for a hearing:

… [T]he father explained that he had miscalendared the time of the hearing. Although we are sensitive to the Family Court's interest in adhering to its time-specific calendaring process, we find that, in light of the relatively short delay, the proceedings that had already taken place on the petition, the absence of prejudice to the mother, and the public policy in favor of resolving cases on the merits, the court improvidently exercised its discretion in denying the father's objections … . Moreover, the father showed that he had a potentially meritorious petition … . Matter of Pecoraro v Ferraro, 2019 NY Slip Op 00129, Second Dept 1-9-19

ADOPTION.

CHILD CONCEIVED WITH AN EGG FROM AN ANONYMOUS DONOR AND CARRIED BY A GESTATIONAL SURROGATE PURSUANT TO AN UNPAID SURROGACY CONTRACT MAY BE ADOPTED BY THE BIOLOGICAL FATHER (SECOND DEPT).

The Second Department, reversing Family Court, determined the biological father of a child conceived with an egg from an anonymous donor and carried by a gestational surrogate can adopt the child. Family Court had held that the unpaid surrogacy contract was against public policy and should not be legitimized by adoption. Family Court also held that a biological father cannot adopt his own child. The Second Department rejected both arguments in an extensive opinion which cannot fairly be summarized here:

While commercial surrogacy contracts subject participants, and those who assist in the formation of such contracts, to civil penalties or felony conviction (see Domestic Relations Law § 123; Social Services Law §§ 374[6]; 389), the only sanction against unpaid surrogacy contracts is to treat them as void and unenforceable (see Domestic Relations Law § 122 …). …

… [T]he fact that a child was born as the result of an unenforceable surrogacy agreement does not foreclose an adoption of the resulting child, upon the surrogate's consent … . …

There is nothing in the text of the Domestic Relations Law which precludes a parent from adopting his or her own biological child. While adoption, as we recognized above, is a statutory creation, the adoption sought here is authorized by the governing statute and there is nothing in the statute which precludes it. Further, to the extent that the Legislature has contemplated this subject, it has permitted adoptions notwithstanding an existing biological connection.

Domestic Relations Law § 110 expressly provides that "[a]n adult or minor married couple together may adopt a child of either of them born in or out of wedlock." Matter of John (Joseph G.), 2019 NY Slip Op 05132, Second Dept 6-26-17

ADOPTION, REUNIFICATION, PARENTAL RIGHTS, TERMINATION OF.

BY STATUTE FAMILY COURT MAY NOT SET A GOAL OF ADOPTION BY SOCIAL SERVICES WITHOUT ORDERING THE FILING OF A PETITION TO TERMINATE PARENTAL RIGHTS; HERE FAMILY COURT ATTEMPTED TO SET THE INCOMPATIBLE GOALS OF ADOPTION AND REUNIFICATION WITH THE PARENT; THE INTENT OF FAMILY COURT IS CLEAR (HOPED-FOR REUNIFICATION) BUT THERE IS NO STATUTORY AUTHORITY FOR THE METHOD CHOSEN BY THE COURT (THIRD DEPT).

The Third Department, reversing Family Court, determined that the goals set by Family Court, moving toward adoption of the child while setting another hearing to see if reunification of the child with mother is possible, were incompatible under the statutes. The intent of Family Court was clear, but the method was not allowed by statute. The matter was sent back for further proceedings:

… [W]e find that Family Court erred in modifying the permanency goal to placement for adoption without directing petitioner to commence a proceeding to terminate respondent's parental rights. Family Ct Act § 1089 (d) (2) (i) provides that a court may impose one of five specified permanency goals, including "placement for adoption with the local social services official filing a petition for termination of parental rights" … . Nothing in the statutory language permits a permanency goal of placement for adoption to be imposed in the absence of a concurrent petition to terminate the respondent's parental rights. Further, the statute does not permit "the court [to] select and impose on the parties two or more goals simultaneously" … .

Here, in addition to stating that the permanency goal was being changed to placement for adoption and that no immediate termination proceeding would be commenced, Family Court also stated that another permanency hearing would be scheduled in six months and that it was the court's "expectation and hope" that the goal could be changed back to reunification at that time. The express language of the permanency order imposes only one goal. However, the effect of the failure to commence termination proceedings and the court's directions to petitioner regarding services and diligent efforts was to impose two concurrent, contradictory goals of placement for adoption and reunification. Matter of Joseph PP. (Kimberly QQ.), 2019 NY Slip Op 09347, Third Dept 12-26-19

ANNUITIES, DIVORCE.

WIFE'S STATUS AS A BENEFICIARY OF AN ANNUITY PAID TO THE HUSBAND WAS REVOKED BY OPERATION OF THE ESTATES, POWERS AND TRUST LAW (EPTL) UPON DIVORCE (THIRD DEPT).

The Third Department determined an annuity paid to the husband in settlement of a medical malpractice action was not payable to the former wife (Malizia), as a beneficiary of the annuity, because her status as a beneficiary was revoked upon divorce, pursuant to the Estates, Powers and Trust Law (EPTL):

EPTL 5-1.4 (a) provides that, "[e]xcept as provided by the express terms of a governing instrument, a divorce . . . revokes any revocable (1) disposition or appointment of property made by a divorced individual to, or for the benefit of, the former spouse." Malizia's argument that EPTL 5-1.4 does not apply to the annuity is unavailing. Although an annuity is not specifically identified as a governing instrument by EPTL 5-1.4 (f) (5), the statute expressly indicates that the list is illustrative and not exhaustive. An annuity is a testamentary substitute that operates similarly to the examples of governing instruments that are specifically named in the statute by providing for the disposition of property at death … . In that regard, the annuity specifically provided for payment of the monthly installments to decedent during his lifetime, and the beneficiary designation constituted a disposition of a property interest to the named beneficiary at decedent's death, i.e., the right to receive any guaranteed payments required to be made after his death. The statute was enacted to prevent the inadvertent disposition of such property to a former spouse following termination of a marriage by creating a conclusive and irrebuttable presumption that any revocable disposition of property to a former spouse is automatically revoked upon divorce … . United States Life Ins. Co. In The City of New York v Shields, 2019 NY Slip Op 02593, Third Dept 4-4-19

APPEALS, ATTORNEYS, NEGLECT.

ASSIGNED COUNSEL'S FAILURE TO FILE A NOTICE OF APPEAL IN A NEGLECT PROCEEDING CONSTITUTED INEFFECTIVE ASSISTANCE OF COUNSEL, FAMILY COURT TO ISSUE REPLACEMENT ORDER FROM WHICH AN APPEAL MAY BE TAKEN (SECOND DEPT).

The Second Department determined that assigned counsel's failure to file a notice of appeal in a neglect proceeding constituted ineffective assistance:

"A respondent in a proceeding pursuant to Social Services Law § 384-b has the right to the assistance of counsel (see Family Ct Act § 262[a][iv]), which encompasses the right to the effective assistance of counsel" … . "[T]he statutory right to counsel under Family Court Act § 262 affords protections equivalent to the constitutional standard of effective assistance of counsel afforded to defendants in criminal proceedings" … . Further, "certain Family Court proceedings, although civil in nature, implicate constitutional due process considerations because they involve issues relating to the custody and welfare of children" … .

Here, the father demonstrated that his assigned counsel's failure to timely file a notice of appeal from the order of fact-finding and disposition constituted ineffective assistance of counsel. Under the circumstances of this case, reversal of the order appealed from is warranted, and we grant the father's motion to vacate the order of fact-finding and disposition and remit the matter to the Family Court … . Upon remittitur, the court should issue a replacement order of fact-finding and disposition so that the father's time to appeal will run anew. Matter of Ricardo T. (Ricardo T.), 2019 NY Slip Op 03347, Second Dept 5-1-19

ARREARS, ATTORNEY'S FEES, DIVORCE.

JUDGE DID NOT HAVE THE DISCRETION TO DENY PLAINTIFF'S MOTION FOR ARREARS AND COUNSEL FEES MADE AFTER THE JUDGMENT OF DIVORCE; ANY DISPUTE ABOUT THE AMOUNT MUST BE RESOLVED BY A HEARING (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiff's motion for leave to enter a money judgment for arrears and counsel fees should not have been denied. The motion for arrears was properly made after the judgment of divorce and any question of the amount owed should have been resolved by a hearing:

A party to a matrimonial action may make an application for a judgment directing the payment of arrears at any time prior to or subsequent to the entry of a judgment of divorce (see Domestic Relations Law § 244 …). Here, the court did not have the discretion to deny the plaintiff's application for leave to enter a money judgment since she established that arrears were due and unpaid … . Where, as here, there are triable issues of fact as to the amount of arrears, an evidentiary hearing should be held … . Furthermore, upon determining the amount of arrears owed, the court should have considered the plaintiff's request for prejudgment interest … and an award of counsel fees … . Uttamchandani v Uttamchandani, 2019 NY Slip Op 06645, Second Dept 9-18-19

ARREST WARRANTS RE CHILDREN WHO ABSCOND FROM PLACEMENT.

ALTHOUGH THERE IS CLEARLY A NEED FOR A STATUTORY MECHANISM TO KEEP CHILDREN WHO ABSCOND FROM PLACEMENT SETTINGS OFF THE STREETS AND SAFE FROM HARM, FAMILY COURT ACT 153 DOES NOT AUTHORIZE AN ARREST WARRANT FOR THIS PURPOSE (FIRST DEPT)

The First Department, in a full-fledged opinion by Justice Tom, determined that Family Court Act 153 does not authorize an arrest warrant for children who abscond from home or placement settings, notwithstanding that the arrest warrant is issued to keep the child safe and off the streets, and to ensure the child does not engage in self-destructive behavior. The First Department acknowledged that the Administration for Child Services (ACS) needs a mechanism for this purpose, but decided no such statutory mechanism exists at the moment:

These cases, consolidated for appeal, present the recurring issue whether Family Court Act § 153, relied on by Family Court, authorizes the issuance of a warrant for the protective arrest of a child who is neither a respondent nor a witness in a Family Court proceeding for purposes of ensuring the child's health and safety rather than to compel his or her attendance in court. Notwithstanding that such protective arrests may have become a practice of Family Court under very compelling circumstances, in the absence of more explicit statutory authority we cannot endorse the legality of the practice. In reaching our conclusion, though, we do not suggest any criticism of the respective Family Courts in this case nor do we impute improper motives to the Administration for Children's Services, various parties or even law enforcement, who, to all appearances, were operating on the best of motives. However, the issuance of an arrest warrant must proceed from explicit statutory authority. Such is lacking in this case, as is, notably, any authoritative decisional law.

The record clearly shows that the two children in these cases are at high risk of bringing harm to themselves or putting themselves in positions where others may harm them if they are left to their own choice of absconding from foster care facilities to enter life on the streets. … Both have significant vulnerabilities masked by aggressive and confrontational behavior. Both have displayed histories of absconding from home and placement settings, presenting the substantial risk that they would end up on the streets. … Both children are marked by multiple mental illness diagnoses and neurological impairments requiring medication which they often will not take and apparently did not take when they absconded, leading to the inevitable downward spiral during which each engaged in risky behavior. … The record also clearly demonstrates the likelihood that they will run away again if not in a controlled setting of some nature, thereby repeating the cycle of being at risk on the streets. Matter of Zavion O. (Donna O.), 2019 NY Slip Op 03554, First Dept 5-7-10

ATTORNEY'S FEES, ATTORNEY FOR THE CHILD.

ATTORNEY FOR THE CHILD PROPERLY AWARDED ATTORNEY'S FEES OF OVER $34,000 IN CONNECTION WITH THE APPEALS IN THIS DIVORCE CASE; HOWEVER A HEARING IS NECESSARY TO APPORTION THE FEES BETWEEN THE PARENTS (SECOND DEPT).

The Second Department determined the attorney for the child in this divorce proceeding properly made a motion seeking attorney's fees for the appeal of the matter to the Second Department and the Court of Appeals and was properly awarded attorney's fees of over $34,000. However, the Second Department held that a hearing was necessary to determine how the fee should be apportioned between the parents:

In this action for a divorce and ancillary relief, the Supreme Court awarded sole legal and physical custody of the parties' minor children to the defendant, without a hearing, under the adequate relevant information standard. This Court affirmed the order … , and the plaintiff appealed to the Court of Appeals. The attorney for the children (hereinafter the AFC) opposed the plaintiff's appeal, but proposed a new standard for the need for evidentiary hearings in custody cases. The Court of Appeals reversed this Court's order, rejecting the adequate relevant information standard, and determined that an evidentiary hearing was required in this particular case … . …

Contrary to the plaintiff's contention, the difference in opinion between this Court (see Matter of Plovnick v Klinger, 10 AD3d 84) and the Appellate Division, Third Judicial Department (see Redder v Redder, 17 AD3d 10), as to whether attorneys for children may be compensated directly by the children's parents, rather than by the State, does not give rise to a constitutional claim under the equal protection clauses of the state and federal constitutions. …

… [T]he plaintiff's motion to modify the parties' apportionment of responsibility for the AFC's fees should not have been decided without an evidentiary hearing. We take no position on whether the equal split between the parties was appropriate, but because the affidavits submitted by the parties provided sharply conflicting reports on the parties' finances … and there was "no evidence in the record that the financial circumstances of the parties [had] ever been considered" … . Lee v Rogers, 2019 NY Slip Op 08559, Second Dept 11-27-19

ATTORNEYS, RIGHT TO COUNSEL.

SUPPORT MAGISTRATE SHOULD NOT HAVE ALLOWED FATHER'S ATTORNEY TO WITHDRAW WITHOUT NOTICE TO FATHER AND SHOULD NOT HAVE PROCEEDED IN FATHER'S ABSENCE (FOURTH DEPT).

The Fourth Department, reversing Family Court, determined the Support Magistrate's findings should not have been confirmed because the Support Magistrate allowed father's attorney to withdraw without notice to father and proceeded in father's absence:

… [T]he Support Magistrate erred in allowing the father's attorney to withdraw as counsel and in proceeding with the hearing in the father's absence. "An attorney may withdraw as counsel of record only upon a showing of good and sufficient cause and upon reasonable notice to the client . . . [, and a] purported withdrawal without proof that reasonable notice was given is ineffective" … . Here, the father's attorney did not make a written motion to withdraw; rather, counsel merely agreed when the Support Magistrate, after noting the father's failure

to appear for the hearing, offered to relieve her of the assignment. The absence of evidence that the father was provided notice of his counsel's decision to withdraw in accordance with CPLR 321 (b) (2) renders the Support Magistrate's finding of default improper … . Matter of Gonzalez v Bebee, 2019 NY Slip Op 08027, Fourth Dept 11-8-19

ATTORNEYS, RIGHT TO COUNSEL.

WHETHER MOTHER VALIDLY WAIVED HER RIGHT TO COUNSEL WAS APPEALABLE BECAUSE THE ISSUE WAS CONTESTED BEFORE MOTHER DEFAULTED BY FAILING TO APPEAR, DESPITE THE FACT THAT MOTHER'S REQUEST TO REPRESENT HERSELF WAS GRANTED; MOTHER WAS ADEQUATELY INFORMED OF THE RIGHTS SHE WAS GIVING UP (FOURTH DEPT).

The Fourth Department, over two separate dissents, determined: (1) whether mother was adequately informed of the rights she was giving up by representing herself was appealable because the matter was contested before mother defaulted by failing to appear; (2) the fact mother was granted the right she requested (representing herself) did not preclude her appeal of the adequacy of her waiver of her right to an attorney; (3) mother was adequately informed of the rights she was giving up:

The mother contends … that Family Court erred in failing to ensure, in response to her request to proceed pro se, that her waiver of the right to counsel was knowing, intelligent, and voluntary. Initially, we conclude that the mother's contention is reviewable on appeal from the orders … despite her default. CPLR 5511 provides, in relevant part, that "[a]n aggrieved party . . . may appeal from any appealable judgment or order except one entered upon the default of the aggrieved party." Thus, in general, "[n]o appeal lies from an order [or judgment] entered upon an aggrieved party's default"… . Nevertheless, "notwithstanding the prohibition set forth in CPLR 5511 against an appeal from an order or judgment entered upon the default of the appealing party, the appeal from [such an] order [or judgment] brings up for review those matters which were the subject of contest' before the [trial court]" … .

… [W]e conclude that "[t]he issue of the mother's waiver of the right to counsel was the subject of contest before . . . [the c]ourt and, therefore, may be reviewed by this Court …". * * *

… [M]other was repeatedly advised by the court of the right to counsel, including assigned counsel, and was represented by several attorneys throughout the proceedings. Yet she discharged or consented to the withdrawal of each of those attorneys for her own reasons and ultimately opted to represent herself, even after she was advised that proceeding without the assistance of trained and qualified counsel might be difficult or detrimental and that she would be required to follow the rules of evidence. The mother also demonstrated the ability and preparedness to proceed pro se by, among other things, issuing subpoenas to various witnesses and filing exhibits. The record thus establishes that the court's inquiry was sufficient to ensure that the mother's waiver of the right to counsel was knowing, intelligent, and voluntary … . Matter of DiNunzio v Zylinski, 2019 NY Slip Op 06337, Fourth Dept 8-22-19

CIVIL CONTEMPT, ATTORNEY'S FEES, SANCTIONS.

DEFENDANT SHOULD HAVE BEEN HELD IN CONTEMPT FOR FAILURE TO PAY ATTORNEY'S FEES AS ORDERED BY THE COURT, THE CONTEMPT PROCEEDINGS WERE NOT FRIVOLOUS AND SANCTIONS SHOULD NOT HAVE BEEN IMPOSED FOR BRINGING THE CONTEMPT PROCEEDINGS (SECOND DEPT).

The Second Department, reversing Supreme Court, determined that plaintiff's law firm (Villar firm) was entitled to attorney's fees for work done before the firm was discharged without cause, the contempt action brought by the firm against defendant for failure to pay the fees as ordered by the court was valid and defendant should have been held in contempt, and the contempt proceedings were not frivolous or designed to harass. Therefore sanctions for bringing the contempt proceedings should not have been imposed:

To prevail on a motion to hold another party in civil contempt, the movant is "required to prove by clear and convincing evidence (1) that a lawful order of the court, clearly expressing an unequivocal mandate, was in effect, (2) that the order was disobeyed and the party disobeying the order had knowledge of its terms, and (3) that the movant was prejudiced by the offending conduct" … . The movant in a civil contempt proceeding need not establish "that the disobedience [was] deliberate or willful" … . "Once the movant establishes a knowing failure to comply with a clear and unequivocal mandate, the burden shifts to the alleged contemnor to refute the movant's showing, or to offer evidence of a defense, such as an inability to comply with the order" … . …

"In addition to or in lieu of awarding costs, the court, in its discretion may impose financial sanctions upon any party or attorney in a civil action or proceeding who engages in frivolous conduct" (22 NYCRR 130-1.1[a] …).

"[C]onduct is frivolous if . . . (1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law; (2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or (3) it asserts material factual statements that are false" (22 NYCRR 130-1.1[c] …). Contrary to the Supreme Court's determination, there is no evidence in the record to support a finding that the Villar firm pursued the contempt motion to harass the parties for settling their case … . Rhodes v Rhodes, 2019 NY Slip Op 01113, Second Dept 2-13-19

CIVIL CONTEMPT, DSS.

THERE WAS NO SHOWING THAT THE DEPARTMENT OF SOCIAL SERVICE'S (DSS'S) VIOLATION OF A COURT ORDER LIMITING THE CHILD'S VISITATION WITH STEPMOTHER PREJUDICED THE CHILD'S RIGHTS, THEREFORE FAMILY COURT SHOULD NOT HAVE HELD DSS IN CONTEMPT (THIRD DEPT).

The Third Department, reversing (modifying) Family Court, determined that the Department of Social Services (DSS) should not have been held in contempt for violation of an order limiting the child's visitation with the stepmother. DSS acknowledged it was aware of the order and acknowledged violating it. But there was no showing of prejudice to the child's rights:

"A party seeking a finding of civil contempt based upon the violation of a court order must establish by clear and convincing evidence that the party charged with contempt had actual knowledge of a lawful, clear and unequivocal order, that the charged party disobeyed that order, and that this conduct prejudiced the opposing party's rights" … . DSS does not dispute that it was aware of the court's order limiting visitation with the stepmother, nor does it dispute that it did not follow that order, thereby establishing the first two elements for a civil contempt finding. Notably, however, DSS contacted the court immediately after receiving the order to advise that the stepmother had been certified as a foster parent and that the child was residing [*3]with her in that capacity. The AFC's petition, filed shortly thereafter, alleged that DSS had violated the order and sought to have the child placed with the foster parents, but failed to allege or present evidence establishing, by clear and convincing evidence, that DSS's failure to comply with the December 2016 order had "prejudiced the [child's] rights" … . Matter of Nilesha RR. (Loretta RR.), 2019 NY Slip Op 04063, Third Dept 5-23-19

CONFRONTATION CLAUSE.

A FAMILY COURT PROCEEDING IS CIVIL IN NATURE AND THE CONFRONTATION CLAUSE APPLIES ONLY IN CRIMINAL MATTERS, THEREFORE DOCUMENTS WRITTEN BY A PSYCHIATRIST WHO DID NOT TESTIFY WERE ADMISSIBLE (FOURTH DEPT).

The Fourth Department determined father's right to confront witnesses in this termination-of-parental-rights proceeding was not violated by the admission in evidence of two documents written by a psychiatrist who did not testify. A Family Court proceeding is civil in nature and the Confrontation Clause applies only in criminal matters:

Although the father's contention is framed in terms of a violation of his right to confront the witnesses against him, "Family Court matters are civil in nature and the Confrontation Clause applies only to criminal matters" … . In addition, while every litigant has a right, guaranteed by the Due Process Clauses of both the Federal and State Constitutions, to confront the witnesses against them … , "this right is not absolute" in civil actions … . The Family Court Act permits the admission of hearsay at dispositional hearings if such evidence is "material and relevant" … . Here, because the father did not object to either the relevancy or materiality of the challenged exhibits, we conclude that the exhibits were properly admitted in evidence … . Matter of Ramon F. (Wilson F.), 2019 NY Slip Op 04852, Fourth Dept 6-14-19

CONSENT ORDERS, APPEALS.

ORDER ENTERED UPON CONSENT IS NOT APPEALABLE, COERCION ARGUMENT MUST BE RAISED IN A MOTION TO VACATE THE ORDER (THIRD DEPT).

The Third Department, dismissing the appeal in this neglect proceeding, noted that an order entered upon consent is not appealable. The argument that the consent was coerced must be raised in a motion to vacate the order:

Following consultation with her counsel, respondent … consented on the record to a finding of neglect. Family Court then entered an order that adjudicated the children to be neglected and contained the agreed-upon terms of disposition. Respondent appeals.

It is well settled that an order entered upon consent is not appealable … . Respondent's claim that her consent was involuntary because she was coerced into accepting the settlement offer should have been raised in Family Court by way of a motion to vacate the order (see Family Ct Act § 1051 [f] …). As the record does not reveal that any such application was made, the appeal is not properly before this Court. Matter of Vicktoriya DD. (Sheryl EE.), 2019 NY Slip Op 03411, Third Dept 5-2-19

CRIMINAL LAW, REMOVAL TO FAMILY COURT, PROHIBITION.

JUDGE HAD THE AUTHORITY TO SEVER TWO COUNTS IN AN INDICTMENT AND REMOVE THE MATTER, INVOLVING A JUVENILE, TO FAMILY COURT; THE PEOPLE'S ARTICLE 78 SEEKING PROHIBITION DENIED AND DISMISSED (FIRST DEPT).

The First Department denied the People's Article 78 action seeking to vacate an order by the respondent judge severing two counts which had been combined in an indictment and removing the charges to Family Court. The People objected to removing the prosecution of a 16-year-old to Family Court. In order the facilitate the removal, respondent judge severed the two counts. The People unsuccessfully argued the judged did not have the authority to sever the counts, and therefore could not send the charges to Family Court:

"[T]he extraordinary remedy of prohibition lies only where there is a clear legal right, and only when a court . . . acts or threatens to act either without jurisdiction or in excess of its authorized powers in a proceeding over which it has jurisdiction" … . "Use of the writ is, and must be, restricted so as to prevent incessant interruption of pending judicial proceedings by those seeking collateral review of adverse determinations made during the course of those proceedings" … .

There is no merit in the People's contention that the court lacks the authority to sever charges that were joined in a single indictment. This argument would have validity in cases where charges were properly joinable in a single indictment. However, the law is clear that the determination of whether the charges were, in fact, properly joinable in the first instance, is a duty of the court that is not delegated to the prosecution or the grand jury.

The court has a duty to examine the indictment to determine whether joinder is proper pursuant to CPL 200.20(a) or (b). Notably, the People have not provided any precedent to support their position to the contrary. Courts routinely rule on the issue of whether charges in an indictment are properly joinable under CPL 200.20(2) and sever those charges that are not … .

While the People disagree with the court's finding that the … charges were not properly joinable under CPL 200.20(2)(b), determination of this issue is not before us in this article 78 proceeding. Rather, we are only asked, and we only have the authority, to determine whether the court acted without jurisdiction or in excess of its authority. Matter of Vance v Roberts, 2019 NY Slip Op 07358, First Dept 10-10-19

CUSTODY, APPEALS, ATTORNEY FOR THE CHILD.

ATTORNEY FOR THE CHILD CAN APPEAL A CHANGE OF CUSTODY TO WHICH THE CHILD IS OPPOSED, THE CHILD IS AGGRIEVED FOR APPELLATE PURPOSES, FAMILY COURT SHOULD NOT HAVE HELD A FULL CUSTODY HEARING WITHOUT FIRST ASSESSING THE ALLEGATIONS OF A CHANGE IN CIRCUMSTANCES, AN APPELLATE COURT CAN TAKE JUDICIAL NOTICE OF PRIOR MODIFICATION PETITIONS, AND FAMILY COURT MUST GIVE DUE CONSIDERATION TO THE CHILD'S WISHES (SECOND DEPT).

The Second Department, reversing Family Court, determined, in a full-fledged opinion by Justice Scheinkman, that mother's petition for a change in custody should not have been granted. The opinion is too comprehensive to be fairly summarized here. Of particular interest is the Second Department's conclusion that Family Court should have not have held a full custody hearing without first determining whether the allegations warranted it. The Second Department took judicial notice of two prior petitions for modification which were dismissed, the last petition being very close in time to the instant petition. The opinion is well worth reading in its entirety. It addresses several substantive issues and distinguishes some Fourth Department authority. The Second Department summarized the issues and holdings as follows:

This appeal raises several important issues pertinent to child custody determinations. We conclude that: (a) the attorney for the child has the authority to pursue an appeal on behalf of the child from an order determining the custody of the child; (b) the child is aggrieved, for appellate purposes, by an order determining custody; (c) the Family Court should not have held a full custody hearing without first determining whether the mother had

alleged and established a sufficient change in circumstances to warrant an inquiry into whether the child's best interests were served by the existing custodial arrangement; and (d) the Family Court erred in failing to give due consideration to the expressed preferences of the child, who is a teenager. Matter of Newton v McFarlane, 2019 NY Slip Op 04386, Second Dept 6-5-19

CUSTODY, ATTORNEY FOR THE CHILD.

ATTORNEY FOR THE CHILD (AFC) SHOULD HAVE BEEN APPOINTED IN THIS CUSTODY MODIFICATION PROCEEDING, MATTER REMITTED (THIRD DEPT).

The Third Department, reversing (modifying) Family Court, determined that an attorney for the child (AFC) should have been appointed in this custody modification proceeding and remitted the matter:

… [W]e reverse and remit for further proceedings conducted with the involvement of an AFC. This Court has previously noted that the "appointment of an [AFC] in a contested custody matter remains the strongly preferred practice," while acknowledging that "such appointment is discretionary, not mandatory" (… see Family Ct Act § 249 [a]). We have also "emphasize[d] the contributions competent [AFCs] routinely make in contested matters; they not only protect the interests of the children they represent, they can be valuable resources to the trial court" … . While advocating for the child, an AFC may provide a different perspective than the parents' attorneys, including through the presentation of evidence on the child's behalf, and may "recommend alternatives for the court's consideration" … . Even absent a request, a court may appoint an AFC on its own motion (see Family Ct Act § 249 [a]).

Family Court had appointed an AFC for this child in connection with a previous proceeding that resulted in the September 2017 stipulated order. Yet, when — less than two months after entry of that order — the parties' relationship deteriorated significantly, Family Court inexplicably did not appoint the same or another AFC to protect the child's interests. The lack of an AFC prejudiced the child's interests. Matter of Marina C. v Dario D., 2019 NY Slip Op 53953, Third Dept 11-27-19

CUSTODY, DUE PROCESS, APPEALS.

FATHER, WHO DID NOT SUBMIT A PETITION FOR CUSTODY, WAS PRECLUDED FROM PRESENTING EVIDENCE OF HIS FITNESS AS A PARENT IN THIS CUSTODY PROCEEDING BROUGHT BY MOTHER; FATHER WAS DEPRIVED OF HIS RIGHT TO DUE PROCESS; ALTHOUGH FATHER DID NOT OBJECT, THE APPELLATE COURT HAS INHERENT AUTHORITY TO CORRECT FUNDAMENTAL ERRORS (THIRD DEPT).

The Third Department, reversing Family Court, determined father was deprived of due process of law because he was not allowed to put in evidence of his fitness as a parent in this custody proceeding brought by mother. Father did not file a custody petition. For that reason Family Court refused to allow father to put in evidence. The Third Department noted father did not object at trial but exercised its inherent authority to correct fundamental errors:

An initial custody determination must be based upon the best interests of the child, taking into account all relevant factors, including "the parents' past performance and relative fitness, their willingness to foster a positive relationship between the child and the other parent, as well as their ability to maintain a stable home environment and provide for the child's overall well-being" … . By this standard, the court must assess the qualifications of both parents in determining what custody determination best serves the interests of the child. In its decision, Family Court expressly held that because the father did not also file a custody petition, it could "only take into consideration the testimony brought by the mother." There were several instances during the trial where the court precluded testimony from the father and his witness because he did not file a petition. As a result, the father was prevented from addressing all of the relevant factors, including who should be the primary custodian and what he did to foster a relationship between the child and the mother. The father's stepfather was precluded from testifying as to his observations of the father as a parent. The father was allowed to briefly testify as to his average day with the child at the conclusion of testimony … . …

We are mindful that the father did not raise any objections at trial to Family Court's evidentiary limitations. We are also mindful that the father was able to briefly testify as to his interactions with the child. That said, this court has inherent authority to exercise its discretion and correct fundamental errors … . In our view, the court's failure to allow the father a full and fair opportunity to present evidence, coupled with the court's own limitations on its decision, constitutes a fundamental due process error requiring reversal of Family Court's order … . **Matter of Liska J. v Benjamin K., 2019 NY Slip Op 05347, Third Dept 7-3-19**

CUSTODY, JUDGES.

THE JUDGE MISCHARACTERIZED THE EVIDENCE AND EXHIBITED BIAS IN FAVOR OF FATHER IN THIS CUSTODY CASE, THE DETERMINATION WAS REVERSED AND THE MATTER SENT BACK FOR ANOTHER HEARING BEFORE A DIFFERENT JUDGE (THIRD DEPT).

The Third Department, reversing the custody determination and remitting the matter for another hearing before a different judge, determined the judge mischaracterized the evidence and exhibited bias in favor of father:

We agree with the mother and the attorney for the child that Family Court's decision and order misstates and mischaracterizes the record evidence and that the determination lacks a sound and substantial basis in the record. For example, the court determined that a "curious" exchange between the child and a therapist "tended to suggest that the child was confused about her feelings toward her father," characterized the testimony by the mother's forensic psychologist who deemed the mother mentally fit as a "brief interlude of comic relief," and lauded the father's willingness to undergo penile plethysmograph testing — characterized as "a colonoscopy of the soul" — as "speak[ing] volumes to his actual innocence." The court went so far as to criticize the forensic expert's testimony concerning the September 2016 visitation as an example of blending incidents by commenting, "The only blending here . . . is that of pseudoscience with the world's oldest profession." The record does not support any of this unfortunate and bizarre commentary.

It is concerning that Family Court wholeheartedly credited the father's testimony, viewed most — if not all — of the evidence in a light least favorable to the mother … and diminished the evidence of domestic violence perpetrated by the father against the mother in the child's presence. Matter of Nicole TT. v David UU., 2019 NY Slip Op 05729, Third Dept 7-18-19

CUSTODY, PARENTING TIME, ORDERS OF PROTECTION.

FATHER'S PETITION FOR CUSTODY OR PARENTING TIME SHOULD NOT HAVE DISMISSED BASED UPON AN ORDER OF PROTECTION ISSUED IN A CRIMINAL MATTER BEFORE THE CHILD WAS BORN (THIRD DEPT).

The Third Department, reversing Family Court, determined an order of protective issue in a criminal proceeding before the child was born did not prohibit contact between the child and father. Father's petition seeking custody and/or parenting time should not have been dismissed on that ground:

At the initial appearance on the petition, Family Court stated that the order of protection had been issued in a criminal matter and that it barred the putative father from having any direct or indirect contact with the mother. The mother then moved to dismiss the petition, arguing that the order of protection rendered the petition moot. Family Court agreed and granted the motion. The putative father appeals.

The order of protection at issue — a copy of which is not in the record but the terms of which we take judicial notice — was issued prior to the child's birth and does not bar the putative father from having contact with the child. It is not, as a result, fatal to the putative father's petition … . Remittal is therefore required for Family Court to consider whether an order of filiation should be issued (see Family Ct Act § 564) and, if so, whether contact with the putative father would be in the best interests of the child and could be accomplished without contravening the terms of the order of protection … . Matter of Justin M. v Valencia N., 2019 NY Slip Op 07453, Third Dept 10-17-19

CUSTODY, PERMANENCY.

MOTHER'S CUSTODY PETITION SHOULD NOT HAVE BEEN DISMISSED WITHOUT A HEARING; CUSTODY PETITION MAY BE HEARD JOINTLY WITH A PERMANENCY HEARING (SECOND DEPT).

The Second Department, reversing Family Court, determined than mother's petition for custody should not have been dismissed without a hearing and noted that a custody petition may be heard jointly with a permanency hearing:

The appeal from the order dated September 27, 2018, has not been rendered academic by the permanency hearing order dated November 13, 2018, which apparently changed the permanency goal from working toward legal guardianship by the maternal grandmother to guardianship by a different relative. The order appealed from denied the mother's petition for custody, and the issue of whether that order was proper will continue to affect the mother's rights … .

Custody determinations should "[g]enerally be made only after a full and plenary hearing and inquiry" … . Here, the record does not reveal the existence of circumstances that would bring this case within the narrow exception to the general right to a hearing … .

However, the petition for custody may be heard jointly with any permanency hearing held pursuant to Family Court Act article 10-A (see Family Ct Act § 1089-a[a] …). Matter of Barcene v Parrilla, 2019 NY Slip Op 07575, Second Dept 10-23-19

CUSTODY, RELOCATE, PETITION TO.

FAMILY COURT SHOULD NOT HAVE MADE RULINGS ON CUSTODY AND MOTHER'S PETITION TO RELOCATE BEFORE COMPLETING THE HEARING (SECOND DEPT).

The Second Department, reversing Family Court, determined Family Court should not have awarded sole custody of daughter to mother and granted mother's petition to relocate without completing the hearing:

The mother commenced this proceeding against the father seeking to modify a prior order of custody so as to award her sole legal and physical custody of the parties' two children and permit her to relocate with both children to the State of Washington. The Family Court commenced a hearing and, prior to the completion of the hearing … modified the prior order so as to award the father sole legal and physical custody of the parties' son and so as to award the mother sole legal and physical custody of the parties' daughter and permit her to relocate with the daughter to the State of Washington. …

Here, where there were many controverted issues, the Family Court should not have awarded the mother sole custody of the parties' daughter and permitted her to relocate with the daughter prior to completing the hearing. The father had not had the opportunity to present a case and was deprived of the opportunity to cross-examine a key witness called by the mother. Moreover, the court failed to give proper consideration to the effect that the daughter's relocation from New York to the State of Washington would have on the relationship between the siblings, especially given the mother's stated willingness to remain in New York … . Matter of Pinto v Pinto, 2019 NY Slip Op 08195, Second Dept 11-13-19

CUSTODY, VISITATION, PRESUMPTION OF LEGITIMACY.

EQUITABLE ESTOPPEL DOCTRINE PROPERLY APPLIED TO FIND THAT THE FORMER SAME-SEX DOMESTIC PARTNER HAD STANDING TO SEEK CUSTODY AND VISITATION RE: CHILDREN BORN DURING THE RELATIONSHIP, PRESUMPTION OF LEGITIMACY RE: A CHILD CONCEIVED WHEN THE BIOLOGICAL MOTHER WAS PREVIOUSLY MARRIED WAS REBUTTED (SECOND DEPT).

The Second Department determined that Family Court properly applied the doctrine of equitable estoppel and the presumption of legitimacy was rebutted in this same-sex domestic-partner case. The biological mother (Perperis) and her domestic partner (Chimienti) were together when both children were born and the relationship lasted three years. The older of the two children was conceived when the biological mother was married, but the couple had separated before the baby was born (followed by divorce):

On March 5, 2018, Nicole Perperis, the biological mother of the two subject children, who were born, via artificial insemination, in September 2014 and May 2016, respectively, entered into a consent order of custody and parenting time (hereinafter the consent order) with her former domestic partner, Jennifer Chimienti. Pursuant to the consent order, the parties agreed to share joint custody of the children, with physical custody and final

decision-making authority to Perperis. The consent order also set forth a parenting time schedule for Chimienti. The parties entered into the consent order, forgoing a hearing on the best interests of the children as to custody and parental access, upon the determination of the Family Court in an order … (hereinafter the September 2017 order), made after a hearing at which Chimienti's standing to seek custody or visitation was contested, that Chimienti established standing, via equitable estoppel, to seek custody of or visitation with the children. …… .[W]e agree with the Family Court that … the appropriate analysis to decide whether Chimienti had standing to seek custody of and visitation with the children is to apply an equitable estoppel analysis. …

… .[W]e agree with the Family Court's determination that, with respect to the older child, the application of an equitable estoppel analysis is not precluded by a legal presumption that the older child, who was born when Perperis was still married to her former wife, is the child of the former wife. We agree with the court's determination that the marital presumption of legitimacy that typically applies to children born during a marriage (see Domestic Relations Law § 24[1]; Family Ct Act § 417) was rebutted by clear and convincing evidence … .

Matter of Chimienti v Perperis, 2019 NY Slip Op 02866, Second Dept 4-17-19

CUSTODY, VISITATION.

EXTRAORDINARY CIRCUMSTANCES WARRANTED AWARDING CUSTODY TO STEPMOTHER WITH VISITATION BY BOTH PARENTS (THIRD DEPT).

The Third Department determined that extraordinary circumstances warranted awarding custody of the child to the stepmother with visitation from both parents. The child had been living with father and stepmother for years when father moved out:

… [T]he child was residing with the other parent — the father — pursuant to a court order. The mother did not originally expressly relinquish the child to the stepmother. Rather, the stepmother assumed parental responsibilities due to her relationship with the father and based on his custodial authority. Nevertheless, in considering the cumulative effect of all the issues, we note that the mother had very little contact with the child for five years, including not seeing him at all for three continuous years, while the child was at a formative age and being raised by the father and the stepmother. Starting in 2012, the mother began consistently exercising her visitation and has continued to do so. However, the mother remained uninvolved in the child's medical and educational life and was only minimally involved in his extracurricular activities. * * *

Moving to the best interests of the child, he has lived with the stepmother since he was a toddler, has a close bond with her and was described as inseparable from his half brother, who also lives with them. The child has always attended schools in the same district, has an educational plan to address his difficulties, participates in sports in that district and all of his friends are there. The mother lives in a different school district. The stepmother has been managing the child's medical conditions for a decade, whereas the mother did not even know the names of his doctors. The stepmother has been communicating with the mother regarding visits and providing the majority of the transportation; the mother has no vehicle and her driver's license is suspended, although she drove to drop the child off on at least some occasions. Matter of Shanna O. v James P., 2019 NY Slip Op 07455, Third Dept 10-17-19

CUSTODY.

AWARDING FATHER SOLE LEGAL CUSTODY DID NOT HAVE A SOUND AND SUBSTANTIAL BASIS IN THE RECORD, MOTHER'S PETITION FOR SOLE LEGAL CUSTODY SHOULD HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Family Court, determined that awarding sole legal custody to father did not have a sound and substantial basis in the record and mother's petition for sole legal custody should have been granted:

"Findings of the Family Court which have a sound and substantial basis in the record are generally entitled to great deference on appeal because any custody determination depends to a great extent on the court's assessment of the credibility of the witnesses and the character, temperament, and sincerity of the parties"… . "However, an appellate court would be seriously remiss if, simply in deference to the finding of a trial judge, it allowed a custody determination to stand where it lacked a sound and substantial basis in the record" … .

Here, the Family Court's determination awarding the father sole legal and physical custody of the child does not have a sound and substantial basis in the record. Contrary to the court's conclusion, the parties had not been sharing custody of the child equally. Instead, the record reflects that the mother had been the child's primary caregiver for the majority of his life until the court granted the father's petition and that, at the time of the hearing, the father had the child on certain weekends. The evidence in the record also demonstrates that the court failed to take into consideration the custody arrangement in place at the time of the hearing, or even the 50/50 arrangement which was requested by the father during the proceeding.

Moreover, the record demonstrates that the mother had taken a proactive role in the child's well being and development, developing well-thought-out plans to address the child's issues regarding medical care, schooling, and socialization … . At the time of the hearing, the father had no concrete plans for the child's education, medical care, or social development. Matter of Lintao v Delgado, 2019 NY Slip Op 00125, Second Dept 1-9-19

CUSTODY.

BOTH PARENTS ACKNOWLEDGED A CHANGE IN THE CUSTODY ARRANGEMENT WAS NEEDED, FAMILY COURT SHOULD NOT HAVE DISMISSED MOTHER'S PETITION (SECOND DEPT).

The Second Department, reversing Family Court, determined mother's petition for modification of the custody arrangement should not have been dismissed. The matter was remitted for a continued hearing:

… [A]ccepting the mother's evidence as true and affording her the benefit of every favorable inference, the mother presented sufficient evidence to establish a prima facie case of showing a change of circumstances which might warrant modification of custody in the best interests of the children … . The mother testified at the hearing that the parties had orally agreed to alter the custody arrangement so as to have the children alternate between the parents' homes every two weeks, instead of every week as provided in the January 2015 order. This testimony was consistent with the father's statements in his answer. That both parents acknowledged that an adjustment to the original custody arrangement was needed, together with information derived from the in camera interviews and other evidence in the record that the weekly shifting between parental homes could be adversely impacting the children, was sufficient to warrant a full inquiry into what arrangement was in the children's best interests. "In addition, while not dispositive, the express wishes of older and more mature children can support the finding of a change in circumstances" … . Matter of Morales v Goicochea, 2019 NY Slip Op 06494, Second Dept 9-11-19

CUSTODY, DEFAULT, ATTORNEYS, APPEALS.

WHEN A PARTY'S ATTORNEY APPEARS THE PARTY IS NOT IN DEFAULT AND MAY THEREFORE APPEAL, FAMILY COURT SHOULD NOT HAVE AWARDED CUSTODY TO NONPARENTS ABSENT A HEARING DEMONSTRATING EXTRAORDINARY CIRCUMSTANCES AND THE BEST INTERESTS OF THE CHILD (FOURTH DEPT).

The Fourth Department determined mother was not in default, because her attorney had appeared, and therefore mother can appeal the award of custody to the nonparent petitioners. The Fourth Department further determined Family Court should have held a hearing to determine whether extraordinary circumstances justified awarding custody to nonparents. The prior consent order of custody in favor of the nonparents does not demonstrate extraordinary circumstances:

"A parent's right to be heard on a matter of child custody is fundamental and not to be disregarded absent a convincing showing of waiver' " … . Moreover, "[i]t is well established that, as between a parent and a nonparent, the parent has a superior right to custody that cannot be denied unless the nonparent establishes that the parent has relinquished that right because of surrender, abandonment, persisting neglect, unfitness or other like extraordinary circumstances" … and further establishes that an award of custody to the nonparent is in the best interests of the child … . "The burden of proving extraordinary circumstances rests on the nonparent, and the mere existence of a prior consent order of custody in favor of the nonparent is not sufficient to demonstrate extraordinary circumstances"… . Inasmuch as the court erred in depriving the mother of custody without conducting the requisite evidentiary hearing … , we reverse and remit the matter to Family Court for a hearing on the custody petition. Matter of Hilton v Hilton, 2019 NY Slip Op 04572, Fourth Dept 6-7-19

CUSTODY.

FATHER'S PETITION FOR SOLE CUSTODY SHOULD NOT HAVE BEEN GRANTED ABSENT A FULL HEARING (SECOND DEPT).

The Second Department, reversing Family Court, determined father's petition for sole custody should not have been granted absent a full hearing:

By "Agreed Order in Suit Affecting the Parent-Child Relationship" (hereinafter the Texas custody order) dated October 4, 2016, which was so-ordered by the District Court, Harris County, Texas, the parties agreed to be appointed "Joint Managing Conservators" of their child, and the father was granted the exclusive right to designate the child's primary residence within Westchester County, New York, or any contiguous county.

Less than two months later, on November 16, 2016, the father filed a petition in the Family Court, Westchester County, to modify the Texas custody order, inter alia, so as to award him sole custody of the child. The mother opposed the petition. Over 21 months, the parties made eight formal appearances in Family Court in connection with the father's petition. The court never conducted an evidentiary hearing on the father's petition, with the exception of taking the partial testimony of one nonparty witness. By order dated September 25, 2018, over the mother's objection and request for an evidentiary hearing, the court, inter alia, granted the father's petition to the extent of awarding him sole legal custody of the child. The mother appeals. We reverse.

Custody determinations should " [g]enerally' be made only after a full and plenary hearing and inquiry'" … . "This general rule furthers the substantial interest, shared by the State, the children, and the parents, in ensuring that custody proceedings generate a just and enduring result that, above all else, serves the best interest of a child" … . Here, the record does not demonstrate the absence of unresolved factual issues so as to render a custody hearing unnecessary … . Matter of Salvi v Salvi, 2019 NY Slip Op 09272, Second Dept 12-24-19

CUSTODY.

MOTHER ENTITLED TO A HEARING ON WHETHER A CHANGE IN HER CIRCUMSTANCES WARRANTED A RETURN OF HER CHILDREN; CUSTODY OF THE CHILDREN HAD PREVIOUSLY BEEN AWARDED TO RESPONDENT (GREAT AUNT) (FOURTH DEPT).

The Fourth Department, reversing Family Court, determined mother was entitled to a hearing on whether there had been a change of circumstances warranting the return of the custody of the children to her. Custody had previously been awarded to respondent (great aunt):

Inasmuch as there has been a prior judicial determination of extraordinary circumstances supporting the award of custody to respondent, "the appropriate standard in addressing the possible modification of the prior order is whether there has been a change of circumstances" warranting an inquiry whether modification of custody or visitation is in the best interests of the children … . We agree with the mother that Family Court erred in granting

respondent's motion to dismiss the petitions at the close of the mother's case on the ground that the mother failed to establish a sufficient change in circumstances since entry of the stipulated order … . At the time the prior order of custody and visitation was entered, the mother did not have a vehicle or employment, and she lived with a man who was prohibited by court order from having any contact with the subject children. The mother established that, at the time of the hearing, she owned a car, worked full-time, and no longer lived with or had a relationship with the aforementioned man. Indeed, in its oral decision dismissing the petitions, the court noted that the mother had "improved" herself and that it was "impressed" with her progress. Matter of Heinsler v Sero, 2019 NY Slip Op 08052, Fourth Dept 11-8-19

EQUITABLE DISTRIBUTION.

CALCULATION OF ENHANCED EARNING CAPACITY STEMMING FROM A DEGREE EARNED DURING MARRIAGE IN THE CONTEXT OF ALLOCATING MARITAL PROPERTY IN A DIVORCE PROCEEDING EXPLAINED (SECOND DEPT).

The Second Department determined Supreme Court property calculated the amount allocated to plaintiff wife for the enhanced earning capacity of defendant husband stemming from his MBA degree earned during the marriage:

The defendant's MBA degree is marital property subject to equitable distribution in this case… . The value of the MBA degree is measured by the present value of the enhanced earning capacity which it affords the defendant … . The non-titled spouse is required to establish the value of the enhanced earning capacity and demonstrate that the non-titled spouse made a substantial contribution to the acquisition of the degree … .

Where a holder of an advanced degree has already embarked on his or her career and has acquired a history of actual earnings, the theoretical valuation method, which compares the average lifetime earnings of a college graduate against the average lifetime earnings of a person holding the relevant advanced degree, must be discarded in favor of a more pragmatic and individualized analysis based on the titled spouse's remaining professional earning potential … . Actual earnings, projected over time, are a recognized proxy for the value of a person's future earning capacity … . The valuation must be founded in economic reality … . Lynch v Lynch, 2019 NY Slip Op 00105, Second Dept 1-9-19

EQUITABLE DISTRIBUTION.

COURT SHOULD NOT HAVE AWARDED PLAINTIFF WIFE $25,000 AS AN INTEREST IN HER HUSBAND'S MBA DEGREE; MARITAL ASSETS WERE USED TO PROCURE THE DEGREE AND THE COST OF THE DEGREE IS NOT A PROPER BASIS FOR SUCH AN AWARD (SECOND DEPT).

The Second Department, reversing (modifying) Supreme Court, determined plaintiff wife in this divorce action should not have been awarded $25,000 for her interest in her husband's MBA degree:

At the time that this action was commenced, an academic degree earned during a marriage constituted marital property subject to equitable distribution (… cf. Domestic Relations Law § 236[B][5][d][7]). The value of a degree is measured by the present value of the enhanced earning capacity which it affords the holder … . The nontitled spouse is required to establish the value of the enhanced earning capacity and demonstrate that the nontitled spouse made a substantial contribution to the acquisition of the degree … . Here, the Supreme Court awarded the plaintiff $25,000, not based on the value of the defendant's enhanced earning capacity, but rather on its determination of the cost of the acquisition of the MBA degree. The utilization of marital funds for the acquisition of the defendant's MBA degree was a choice made by the parties during the course of the marriage that should not be second-guessed once the marriage has ended … . Furthermore, the plaintiff failed to establish the actual value of the defendant's enhanced earning capacity … , and the court declined to award the defendant any distribution of the plaintiff's master's degree, which was also earned during the marriage. Accordingly, we modify the judgment by deleting the provision awarding the plaintiff $25,000 as and for her interest in the defendant's MBA degree. Ospina-Cherner v Cherner, 2019 NY Slip Op 09276, Second Dept 12-24-19

EQUITABLE DISTRIBUTION.

INHERITED PROPERTY WHICH HAD BEEN COMMINGLED WITH MARITAL PROPERTY SHOULD HAVE BEEN TREATED AS MARITAL PROPERTY AND DIVIDED EQUALLY (SECOND DEPT).

The Second Department determined in this divorce action that the inherited property which was commingled with marital should have been considered marital property and divided equally:

The proceeds from an inheritance are separate property (see Domestic Relations Law § 236[B][1][d][1]…). However, where separate property has been commingled with marital property, for example in a joint bank account, there is a presumption that the commingled funds constitute marital property … . This presumption may be overcome by evidence that the funds were deposited into the joint account as a matter of convenience, without the intention of creating a beneficial interest … .

Here, by depositing inherited funds into accounts titled jointly with the defendant, the plaintiff created the presumption that the funds were marital … . Moreover, the plaintiff failed to rebut the presumption that the funds were transmuted into marital property, as she failed to establish that the funds were deposited into the parties' joint accounts only as a matter of convenience without the intention of creating a beneficial interest … . Candea v Candea, 2019 NY Slip Op 04349, Second Dept 6-5-10

EVIDENCE, ABUSE.

CHILD'S INCOMPLETE TESTIMONY STRICKEN IN A FAMILY COURT ACT 1028 PROCEEDING MAY BE ADMITTED IN A FAMILY COURT ACT 1046 CHILD ABUSE PROCEEDING (FIRST DEPT).

The First Department determined that a child's testimony stricken from a Family Court Act 1028 proceeding can be admitted in a Family Court Act 1046 (a)(vi) child abuse proceeding:

On the merits, this appeal raises the issue of whether a child's testimony stricken from a hearing pursuant to Family Ct Act § 1028 may be considered in connection with a fact-finding hearing regarding abuse allegations, pursuant to Family Ct Act § 1046(a)(vi). We hold that it may be so used. Family Ct Act § 1046(a)(vi) sets forth, in relevant part, that "previous statements made by the child relating to any allegations of abuse or neglect shall be admissible in evidence," when corroborated, and "[t]he testimony of the child shall not be necessary to make a fact-finding of abuse or neglect." Here, then 14-year-old Ashley refused to continue with her testimony at the FCA 1028 hearing regarding her allegations of sexual abuse after she already had been cross-examined for three days by respondent's counsel. According to a letter from Ashley's therapist submitted to the court, it would be detrimental for the child to return to testify. We agree with the Family Court that it could rely upon Ashley's incomplete testimony for the purposes of the subsequent fact-finding hearing, subject to a statutory requirement of corroboration. The use of Ashley's incomplete testimony was in accordance with the legislative intent of Family Ct Act § 1046(a)(vi) to address "the reluctance or inability of victims to testify" … . Matter of Jaylyn Z. (Jesus O.), 2019 NY Slip Op 01846, First Dept 3-14-19

EVIDENCE, BEST EVIDENCE RULE, POSTNUPTIAL AGREEMENTS.

COPY OF POSTNUPTIAL AGREEMENT SHOULD NOT HAVE BEEN ADMITTED UNDER THE BEST EVIDENCE RULE; JUDGMENT OF DIVORCE REVERSED (SECOND DEPT).

The Second Department, reversing Supreme Court in this divorce action, determined a copy of the postnuptial agreement should not have been admitted pursuant to the best evidence rule:

The best evidence rule requires the production of an original writing where its contents are in dispute and sought to be proven … . The rule serves mainly to protect against fraud, perjury, and inaccuracies derived from faulty memory … . "[S]econdary evidence of the contents of an unproduced original may be admitted upon threshold factual findings by the trial court that the proponent of the substitute has sufficiently explained the unavailability of the primary evidence and has not procured its loss or destruction in bad faith" … . "Loss may be established upon a showing of a diligent search in the location where the document was last known to have been kept, and through the testimony of the person who last had custody of the original" … . The more important the document is to the resolution of the ultimate issue in the case, the stricter the requirement of establishing its loss … .

Here, at trial, the plaintiff merely testified that she did not possess the original postnuptial agreement and that she believed it was either lost or stolen. Given the significance of the postnuptial agreement to the issue of equitable distribution, the defendant's allegations that his purported signature on the document was forged, and the plaintiff's failure to adequately explain the unavailability of the original document, we disagree with the Supreme Court's determination to admit a copy of the document into evidence … , and to incorporate the purported agreement into the judgment of divorce. Mutlu v Mutlu, 2019 NY Slip Op 08567, Second Dept 11-27-19

FAMILY OFFENSES, JURISDICTION.

HEARING NECESSARY TO DETERMINE WHETHER FAMILY COURT HAS SUBJECT MATTER JURISDICTION IN THIS FAMILY OFFENSE PROCEEDING; JURISDICTION DEPENDS ON THE NATURE OF THE RELATIONSHIP BETWEEN THE PARTIES (SECOND DEPT).

The Second Department, reversing Family Court, determined a hearing was necessary on whether the court had subject matter jurisdiction for the petition seeking an order of protection:

… [T]he petitioner commenced this proceeding pursuant to Family Court Act article 8 seeking an order of protection against Cynthia J. Brock. The petitioner alleged, inter alia, that she and Brock were in an intimate relationship in that the petitioner was the paternal great grandmother of Brock's child, and that she and Brock had "lived together in the past." The petitioner further alleged that although her grandson and the child had moved out of her home a month earlier, Brock continued to routinely drop off the child at the petitioner's home after Brock's parental access time with the child, and used these opportunities to threaten, abuse, and annoy the petitioner. The petitioner also alleged that Brock telephoned the child on a daily basis, and verbally harassed the petitioner on the phone. Subsequently, Brock made an application to dismiss the petition for lack of subject matter jurisdiction on the ground that the relationship between her and the petitioner did not qualify as an "intimate relationship" within the meaning of Family Court Act § 812(1)(e). The Family Court granted the application and dismissed the petition.

The Family Court is a court of limited subject matter jurisdiction, and "cannot exercise powers beyond those granted to it by statute"… . Pursuant to Family Court Act § 812(1), the Family Court's jurisdiction in family offense proceedings is limited to certain proscribed criminal acts that occur "between spouses or former spouses, or between parent and child or between members of the same family or household" … . For purposes of Family Court Act article 8, "members of the same family or household" include, inter alia, "persons who are not related by consanguinity or affinity and who are or have been in an intimate relationship regardless of whether such persons have lived together at any time" … . Expressly excluded from the ambit of "intimate relationship" are "casual acquaintance[s]" and "ordinary fraternization between two individuals in business or social contexts" … . Beyond those delineated exclusions, what qualifies as an intimate relationship within the meaning of Family Court Act § 812(1)(e) is determined on a case-by-case basis … . Relevant factors include "the nature or type of relationship, regardless of whether the relationship is sexual in nature; the frequency of interaction between the persons; and the duration of the relationship … . Matter of Hamrahi v Brock, 2019 NY Slip Op 07781, Second Dept 10-30-19

FAMILY OFFENSES.

FAMILY OFFENSE OF HARASSMENT UPHELD, SEXUAL MISCONDUCT, ASSAULT SECOND AND CRIMINAL OBSTRUCTION OF BREATHING NOT SUPPORTED BY THE EVIDENCE (FIRST DEPT).

The First Department, in this Family Law family offense proceeding, determined the evidence supported harassment second, but did not support one count of sexual misconduct, assault in the second degree, or criminal obstruction of breathing or blood circulation. Petitioner admitted that she expected payment for sex and did not demonstrate a lack of consent with respect to one of the sexual misconduct counts. Biting petitioner's ear during sex did not constitute assault second (teeth being the dangerous instrument). And restricting petitioner's breathing during sex was not a crime because respondent stopped immediately when petitioner expressed discomfort. With respect to harassment, the court wrote:

The record shows, inter alia, that respondent threatened petitioner that he would take the steps necessary to cause her to lose her immigration status and rights to the child if she stopped prostituting herself to him, thereby evincing respondent's intent to harass and alarm petitioner (Penal Law § 240.26[3]) and his inducing petitioner to engage in a sexual relationship with him by instilling fear in her … . Matter of Irena K. v Francesco S., 2019 NY Slip Op 05066, First Dept 6-25-19

FAMILY OFFENSES.

THE FAMILY OFFENSE PETITION DID NOT ALLEGE ALL THE ELEMENTS OF HARASSMENT SECOND DEGREE AND WAS PROPERLY DISMISSED (FOURTH DEPT).

The Fourth Department determined the portion of the family-offense petition which charged harassment in the second degree was properly dismissed because it did not allege all the elements of the offense:

A person commits harassment in the second degree under Penal Law § 240.26 (3) when he or she, "with intent to harass, annoy or alarm another person[,] engages in a course of conduct or repeatedly commits acts which alarm or seriously annoy such other person and which serve no legitimate purpose" … . Thus, "[t]o be viable

under the circumstances here, the [petition was] required to allege that respondent[, inter alia,] engaged in a course of conduct that did alarm or seriously annoy petitioner and the conduct served no legitimate purpose" … . Although the petition before us accuses respondent of engaging in a course of conduct that annoyed and alarmed petitioner, nowhere does it allege that respondent's alleged course of conduct "serve[d] no legitimate purpose" (§ 240.26 [3]). Thus, the petition does not adequately plead an allegation that respondent committed harassment in the second degree under section 240.26 (3), and the court therefore properly dismissed the petition to that extent … . Matter of Rohrback v Monaco, 2019 NY Slip Op 04851, Fourth Dept 6-14-19

FAMILY OFFENSES, CUSTODY, VISITATION.

FAMILY COURT DID NOT MAKE THE REQUIRED FINDINGS OF FACT IN THIS FAMILY OFFENSE, CUSTODY AND VISITATION CASE, MATTER REMITTED (FOURTH DEPT).

The Fourth Department, sending the matter back to Family Court, determined Family Court did not make the requisite findings of fact in this family offense, custody and visitation case:

… [W]e agree with the father that Family Court failed to adequately set forth its essential findings of fact (see CPLR 4213 [b]; Family Ct Act § 165 [a] …). …[T]he court failed to specify the family offense upon which the order of protection was predicated … . … [T]he court failed to "set forth its analysis of those factors that traditionally affect the best interests of a child, namely, the relative fitness of each party, each parent's ability to provide for the emotional and intellectual development of the child, the ability to provide financially for the child, the quality of the home environment, the length of time and stability of prior custodial arrangements, [and] the need of a child to reside with siblings[, if any] . . . As a result, we are unable to review [the court's] ultimate factual finding regarding each of those factors and the weight it placed upon each factor relative to the best interests of the child[ ]" … . Under the circumstances of these cases, we decline to exercise our discretion to make the requisite findings … . Matter of Benson v Smith, 2019 NY Slip Op 02221, Fourth Dept 3-22-19

GENETIC TESTING, ATTORNEYS, INADEQUATE ASSISTANCE.

FAMILY COURT SHOULD NOT HAVE ORDERED A GENETIC MARKER TEST WITHOUT A HEARING AND THE CHILD DID NOT RECEIVE ADEQUATE ASSISTANCE OF COUNSEL (THIRD DEPT).

The Third Department determined Family Court should not have ordered a genetic marker paternity test without a hearing and the child did not receive adequate assistance of counsel:

The attorney for the child (hereinafter AFC) informed the court that, through discussions with the grandmother, the AFC learned that the child might also hold a belief that someone else is his father. The record does not give any indication that the AFC discussed with the child his belief as to who his father is. Beyond a few short and scattered statements, there was no substantive evidence or discussion of who has a parent-child relationship with the child and whether, due to equitable estoppel, a genetic marker test would not be in the child's best interests. The court's order is reflective of this, as it strictly relates to how the test is to be carried out and contains no case-specific discussion. Accordingly, Family Court did not possess adequate information to determine the child's best interests and, as such, it erred in ordering genetic marker testing without first conducting a hearing … .

Additionally, we find that the child did not receive the effective assistance of counsel. The record is bereft of evidence indicating that the AFC consulted with the child, who was from 4½ to 6 years old throughout the time of this litigation … . We recognize that such consultation runs the risk of raising parentage concerns not harbored by the child; nevertheless, a patient, careful and nuanced inquiry is not only possible, but necessary … . "Counsel's failure to consult with and advise the child to the extent of and in a manner consistent with the child's capabilities constitutes a failure to meet [his or her] essential responsibilities as the [AFC]" … . Inasmuch as consultation with the child and subsequent communication of the child's position to Family Court are of the utmost importance … , it is clear that the child did not receive meaningful representation … . Matter of Schenectady County Dept. of Social Servs. v Joshua BB., 2019 NY Slip Op 00335, Third Dept 1-17-19

GENETIC TESTING, PRESUMPTION OF LEGITIMACY.

PETITIONER HAD AN EXTRAMARITAL AFFAIR WITH MOTHER WHO REMAINS MARRIED, PETITION FOR GENETIC TESTING PROPERLY DENIED BASED UPON THE PRESUMPTION OF LEGITIMACY AND THE BEST INTERESTS OF THE CHILD (THIRD DEPT).

The Third Department determined Family Court properly denied the petitioner's request for genetic testing, citing the presumption of legitimacy and the best interests of the child. Petitioner had an extramarital affair with mother, who remains married:

The testimony at the hearing established that respondents were married at all relevant times, including when the child was conceived and when the child was born. The husband was present at the child's birth and was named on the child's birth certificate as the father. Since the birth of the child, who was three years old at the time of the hearing, it is undisputed that the husband has taken an active role as a parent and has developed a strong and loving bond with the child … . The mother testified that she believes the husband to be the child's biological father and, to date, the husband is the only father that the child has known. Although petitioner's expert and the school social worker who testified on respondents' behalf disagreed on the ultimate question of whether genetic testing should be performed, petitioner's expert specifically qualified his recommendation, stating that, although he believed genetic testing should be performed, he "would not want that to suddenly mean that the child has to find [the results] out" and opined that, to do so at such a young age, would be "ill-advised" and that any such revelation should occur sometime "within [10] years" and "before puberty," with the aid of "counseling or consultation." Meanwhile, the social worker opined that, given the child's young age, it would be confusing, traumatic and potentially disruptive to his development and ability to form proper attachments throughout the rest of his life should such information be revealed at the present time. Family Court also appropriately considered the hostility that petitioner harbors toward respondents in determining that granting petitioner's application would only serve to create uncertainty and unnecessarily disrupt the child's otherwise stable, loving and established family dynamic … . Matter of Mario WW. v Kristin XX., 2019 NY Slip Op 04798, Third Dept 6-13-19

GENETIC TESTING.

THE 3RD DEPARTMENT, REVERSING FAMILY COURT, DETERMINED IT WAS IN THE BEST INTERESTS OF THE CHILD (BORN 2003) TO ORDER A DNA TEST FOR PETITIONER, IN PART BECAUSE NOT KNOWING WHO HER BIOLOGICAL FATHER IS A SOURCE OF TURMOIL (THIRD DEPT).

The Third Department, reversing Family Court, determined it was in the child's best interests that petitioner undergo a paternity test:

In light of [the] evidence, as well as evidence revealed at the Lincoln hearing, we disagree with Family Court's determination that equitable estoppel applies and find that it is in the child's bests interests for DNA testing to occur. The record is clear that the child understands that William P. is her "legal" father and that there is a significant chance that petitioner is her biological father. Although testing could possibly impact the child's relationship with William P., the record reveals that this relationship is already tumultuous and that some of this tumult may stem from the child's uncertainty as to whether petitioner is in fact her biological father. Indeed, it is evident from the record that if the child learns that William P. is her biological father, this information would positively benefit their relationship. The record also reveals that communication between petitioner and the child has occurred, possibly in violation of a court order, but that communication nevertheless occurred and it has had a clear effect on the child that cannot be mitigated by refusing to order a DNA test. In fact, DNA testing can mitigate the turmoil in the child's life that presently exists because she does not know who her biological father is. Although we are certainly mindful of the inherent inequities in allowing a DNA test to occur given the child's age [born 2003], our analysis must turn exclusively on the best interests of the child … . To that end, we are also mindful that, if petitioner is found to be the child's biological father, given his lengthy incarceration, the child will not be able to enjoy a "traditional" parent-child relationship with him. However, petitioner and the child would be able to communicate by way of letters, telephone contact and potentially through visitation at the prison. Matter of Stephen N. v Amanda O., 2019 NY Slip Op 04510, Third Dept 6-6-19

INDIAN LAW, ADOPTION.

MOTHER DID NOT HAVE STANDING TO BRING AN ACTION TO VACATE THE ADOPTION OF HER CHILD BY HER FORMER HUSBAND PURSUANT TO THE INDIAN CHILD WELFARE ACT (ICWA) BECAUSE THE ACT ONLY APPLIES TO CHILDREN REMOVED FROM A PARENT'S CUSTODY (SECOND DEPT).

The Second Department determined mother did not have standing to bring an action pursuant to the Indian Child Welfare Act (ICWA) to vacate an order of adoption in favor of her former husband. Mother alleged the adoption was not accomplished in compliance with the ICWA. The ICWA only applies to a parent from whose custody the child was removed and the child had not been removed from mother's custody:

… [A]lthough the adoption proceeding involved the voluntary termination of the birth father's parental rights to the subject child, the plain language of both 25 USC § 1914 and 25 CFR 23.137(a) is clear that only the child, the parent or Indian custodian from whose custody the child has been removed, and the Indian child's tribe have standing to allege a violation of sections 1911, 1912, or 1913 of the ICWA . Since the mother does not fall in… to any of those categories, she lacked standing to allege a violation of sections 1911, 1912, or 1913 of the ICWA … . "[T]he language of [section] 1914 … limits standing to challenge state-law terminations of parental right to parents from whose custody such child was removed'" … . Matter of Connor (Mariann D.–Jacob D.), 2019 NY Slip Op 05979, Second Dept 7-31-19

INDIAN LAW, NEGLECT.

FAMILY COURT PROPERLY TRANSFERRED THIS DERIVATIVE NEGLECT PROCEEDING TO THE UNKECHAUG INDIAN NATION PURSUANT TO THE INDIAN CHILD WELFARE ACT (ICWA) (SECOND DEPT).

The Second Department determined Family Court properly transferred the derivative neglect proceeding to the Unkechaug Indian Nation pursuant to the Indian Child Welfare Act (ICWA):

The ICWA provides that "the Indian custodian of the child and the Indian child's tribe shall have a right to intervene at any point" in a proceeding to which the ICWA applies … . Congress authorized the Department of the Interior, Bureau of Interior Indian Affairs (hereinafter the DOI), to promulgate rules and regulations "as may

be necessary to carry out the provisions of [ICWA]" … . The current regulations define the term "child-custody proceeding" as "any action, other than an emergency proceeding, that may culminate in" foster-care placement, termination of parental rights, preadoptive placement, and adoptive placement … . "An action that may culminate in one of these four outcomes is considered a separate child-custody proceeding from an action that may culminate in a different one of these four outcomes" … . The DOI explained that "[t]he final rule uses the phrase may culminate in one of the following outcomes,' rather than the less precise phrase involves,' used in the draft rule, in order to make clear that ICWA requirements would apply to an action that may result in one of the placement outcomes, even if it ultimately does not. For example, ICWA would apply to an action where a court was considering a foster-care placement of a child, but ultimately decided to return the child to his parents. Thus, even though the action did not result in a foster-care placement, it may have culminated in such a placement and, therefore, should be considered a child-custody proceeding' under the statute" … . Matter of Dupree M. (Samantha Q.), 2019 NY Slip Op 02523, Second Dept 4-3-19

JUDGES, SUA SPONTE, DIVORCE.

JUDGE SHOULD NOT HAVE, SUA SPONTE, DISMISSED THIS DIVORCE ACTION ON A GROUND NOT RAISED BY THE PARTIES (SECOND DEPT).

The Second Department determined Supreme Court should not have dismissed the complaint in this divorce action, sua sponte, on a ground not raised by the parties:

The Supreme Court should not have granted the defendant's motion for summary judgment on a ground not raised in the defendant's motion … . "[O]n a motion for summary judgment, the court is limited to the issues or defenses that are the subject of the motion before the court"… . The plaintiff had no opportunity to address the issue regarding the allegedly defective summons, and this "lack of notice and opportunity to be heard implicates the fundamental issue of fairness that is the cornerstone of due process" … .

Since the Supreme Court did not consider the merits of the motion and cross motion, the matter must be remitted to the Supreme Court, Richmond County, for a determination of the motion and cross motion on the merits … . Patel v Sharma, 2019 NY Slip Op 00452, Second Dept 1-23-19

JUDGMENTS, DIVORCE, DEBTOR-CREDITOR, APPEALS.

ALTHOUGH THE JUDGMENTS WERE DOCKETED, THE DEBTOR'S NAME WAS MISSPELLED RENDERING THE LIEN INVALID; ALTHOUGH THE ISSUE WAS NOT RAISED BELOW, THE APPELLATE COURT CAN CONSIDER AN ISSUE OF LAW WHICH COULD NOT BE AVOIDED IF IT HAD BEEN RAISED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the judgment creditor, Fischer, was not entitled to priority over the respondent wife, Mayrav, who had been awarded real property owned with her husband, Julius, in divorce proceedings. Although Fisher's judgments were docketed, Julius's surname was spelled incorrectly, rendering the lien invalid. Although this issue had not been raised below, the appellate court can address it because it is a question of law which could not have been avoided if it had been raised:

"CPLR 5203(a) gives priority to a judgment creditor over subsequent transferees with regard to the debtor's real property in a county where the judgment has been docketed with the clerk of that county" (… see CPLR 5203[a]). Pursuant to CPLR 5018(c), a judgment is docketed when the clerk makes an entry "under the surname of the judgment debtor . . . consist[ing] of . . . the name and last known address of [the] judgment debtor" … . "A judgment is not docketed against any particular property, but solely against a name" … . " Once docketed, a judgment becomes a lien on the real property of the debtor in that county'" … .

… [I]t is undisputed that when the judgments were docketed, Julius's surname was spelled incorrectly. Because the judgments were not docketed under the correct surname, no valid lien against Julius's interest in the subject property was created … . Therefore, Fischer was not entitled to a determination that his interest in the subject property was superior to that of Mayrav, whose interest "vest[ed] upon the judgment of divorce" … . Although Mayrav failed to argue in the Supreme Court that Fischer did not have a valid lien on the subject property in light of the undisputed fact that Julius's surname was misspelled, that issue can be raised for the first time on appeal because it is one of law which appears on the face of the record and could not have been avoided if it had been raised at the proper juncture … . Accordingly, that branch of the petition which sought a determination that Fischer's interest in the subject property was superior to that of Mayrav should have been denied. Matter of Fischer v Chabbott, 2019 NY Slip Op 09002, Second Dept 12-18-19

JUDGMENTS, DIVORCE, DEBTOR-CREDITOR.

THE DIVISION OF MARITAL PROPERTY PURSUANT TO A DIVORCE DOES NOT RENDER ONE FORMER SPOUSE THE JUDGMENT DEBTOR OF THE OTHER, THEREFORE A JUDGMENT DEBTOR WHO DOCKETS A JUDGMENT DOES NOT HAVE PRIORITY PURSUANT TO CPLR 5203 OVER A JUDGMENT OF DIVORCE WHICH HAS NOT BEEN DOCKETED (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Wilson, determined the 2015 judgment of divorce which awarded the wife, Andrea, a percentage of marital property, a home worth $5 million, did not make Andrea a judgment creditor such that the failure to docket the judgment of divorce gave priority to a judgment debtor, Pangea, who had docketed a 2016 judgment:

The United States Court of Appeals for the Second Circuit has certified the following question to us: "If an entered divorce judgment grants a spouse an interest in real property pursuant to Domestic Relations Law § 236, and the spouse does not docket the divorce judgment in the county where the property is located, is the spouse's interest subject to attachment by a subsequent judgment creditor that has docketed its judgment and seeks to execute against the property?" We answer that question in the negative. * * *

Pangea's conception of Andrea as judgment creditor is utterly incompatible with our legislature's dramatic revision of the Domestic Relations Law in 1980. By incorporating the concept of "marital property" into Domestic Relations Law § 236, "the New York Legislature deliberately went beyond traditional property concepts when it formulated the Equitable Distribution Law" … . … Marital assets are not owned by one spouse or another, and the dissolution of a marriage involving the division of marital assets does not render one ex-spouse the creditor of another. Courts are empowered "not only to make an equitable disposition of marital property between [the spouses], but also to make a distributive award in lieu of or to supplement, facilitate or effectuate the division or distribution of property where authorized in a matrimonial action, and payable in a lump sum or over a period of time" … . …

Andrea therefore cannot properly be considered a judgment creditor of John [her ex-husband]. Thus, CPLR 5203 (a), by its plain terms, has no application here, and Pangea can claim no priority. Pangea Capital Mgt., LLC v Lakian, 2019 NY Slip Op 05059, CtApp 6-25-19

JUDGMENTS, DIVORCE.

SUPREME COURT SHOULD NOT HAVE MODIFIED THE PARENTAL ACCESS PROVISIONS OF THE JUDGMENT OF DIVORCE WITHOUT HOLDING A HEARING (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the parental access provisions of the judgment of divorce should not have been modified without holding a hearing:

"A party seeking a change in [parental access] or custody is not automatically entitled to a hearing, but must make an evidentiary showing sufficient to warrant a hearing" … . As a general matter, custody and parental access determinations should only be rendered after a full hearing … .However, this general right is not absolute … , and a hearing "is not necessary where the undisputed facts before the court are sufficient, in and of themselves, to support a modification of custody … .

The plaintiff made the necessary showing entitling him to a hearing regarding that branch of his motion which was to modify the parental access provisions of the judgment of divorce with respect to the child … . The record shows that there were disputed factual issues regarding the child's best interests such that a hearing on modification of parental access was required … . Further, "[a] decision regarding child custody and parental access should be based on admissible evidence" … . Here, in making its determination, the Supreme Court relied solely on information provided at court conferences, and the hearsay statements and conclusions of the family specialist, whose opinions and credibility were untested by either party … . Katsoris v Katsoris, 2019 NY Slip Op 08833, Second Dept 12-11-19

JURISDICTION, CUSTODY.

NEW YORK DID NOT HAVE SUBJECT MATTER JURISDICTION OVER A CUSTODY MATTER BECAUSE THE CHILD HAD NOT LIVED IN NEW YORK FOR SIX MONTHS AT THE TIME THE PROCEEDINGS WERE COMMENCED, NEW JERSEY STILL HAD JURISDICTION AT THAT TIME BECAUSE THE CHILD HAD BEEN REMOVED FROM NEW JERSEY LESS THAN SIX MONTHS BEFORE THE NEW YORK PROCEEDINGS WERE COMMENCED (FOURTH DEPT).

The Fourth Department, in a full-fledged opinion by Justice NeMoyer, reversing Family Court, determined that New York did not have subject matter jurisdiction over a child custody proceeding. At the time the proceeding was brought the child had not lived in New York for six months and New Jersey still had jurisdiction. The Fourth Department went through the history of jurisdictional issues in custody matters and through each of the grounds for jurisdiction codified in the Domestic Relations Law:

Instead of claiming home state jurisdiction under Domestic Relations Law § 76 (1) (a), the mother essentially argues that the court had subject matter jurisdiction over this proceeding under the safety net provision of section 76 (1) (d), which confers jurisdiction to make custody determinations when, insofar as relevant here, "no court of any other state would have jurisdiction under the criteria specified in [section 76 (1)] (a)." …

We reject the mother's reliance on section 76 (1) (d). Under the special UCCJEA [Uniform Child Custody Jurisdiction and Enforcement Act] definition of "home state" applicable to infants under six months old (Domestic Relations Law § 75-a [7]; NJ Stat Ann § 2A:34-54), New Jersey was the child's "home state" between the date of his birth (February 18, 2015) and the alleged date of his move to New York (July 15, 2015) … . Because the UCCJEA confers continuing jurisdiction on the state that "was the home state of the child within six months before the commencement of the proceeding" if a parent lives in that state without the child (Domestic Relations Law § 76 [1] [a]; NJ Stat Ann § 2A:34-65 [a] [1]), it follows that New Jersey retained continuing jurisdiction of this matter until January 15, 2016, i.e., six months after the child's alleged move to New York on July 15, 2015 and one week after the instant proceeding was commenced on January 8, 2016 … . Thus, New York lacked jurisdiction under section 76 (1) (d) because New Jersey could have exercised jurisdiction under the criteria of section 76 (1) (a) on the date of this proceeding's commencement … . Matter of Nemes v Tutino, 2019 NY Slip Op 03236, Fourth Dept 4-26-19

JURISDICTION, DIVORCE.

NEW YORK DID NOT HAVE JURISDICTION OVER FATHER, A KENTUCKY RESIDENT, IN THIS DIVORCE ACTION: THE COUPLE HAD NOT LIVED TOGETHER IN NEW YORK STATE FOR 23 YEARS (THIRD DEPT).

The Third Department, reversing Supreme Court, determined New York did not have jurisdiction over father, a Kentucky resident, in this divorce action. The couple had last lived in New York in 1995 and had resided in Kentucky from 2003 to 2015:

Assuming, without deciding, that the wife established one of the predicates for jurisdiction under CPLR 302 (b), we find that the quality and nature of the husband's activities in New York were such that it would be unreasonable and unfair to require him to defend an action in this state. Although the parties married in New York in 1991 and resided here until 1995, they have not resided together in this state in over 23 years. From 2003 until 2015, the parties resided together in Kentucky, where, at the time of commencement of this action, the husband was employed as a university professor and the parties owned real property. With the husband's consent, the wife moved to New York with the parties' son in August 2015 and, as vaguely asserted by the wife, the husband has visited them in New York. The parties have not rented or purchased a home in New York. Rather, the wife and the son have lived rent-free with the wife's parents, with the husband providing additional financial support. In our view, the husband's contacts with New York are insufficient to warrant the exercise of personal jurisdiction over him … .Accordingly, Supreme Court should have granted the husband's motion to dismiss the complaint for lack of personal jurisdiction. Crosby v Crosby, 2019 NY Slip Op 08469, Third Dept 11-21-19

JURISDICTION, FORUM NON CONVENIENS, PARENTAL ACCESS.

FAMILY COURT SHOULD NOT HAVE RELINQUISHED JURISDICTION WITHOUT CONSIDERING THE INCONVENIENT FORUM FACTORS MANDATED BY THE DOMESTIC RELATIONS LAW; MOTHER HAD RELOCATED TO FLORIDA WITH THE CHILDREN AND FATHER WAS SEEKING TELEPHONE AND ELECTRONIC CONTACT WITH THE CHILDREN (THIRD DEPT).

The Third Department, reversing Family Court, determined Family Court should not have relinquished jurisdiction without considering the factors required by statute before finding New York to be an inconvenient forum. Mother had relocated to Florida with the children and father brought a petition and an order to show cause alleging mother refused to allow telephone and electronic contact with the children:

… [M]other's counsel made a request for dismissal of the petition on jurisdictional grounds pursuant to the Uniform Child Custody Jurisdiction and Enforcement Act (see Domestic Relations Law art 5-A [hereinafter UCCJEA]). The father opposed this request, advising that he had not received the notice of limited appearance and did not know that jurisdiction would be contested at the initial appearance. Following a brief discussion with counsel, Family Court granted the mother's request, dismissed the petition, denied the relief sought in the order to show cause and directed all further proceedings to take place in Florida. The father appeals.

Family Court erred in summarily relinquishing jurisdiction. As the court acknowledged, it had exclusive continuing jurisdiction over the matter pursuant to the UCCJEA … . Although a court may decline to exercise such jurisdiction upon finding that New York is an inconvenient forum and another state is a more appropriate forum … , such a determination must be made in accord with the statutory directives established within Domestic Relations Law § 76-f. The statutory requirements were not met here. Matter of Cody RR. v Alana SS., 2019 NY Slip Op 07471, Third Dept 10-17-19

JURISDICTION, SEPARATION AGREEMENTS, MAINTENANCE.

FAMILY COURT EXCEEDED ITS JURISDICTION WHEN IT SUSPENDED MAINTENANCE PAYMENTS; THE PAYMENTS WERE GOVERNED BY THE PARTIES' SEPARATION AGREEMENT, AN INDEPENDENT CONTRACT (FOURTH DEPT).

The Fourth Department, reversing (modifying) Family Court, determined Family Court exceeded its jurisdiction in suspending maintenance payments to mother because the maintenance was provided for in the parties' separation agreement:

… [W]e agree with the mother and the AFC [attorney for the child] that the court exceeded its jurisdiction in suspending maintenance payments to the mother inasmuch as the parties' separation agreement setting forth that obligation is an independent contract … . Family Court is a court of limited jurisdiction and cannot exercise powers beyond those granted to it by statute … , and "[i]t generally has no subject matter jurisdiction to reform, set aside or modify the terms of a valid separation agreement"… . We therefore modify the order by vacating the tenth provision of the second ordering paragraph insofar as it relates to the suspension of maintenance payments, and we remit the matter to Family Court for a determination of the amount of any maintenance arrears … . Matter of Krier v Krier, 2019 NY Slip Op 09129, Fourth Dept 12-20-19

JURISDICTION, SUPPORT.

BECAUSE NO PETITION HAD BEEN FILED IN THIS SUPPORT ENFORCEMENT PROCEEDING, FAMILY COURT DID NOT HAVE SUBJECT MATTER JURISDICTION, A DEFECT THAT MAY BE BROUGHT UP AT ANY TIME (THIRD DEPT).

The Third Department determined Family Court did not have subject matter jurisdiction over the support enforcement proceeding because no petition had been filed. The support magistrate had erroneously treated a request by Florida to register the Florida support judgment in New York as an "enforcement petition:"

The Uniform Interstate Family Support Act (see Family Ct Act art 5-B) provides that "[a] registered support order issued in another state . . . is enforceable in the same manner and is subject to the same procedures as an

order issued by a tribunal of this state" (Family Ct Act § 580-603 [b]). In New York, proceedings for the violation of a support order "shall be originated by the filing of a petition containing an allegation that the respondent has failed to obey a lawful [support] order," and Family Court lacks subject matter jurisdiction to determine a violation claim without that petition (Family Ct Act § 453 …). DSS was free to, and eventually did, file a petition alleging that the father had failed to comply with the support provisions contained in the 2014 judgment (see Family Ct Act §§ 453 [a]; 580-603 [b]). This proceeding did not arise out of that petition, however, and was not rendered viable by its filing … . Family Court accordingly lacked subject matter jurisdiction to render the appealed-from order, and "the claim that a court lacked subject matter jurisdiction 'may be raised at any time and may not be waived'" … . Matter of Pudvah v Pudvah, 2019 NY Slip Op 03414, Third Dept 5-2-19

JURISDICTION, VISITATION.

PETITION WAS PROPERLY DISMISSED BECAUSE IT DID NOT DEMONSTRATE SUBJECT MATTER JURISDICTION ON ITS FACE, BUT BECAUSE THE MERITS WERE NOT ADDRESSED THE PETITION SHOULD NOT HAVE BEEN DISMISSED WITH PREJUDICE (THIRD DEPT).

The Third Department determined Family Court properly dismissed a petition because there was no indication that New York had jurisdiction, the petition should not have been dismissed with prejudice because the merits were not reached:

Upon review of the petition, Family Court, sua sponte, found that the children resided in Georgia and dismissed the petition with prejudice for lack of subject matter jurisdiction. Petitioner appeals.

In his petition, petitioner alleged that respondent is an aunt of the children who obtained temporary guardianship of them following the mother's death and, further, that the children reside with respondent in Georgia; notably, however, he did not allege that a New York court had made a prior custody determination involving the children, nor did he allege any circumstances involving the children that would support a specific basis for jurisdiction. Thus, the petition fails to allege any facts that would provide New York with jurisdiction to make the determination in this case … and, therefore, Family Court did not err by dismissing this proceeding without a hearing … . However, inasmuch as Family Court dismissed the proceeding for lack of subject matter jurisdiction based solely upon a review of petitioner's sparse pro se petition and without reaching the merits, it erred in dismissing the proceeding with prejudice … . Matter of David EE. v Laquanna FF., 2019 NY Slip Op 00336, Third Dept 1-17-19

JURISDICTION, CUSTODY, ATTORNEYS, RIGHT TO COUNSEL.

FAMILY COURT DID NOT HAVE A SUFFICIENT BASIS, I.E. STATEMENTS BY A CASEWORKER AND THE ATTORNEY FOR THE CHILD, TO DETERMINE NEW YORK HAD BEEN DIVESTED OF JURISDICTION IN THIS CUSTODY CASE; MOTHER WAS NOT ADEQUATELY INFORMED OF HER RIGHT TO COUNSEL (SECOND DEPT).

The Second Department, reversing Supreme Court, determined that the judges should not have dismissed mother's petition to modify custody solely on the basis of statements made by a caseworker and the attorney for the child indicating the child lived in New Jersey. The Second Department further found that Family Court did not adequately inform mother of the rights she was giving up by representing herself:

Pursuant to the Uniform Child Custody Jurisdiction and Enforcement Act, codified at article 5-A of the Domestic Relations Law, a court of this state which has made an initial custody determination has exclusive, continuing jurisdiction over that determination until it finds that it should relinquish that jurisdiction because "neither the child" nor "the child and one parent" have a "significant connection" with New York, and "substantial evidence is no longer available in this state concerning the child's care, protection, training, and personal relationships" (Domestic Relations Law § 76-a[1][a] …).

Here, it is undisputed that the initial custody determination was rendered in New York. Nothing on the record before the Family Court established that it had been divested of exclusive, continuing jurisdiction pursuant to Domestic Relations Law § 76-a(1). * * *

Moreover, the parent of any child seeking custody in any proceeding before the Family Court has the right to the assistance of counsel (see Family Ct Act § 262[a][v]). A party may waive that right and proceed without counsel provided he or she makes a knowing, voluntary, and intelligent waiver of the right to counsel … . In order to determine whether a party has validly waived the right to counsel, a court must conduct a "searching inquiry" to ensure that the waiver has been made knowingly, voluntarily, and intelligently … . A waiver is valid where the party was aware of the dangers and disadvantages of proceeding without counsel … . Here, the Family Court did not conduct a sufficiently searching inquiry to ensure that the mother's waiver of her right to counsel was knowingly, voluntarily, and intelligently made … . Matter of Means v Miller, 2019 NY Slip Op 06088, Second Dept 8-7-19

JUVENILE DELINQUENCY, APPEALS.

RESPONDENT, WHO HAD BEEN ADJUDICATED A JUVENILE DELINQUENT, WAS NOT GIVEN SUFFICIENT INFORMATION BEFORE ADMITTING TO A PROBATION VIOLATION, THE PETITION WAS DISMISSED; THE ERROR DID NOT REQUIRE PRESERVATION AND THE APPEAL WAS NOT MOOT BECAUSE OF THE COLLATERAL CONSEQUENCES OF A JUVENILE DELINQUENCY ADJUDICATION (THIRD DEPT).

The Third Department, dismissing the petition, determined that respondent, who had been adjudicated a juvenile delinquent, was not provided sufficient information before admitting to a probation violation. Because of the collateral consequences of a "juvenile delinquent" adjudication, the appeal is not moot, even though the period of respondent's custody and care under the Office of Children and Family Services had expired. In addition, the error did not required preservation:

Initially, we note that preservation of this claim was not required … . Family Ct Act § 321.3 (1) requires a court to advise a respondent of his or her right to a fact-finding hearing and to question both the respondent and his or her parent, if present, as to whether the respondent committed the act contained in the admission, whether the respondent is voluntarily waiving his or her right to a fact-finding hearing, and whether the respondent is aware of the possible specific dispositional orders … . The May 2018 allocution did not meet these statutory requirements. Although Family Court did advise respondent, to some extent, regarding his rights, the failure to meet the statutory mandates rendered the allocution inadequate. Critically, although respondent's mother was present, the court failed to question her regarding respondent's waiver of the fact-finding hearing … or about his failure to attend counseling. Instead, respondent was merely asked whether he had sufficient time to speak to his parents about the allocution … . Moreover, the court did not determine whether respondent and his mother understood the possible specific dispositional orders that might result from his allocution … . Although it was stated that placement outside the home was an available option, the court did not "ascertain whether [respondent] and his parent[] were aware of the full extent of such a disposition" … . Matter of Elijah X., 2019 NY Slip Op 07464, Third Dept 10-17-19

JUVENILE DELINQUENCY.

13-YEAR-OLD WHO, AS A FIRST OFFENSE, PARTICIPATED IN AN ASSAULT (USING A MINI OR SOUVENIR BASEBALL BAT) OF A COUPLE BY HER FATHER AND HER FATHER'S GIRLFRIEND PROPERLY ADJUDICATED A JUVENILE DELINQUENT AND SENTENCED TO A 12-MONTH PERIOD OF PROBATION WITH MENTAL HEALTH SERVICES AND SCHOOL MONITORING, STRONG TWO-JUSTICE DISSENT (FIRST DEPT).

The First Department, over an extensive two-justice dissent, determined the juvenile delinquent adjudication, the 12-month probation period, mental health services and school monitoring were appropriate. The dissenters argued an adjournment in contemplation of dismissal (ACD) was the appropriate disposition for this first offense. Appellant was 13 when her father, her father's girlfriend and an unidentified man assaulted a couple. The father was panhandling in the subway and the couple had allegedly refuse to give the father money. Appellant apparently participated in the assault by striking the woman with a mini or souvenir baseball bat:

Although this was appellant's first arrest, she was a participant in an unprovoked violent attack on two strangers. There is no dispute that appellant's father instigated the attack. In the ensuing melee, appellant repeatedly struck the female complainant with a mini or souvenir baseball bat, while the father's girlfriend continuously punched the complainant. Appellant continued the attack by joining her father and his girlfriend in chasing the two complainants, who were able to seek refuge in a restaurant where they called 911. After the police arrived, the complainants were transported by ambulance to the hospital to be treated for their injuries. The female complainant suffered from anxiety after the attack and continuing to the time of trial, and intended to relocate to another borough as a result of the attack. The dissent parses the incident focusing on the injuries inflicted by appellant, but as part of a group assault she is responsible for the consequences of the attack.

In addition to the seriousness of the offense, the available information supported the conclusions that appellant would benefit from engagement in mental health services and monitoring with regard to her school attendance and her academic performance and that she was in need of a longer period of supervision than the six-month period that an adjournment in contemplation of dismissal would have provided … . We find no abuse of discretion in the decision of the court, which heard the evidence and observed appellant throughout the proceedings. We note that appellant may seek relief from the juvenile delinquent adjudication when she reaches the age of 17 … . Matter of A.V., 2019 NY Slip Op 04996, First Dept 6-20-19

JUVENILE DELINQUENCY.

ALLOCUTION CAST DOUBT ABOUT GUILT IN THIS JUVENILE DELINQUENCY PROCEEDING, AN EXCEPTION TO THE PRESERVATION REQUIREMENT FOR APPEAL (SECOND DEPT).

The Second Department, reversing Family Court, determined that the plea allocution was defective in this juvenile delinquency proceeding. The allocution did not support the elements of the charged offense (grand larceny fourth degree if committed by an adult) and the juvenile's foster care planner was not questioned about the offense, a defect which cannot be waived. Although no motion to withdraw was made, the allocution cast significant doubt about guilt which constitutes an exception to the the preservation requirement for appeal:

The appellant did not move to withdraw his admission on the grounds raised on appeal … . However, this is one of the " rare case[s] . . . where the [appellant's] recitation of the facts underlying the crime pleaded to clearly casts significant doubt upon the [appellant's] guilt,' [which] fall[s] into the narrow exception to the preservation requirement"… . In addition, the appellant was not required to preserve his contention that the Family Court erred in failing to obtain an allocution from the foster care case planner, since the statutory requirement of such an allocution may not be waived … . * * *

The Family Court did not elicit any additional details concerning the incident in order to clarify how the appellant came to be in possession of the $5 such that it could be concluded that he took it from the boy's person within the meaning of Penal Law § 155.30(5). Thus, the court "did not elicit a sufficient factual basis to support [the appellant's] admission'" … .

In addition, the appellant's admission was defective since his foster care case planner was present, but the Family Court failed to ascertain through allocution of the foster care case planner, as a person legally responsible for the appellant's care, "that (a) [the appellant] committed the act or acts to which he [was] entering an admission, (b) he [was] voluntarily waiving his right to a fact-finding hearing, and (c) he [was] aware of the possible specific dispositional orders" … . Matter of Richard S., 2019 NY Slip Op 00130, Second Dept 1-9-19

JUVENILE DELINQUENCY.

FAMILY COURT ABUSED ITS DISCRETION BY DENYING THE APPLICATION FOR AN ADJOURNMENT IN CONTEMPLATION OF DISMISSAL IN THIS JUVENILE DELINQUENCY PROCEEDING (SECOND DEPT).

The Second Department, reversing Family Court, determined the court abused its discretion by denying the application for an adjournment in contemplation of dismissal in this juvenile delinquency proceeding:

… [T]he Family Court improvidently exercised its discretion in denying the appellant's application pursuant to Family Court Act § 315.3 for an adjournment in contemplation of dismissal. This proceeding constituted the appellant's first contact with the court system, he took responsibility for his actions, and the record demonstrates that he learned from his mistakes. During the pendency of the proceeding, the appellant readily complied with the supervision imposed by the court and his father's supervision in the home, and he garnered praise from the Probation Department and school officials. Under the circumstances, including the appellant's commendable academic and school attendance record, his mentoring of fellow students at his school, and the minimal risk that he poses to the community, an adjournment in contemplation of dismissal was warranted … . Matter of Nijuel J., 2019 NY Slip Op 00876, Second Dept 2-6-19

JUVENILE DELINQUENCY.

FAMILY COURT FAILED TO COMPLY WITH THE FAMILY COURT ACT AND PENAL LAW REQUIREMENTS IN THIS JUVENILE DELINQUENCY PROCEEDING, PETITION DISMISSED (SECOND DEPT).

The Second Department, reversing Family Court in this juvenile delinquency proceeding, determined the court failed to comply with the notice provisions and the plea allocution requirements of the Family Court Act, as well as the proof requirements of the Penal Law. It was alleged the appellant either recklessly or intentionally broke a window:

Although the Family Court, Ulster County, advised the appellant of her rights prior to accepting an admission, the court failed to obtain an allocution from a parent or a person legally responsible for the appellant with regard to their understanding of any rights the appellant may be waiving as a result of her admission (see Family Ct Act

§ 321.3[1] …). The appellant appeared telephonically even though there is no provision under article 3 of the Family Court Act authorizing the appearance by telephone of a minor in a juvenile delinquency proceeding, and the only persons in court that day were the appellant's attorney and the attorney representing the Ulster County Attorney's Office. …

Since the provisions of Family Court Act § 321.3 may not be waived, and the record does not support the determination of the court that a "reasonable and substantial effort" was made to notify the appellant's mother or guardian about the … proceeding … .

… [T]he plea allocution also failed to comport with the sufficiency requirements of Family Court Act § 321.3(1), which mandates that the court ascertain through allocution of the appellant that she "committed the act or acts to which [s]he is entering an admission" … . The appellant's allocution to breaking a window failed to establish the elements of criminal mischief in the fourth degree under subdivision 3 of Penal Law § 145.00, which requires evidence that the appellant "[r]ecklessly damage[d] property of another person in an amount exceeding two hundred and fifty dollars" … The petition did not allege any monetary amount as to the cost of the damage to the window, and no evidence as to the value of the window was adduced at the proceeding … . In fact, the invoice attached to the petition indicates that the cost of replacing the window, including labor, totaled $225, an amount less than the requisite jurisdictional predicate.

Even if the petition was liberally construed to have charged the appellant with the intentional conduct subdivision of criminal mischief, Penal Law § 145.00(1), rather than the subdivision that was charged, which pertains to reckless conduct … , dismissal of the petition is warranted … . The appellant's allocution to breaking the window failed to show that she intentionally broke the window … . Matter of P., 2019 NY Slip Op 06497, Second Dept 9-11-19

JUVENILE DELINQUENCY.

MOTHER WAS NOT ADVISED OF THE RIGHTS HER SON WAS GIVING UP BY ADMITTING TO THE OFFENSE IN THIS JUVENILE DELINQUENCY PROCEEDING, NEW FACT-FINDING ORDERED (FIRST DEPT).

The First Department, reversing Family Court in this juvenile delinquency proceeding, determined appellant's mother was not advised of the rights appellant was giving up by admitting to the offense:

Family Court … adjudicated appellant a juvenile delinquent … upon his admission that he committed an act that, if committed by an adult, would constitute criminal facilitation in the fourth degree, and placed him on probation for a period of 12 months … .

As the presentment agency concedes, appellant's admission was defective because the court's allocution of appellant's mother failed to advise her of the rights appellant was waiving as a result of his admission and the dispositional consequences of appellant's admission (see Family Ct Act § 321.3[1]). However, because appellant violated his probation, which was extended and remains in effect, we agree with the presentment agency that the petition should not be dismissed, and that the matter should be remanded for a new fact-finding determination on both petitions covered by the disposition … . Matter of Kwesi P., 2019 NY Slip Op 08359, First Dept 11-19-19

MALTREATMENT.

EVIDENCE NOT SUFFICIENT TO SUPPORT 'INDICATED' CHILD MALTREATMENT REPORT, DETERMINATION ANNULLED AND REPORT AMENDED TO 'UNFOUNDED' AND SEALED (FOURTH DEPT).

The Fourth Department determined the evidence of child maltreatment was insufficient and the "indicated" report maintained in the New York State Central Register of Child Abuse and Maltreatment should be amended to unfounded and sealed:

At the fair hearing, DSS had the burden of establishing by a fair preponderance of the evidence that petitioner maltreated the child by the use of excessive corporal punishment (see Social Services Law § 424-a [2] [d]), and

that such corporal punishment impaired or was in imminent danger of impairing the child's physical, mental, or emotional condition (see Social Services Law § 412 [2] [a]; Family Ct Act § 1012 [f] [i]). Impairment of mental or emotional condition is defined as "a state of substantially diminished psychological or intellectual functioning" (Family Ct Act § 1012 [h]). Physical impairment is defined as " a state of substantially diminished physical growth, freedom from disease, and physical functioning' " … . …

Other than a general reference in DSS records that the child was "upset" by the incident, DSS did not present evidence that the incident physically, mentally, or emotionally impacted the 10-year-old child. The marks observed on the child's back, i.e., the sole marks attributed to petitioner by a preponderance of the evidence, apparently resolved the day after petitioner struck him, and before the DSS case worker examined the child. Under the circumstances here, the evidence is insufficient to establish that the child suffered the requisite impairment of his physical, mental, or emotional well-being to support a finding of maltreatment. Thus, the determination that petitioner placed the child in imminent risk of physical or emotional impairment is not supported by substantial evidence, and we therefore annul the determination and grant the petition … . Matter of Jonathan L. v Poole, 2019 NY Slip Op 01908, Fourth Dept 3-15-19

NAME CHANGE, CHILD'S HYPHENATED SURNAME.

CHILD'S NAME CHANGE TO THE HYPHENATED SURNAMES OF BOTH PARENTS, WHO ARE NOT MARRIED, AFFIRMED (THIRD DEPT).

The Third Department, over a two-justice dissent, determined the petition to change the child's last name was properly granted to the extent that the hyphenated surnames of both parents, who are not married, were assigned to the child:

The parties have joint legal custody and the mother has always had primary physical custody of the child. Because he was overseas on active military duty, the father was not present at the time of the child's birth. Prior to the child's birth, however, the father had strongly expressed to the mother that the child should have his surname. Nevertheless, the mother gave the child her surname, Bafumo. The father commenced this proceeding in November 2016 under Civil Rights Law article 6 to change the surname of the child from Bafumo to Weinhofer, his surname. …

A petition to change the surname of a child shall be granted as long as the opposing party does not have a reasonable objection to the proposed name change and "the interests of the [child] will be substantially promoted

by the change" (Civil Rights Law § 63). Although it appears that Supreme Court rendered its determination based solely on the second element — whether the child's interests would be substantially promoted by the name change — given that the record is sufficiently developed as to the first element — whether the mother's objections to the father's petition were reasonable — it is unnecessary to remit the matter for a new hearing … . That said, we find that the mother's objections were not reasonable. Matter of Bafumo, 2019 NY Slip Op 02767, Third Dept 4-10-19

NEGLECT, ABANDONMENT.

THE EVIDENCE DID NOT SUPPORT THE FINDING THAT FATHER ABANDONED THE CHILD, THE PERMANENT NEGLECT FINDING, HOWEVER, WAS SUPPORTED BY THE EVIDENCE (FOURTH DEPT).

The Fourth Department, reversing (modifying) Family Court determined the evidence did not support the finding that father abandoned the child, but the evidence did support a finding of permanent neglect. The criteria for permanent neglect, not summarized here, are described in some depth in the decision. The matter was sent back for a dispositional hearing or a waiver of the hearing:

"An order terminating parental rights may be entered upon the ground that a child's parent abandoned such child for the period of six months immediately prior to the date on which the petition is filed in the court' " … . A child is deemed abandoned "if the parent evinces an intent to forego his or her parental rights and obligations as manifested by his or her failure to visit the child and communicate with the child or agency, although able to do so and not prevented or discouraged from doing so by the agency' " … . "Parents are presumed able to visit and communicate with their children and, although incarcerated parents may be unable to visit, they are still presumed able to communicate with their children absent proof to the contrary" … .

Here, the record establishes that the father—following up on a prior attempt to establish paternity that he had initially failed to adequately pursue—definitively established his paternity, while incarcerated, less than two months into the six-month period preceding the filing of the petition … . Thereafter, throughout the relevant period, the father initiated communications with the child's caseworker; sent the caseworker at least four letters inquiring about the child and included a card and drawing for the child in at least one of those letters; and participated in a service plan review. We conclude that the father's contacts "were not minimal, sporadic, or insubstantial" … . Matter of Jarrett P. (Jeremy P.), 2019 NY Slip Op 04609. Second Dept 6-7-19

NEGLECT, ABUSE, TEMPORARY REMOVAL.

MOTHER'S APPLICATION FOR RETURN OF THE CHILD AFTER TEMPORARY REMOVAL OF THE CHILD IN THIS DERIVATIVE NEGLECT AND ABUSE PROCEEDING SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Family Court, determined that mother's application for return of the child who had been temporarily removed from the home should not have been granted:

… [T]he Family Court's determination granting the mother's application for the return of the subject child lacked a sound and substantial basis in the record. At the hearing, the mother admitted to hitting Sincere G. with an extension cord, leaving welts on his skin, because he would not clean his room and she wanted to get "control" over him. Although the mother testified that she only hit Sincere G. on his arms and legs, photographs admitted into evidence at the hearing clearly show welts across his chest as well. Since that incident, and as of the time of the hearing, the mother had failed to sufficiently address the mental health issues that led to the incident … . Accordingly, we cannot agree that the return of the subject child to the mother's custody, notwithstanding the conditions that were imposed, would not present an imminent risk to the child's life or health. The mother's application for the return of the child should have been denied, and we remit the matter to the Family Court, Kings County, for further proceedings on the petition. Pending those further proceedings, the subject child shall remain in the care and custody of the father, with supervised parental access to the mother, pursuant to the terms and conditions of an order of the Family Court … . Matter of Tatih E. (Keisha T.), 2019 NY Slip Op 00434, Second Dept 1-23-19

NEGLECT, ABUSE.

APPELLANT, A COUSIN, WAS NOT THE FUNCTIONAL EQUIVALENT OF A PARENT AND WAS NOT, THEREFORE, A PROPER RESPONDENT IN THIS SEXUAL ABUSE/NEGLECT ARTICLE 10 PROCEEDING (SECOND DEPT).

The Second Department, reversing Family Court, determined appellant was not the functional equivalent of a parent and therefore was not a proper respondent in this Family Court Act Article 10 sexual abuse/neglect proceeding:

We disagree with the Family Court's determination that the appellant was a person legally responsible for Sabrina and Zulena within the meaning of the Family Court Act. The appellant was a cousin of the subject children who resided with them for a period of time in their grandmother's apartment along with the children's mother and father. The record demonstrates that numerous other adults and children resided in the apartment during the relevant time period, including the children's aunt, uncle, and grandmother. Although Sabrina, who was about 13 to 15 years old during the relevant time period, testified generally that there were times when the appellant would supervise her, the testimony of other witnesses, including that of her mother, contradicted this aspect of her account. In this regard, Sabrina's mother testified that she never made the appellant responsible for the children, and that she did not leave them alone with him, as there were always other caretakers present. Sabrina's mother testified that Sabrina's older sister was responsible for the children's care on the occasions when she was at work or otherwise away from the home. In addition, the evidence at the hearing demonstrated that the children's grandmother and other adults were present in the apartment during the time when Sabrina's mother was at work. Although there was evidence that the appellant sometimes contributed money to the grandmother's household, and that he had, on occasion, performed general household chores for the benefit of the entire family, these circumstances were outweighed by evidence that the appellant did not exercise control over the children's environment in a manner commensurate with that of a parent … . Matter of Zulena G. (Regilio K.), 2019 NY Slip Op 06392, Second Dept 8-28-19

NEGLECT, ABUSE.

TRANSCRIPT OF FAMILY COURT ACT 1028 HEARING SHOULD NOT HAVE BEEN USED AS A REPLACEMENT FOR AN ABUSE-NEGLECT FACT-FINDING HEARING BECAUSE THE PROOF REQUIREMENTS ARE DIFFERENT AND BECAUSE THERE WAS NO FINDING THAT THE WITNESS AT THE 1028 HEARING WAS UNAVAILABLE (SECOND DEPT).

The Second Department, reversing Family Court, determined the transcript of the Family Court Act 1028 hearing (seeking the quick return of a child temporarily removed pending a fact-finding hearing) should not have been used to replace the abuse/neglect fact-finding hearing because the proof requirements are different:

Family Court Act § 1028 permits a parent to apply for the return of a child who has been temporarily removed from the custody of the parent pending the fact-finding hearing on the issue of abuse or neglect … . "[A] section 1028 hearing is intended to give a parent an opportunity for a prompt reunion with the child, pending trial" … . In analyzing an application for a child's return under Family Court Act § 1028, a court must engage in a test balancing the imminent risk with the best interests of the child and, where appropriate, the reasonable efforts made to avoid removal or continuing removal … . Section 1028 hearings, however, were not intended to replace fact-finding hearings, as the evidentiary standards are different. Family Court Act § 1046 provides that "only competent, material and relevant evidence may be admitted" at a fact-finding hearing, whereas evidence "[i]n a dispositional hearing and during all other stages of a proceeding under" Family Court Act article 10 need only be "material and relevant" … . A determination on an application pursuant to section 1028 "should not be taken as any indication of what ultimate determination should be made by the Family Court as to [a] petition alleging abuse and neglect" … . "At a fact-finding hearing, any determination that a child is an abused or neglected child must be based on a preponderance of the evidence" … .

CPLR 4517, which governs the admissibility of prior testimony in a civil action, is applicable here … , as the Family Court Act does not prescribe the issue of whether testimony from a prior hearing pursuant to Family Court Act article 10 may be admitted into evidence on the petitioner's direct case in a fact-finding hearing. Pursuant to CPLR 4517(a)(3), prior trial testimony of a witness may be used by any party for any purpose against another party if the court finds that such witness is dead or otherwise unavailable. In this matter, the Family Court made no such finding.

Here, the Family Court should not have admitted into evidence at the fact-finding hearing transcripts of testimony from the hearing conducted pursuant to Family Court Act § 1028. As ACS now correctly concedes, the caseworker's testimony at the prior hearing, which included hearsay statements, actually formed the basis of the court's neglect finding at the subsequent fact-finding hearing. Matter of Louie L. V. (Virzhiniya T. V.), 2019 NY Slip Op 07592, Second Dept 10-23-19

NEGLECT, ABUSE, MISSING WITNESS, JUDGES, SUA SPONTE.

JUDGE SHOULD NOT HAVE, SUA SPONTE, DRAWN AN ADVERSE INFERENCE AGAINST FATHER BASED UPON FATHER'S FAILURE TO CALL HIS GIRLFRIEND AS A WITNESS WITHOUT FIRST INFORMING FATHER AND GIVING FATHER A CHANCE TO EXPLAIN, ERROR DEEMED HARMLESS HOWEVER (FOURTH DEPT).

The Fourth Department determined the judge should not have drawn an adverse inference against father for his failure to call his girlfriend as a witness without first informing father and giving father a chance to explain. The error was deemed harmless however:

"A party is entitled to a missing witness charge when the party establishes that an uncalled witness possessing information on a material issue would be expected to provide noncumulative testimony in favor of the opposing party and is under the control of and available to that party" … . "The party seeking a missing witness inference has the initial burden of setting forth the basis for the request as soon as practicable . . . to[, inter alia,] avoid substantial possibilities of surprise" … . Here, in its written decision, "[t]he court sua sponte drew a negative inference based on the [father's] failure to call [his girlfriend] as a witness, and failed to advise [him] that it intended to do so" … . Thus, the father "lacked the opportunity to explain [his] failure to call [his girlfriend] as a witness, or to discuss whether [his girlfriend] was even available to testify or under [his] control" … . We conclude, however, that the error did not affect the result … . Matter of Liam M.J. (Cyril M.J.), 2019 NY Slip Op 02207, Fourth Dept 3-22-19

NEGLECT.

CHILD'S STATEMENT ABOUT AGE-INAPPROPRIATE SEXUAL CONDUCT NOT CORROBORATED; NEGLECT ALLEGATIONS AGAINST MOTHER NOT PROVEN (FOURTH DEPT).

The Fourth Department, reversing Family Court, determined that mother's child's statement about age-inappropriate sexual conduct involving mother's child and a non-family child was not corroborated and therefore the neglect allegation against mother was not proven:

Although the testimony of the two caseworkers established that the disclosure reflected age-inappropriate knowledge of sexual matters, petitioner failed to submit "[a]ny other evidence tending to support" the reliability of the youngest child's statements apart from the disclosure itself … . …

The two caseworkers who testified on behalf of petitioner asserted that they utilized forensic interviewing techniques to avoid leading the youngest child during their interviews, but petitioner failed to offer any evidence establishing that either caseworker was qualified to give expert validation testimony in such matters … . …

An admission by the mother "that she had heard that the purported prior incident occurred in the manner stated by others . . . is in no sense an admission of any fact pertinent to the issue, but a mere admission of what [she] had heard without adoption or indorsement' " … . …

… [P]etitioner offered no admissible evidence regarding the time frame when the mother became aware of that incident. Absent such evidence, we cannot conclude that the mother had sufficient time to act but failed to appropriately do so. …

We therefore conclude that petitioner failed to establish by a preponderance of the evidence that the mother neglected the subject children by failing to act as " a reasonable and prudent parent' " would have acted under the circumstances … . Matter of Carmellah Z. (Casey V.), 2019 NY Slip Op 08298, Fourth Dept 11-15-19

NEGLECT.

EVIDENCE OF EXCESSIVE CORPORAL PUNISHMENT WARRANTED A NEGLECT FINDING, FAMILY COURT REVERSED (FOURTH DEPT).

The Fourth Department, reversing Family Court, determined that the evidence of excessive corporal punishment warranted a finding of neglect:

A party seeking to establish neglect must establish, by a preponderance of the evidence, " first that [the] child's physical, mental or emotional condition has been impaired or is in imminent danger of becoming impaired and second, that the actual or threatened harm to the child is a consequence of the failure of the parent or caretaker to exercise a minimum degree of care in providing the child with proper supervision or guardianship' " … . Although a parent may use reasonable force to discipline his or her child to promote the child's welfare … , the "infliction of excessive corporal punishment" constitutes neglect (Family Ct Act § 1012 [f] [i] [B]). Indeed, " a single incident of excessive corporal punishment is sufficient to support a finding of neglect' " … .

Here, petitioner established by a preponderance of the evidence that the father neglected the child by inflicting excessive corporal punishment (see generally Family Ct Act § 1012 [f] [i] [B]). At the hearing, petitioner presented, among other things, witness testimony and medical records indicating that the child sustained a bruised left temple, a bruised eye, and a bloody and swollen nose after the father struck him … . Matter of Justin M.F. (Randall L.F.), 2019 NY Slip Op 01907, Fourth Dept 3-15-19

NEGLECT.

FIRING A SHOTGUN THROUGH A SCREEN DOOR INTO THE DRIVEWAY WHEN THE CHILD WAS NOT HOME DOES NOT CONSTITUTE NEGLECT (THIRD DEPT).

The Third Department, reversing Family Court, determined the neglect finding against father was not supported by the evidence. Father fired a shotgun through the front door into the driveway when the child was not home. The fact that the child could have returned home and could have been in the driveway was not sufficient:

Although a finding of imminent danger can be established through a single incident or circumstance, the danger "must be near or impending, not merely possible" … . As such, it has been held that a finding of imminent danger is contingent on the child being present … .

Here, it is undisputed that the child was not present during the shooting. Despite this, petitioner and the attorney for the child argue that the child and the mother could have returned to the home at any time and traveled through the likely path of the shotgun pellets. However, this did not occur, nor can such danger be said to have been imminent as it was only hypothetical, rather than "near or impending" … . Put another way, the issue is not that there was no imminent risk because, fortuitously, nothing happened to the child, but rather that nothing could have happened under the particular scenario because the child was not home … . "While respondent's conduct was far from ideal and it is possible to speculate about ways that events could have turned out differently for the child[], nonetheless, the record fails to establish that the child[] [was] in imminent danger" … . Matter of Jordyn WW. (Tyrell WW.), 2019 NY Slip Op 07460, Third Dept 10-17-19

NEGLECT.

IN THIS NEGLECT PROCEEDING STEMMING FROM THE PARENTS' REFUSAL TO ALLOW THEIR TEENAGE CHILD TO RETURN HOME, THE PARENTS SHOULD HAVE BEEN ALLOWED TO PRESENT EVIDENCE OF THEIR TEENAGE CHILD'S BEHAVIOR WHICH RESULTED IN CRIMINAL PROCEEDINGS AND AN ORDER OF PROTECTION IN FAVOR OF FATHER, AS WELL AS EVIDENCE OF THEIR ATTEMPTS TO MEET WITH THE AGENCY AND WORK OUT A PLAN (FIRST DEPT).

The First Department, reversing Family Court, determined that respondent-parents should have been allowed to present evidence of their teenage child's behavior in this neglect proceeding. The parents refused to allow the child to return home after a physical fight between the child and father which resulted in criminal proceedings against the child and an order of protection in favor of the father:

Parents are obligated to support a child under the age of 21 (Family Court Act § 413[1][a]) and to exercise a "minimum degree of care" in supplying the child with adequate food, clothing, shelter, and education … . In determining whether a parent has neglected a child by failing to meet that standard, the court "must evaluate parental behavior objectively," by asking whether "a reasonable and prudent parent [would] have so acted, or failed to act, under the circumstances then and there existing" … . This Court has concluded in many

circumstances that a child's history of disciplinary issues did not justify a parent in excluding the child from the home while failing to cooperate with the agency's efforts to address the child's problems and to return the child to the home … .

However, none of those cases involved pending criminal proceedings and an order of protection against the child and in favor of one parent. Respondents were entitled to a full and fair opportunity to present evidence … showing that they acted reasonably as prudent parents under all the circumstances … , and that, based on a founded fear it would be unsafe for the child to return home, they were unable to continue to care for him … . Instead, the court limited evidence to the time period alleged in the petition, precluding respondents from presenting other evidence concerning the child's behavior. Respondents also were precluded from presenting evidence of their attorney's communications with the agency, which was offered to show their willingness to meet and plan with the agency provided that the child was not present and their attorney could be present. Matter of Elijah M. (Robin M.), 2019 NY Slip Op 05471, First Dept 7-9-19

NEGLECT.

INSUFFICIENT EVIDENCE OF NEGLECT AND DERIVATIVE NEGLECT FOR FAILURE TO PROVIDE ADEQUATE FOOD, CLOTHING AND SHELTER; EVIDENCE SUPPORTED EDUCATIONAL NEGLECT AND DERIVATIVE NEGLECT, DESPITE MOTHER'S HOME-SCHOOLING EFFORTS, TWO-JUSTICE DISSENT (FIRST DEPT).

The First Department reversed Family Court's finding of neglect and derivative neglect for failure to provide adequate food, clothing and shelter, The evidence, i.e., the caseworker's progress notes and the testimony of a police officer based upon a single visit, was deemed insufficient. However, the majority, over a two-justice dissent, found the evidence of educational neglect and derivative neglect sufficient. The older children were not attending school, but the college-educated mother was home-schooling them:

Although the mother's living conditions were unsuitable, the record presents no basis for a conclusion that the children's "physical, mental or emotional condition ha[d] been impaired or [wa]s in imminent danger of becoming impaired" as a result of their exposure to such environment (Family Court Act § 1012[f][i]). The officer's testimony provided no information about the physical or mental condition of the children at the time of her visit, and petitioner did not introduce the results of the medical examination of the children conducted on the day when they were first removed from the home. …

The court found that the mother did not establish that she was qualified to teach, especially with respect to elementary-school-aged children. The mother admitted that she knew her educational plan was not approved by the Board of Education, yet, she never followed up with an approved individual home instruction plan as required by the Board of Education. The court found that the mother failed to show that her instruction was substantially equivalent to that in public school, and that the children were educated for at least as many hours as provided in public school … . The court further found that the mother's use of college-level textbooks and testing the children using high school examination tests did not constitute appropriate education for elementary-school-aged children. We defer to these findings of the Family Court. Matter of Puah B. (Autumn B.–Hemerd B.), 2019 NY Slip Op 04451, First Dept 6-6-19

NEGLECT.

MOTHER'S MOTION TO VACATE A FACT-FINDING OF NEGLECT WITHOUT ADMISSION SHOULD HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Family Court, determined mother's motion to vacate a neglect fact-finding without admission:

… [T]he mother moved pursuant to Family Court Act § 1061 to vacate so much of the order of fact-finding and disposition as, upon her consent to the entry of an order of fact-finding without admission pursuant to Family Court Act § 1051(a), found that she neglected the children and imposed certain conditions upon her custody of them. The Family Court denied the mother's motion, and the mother appeals.

Pursuant to Family Court Act § 1061, the Family Court may, for good cause shown, set aside, modify, or vacate any order in the course of a proceeding under article 10 of the Family Court Act … . "As with an initial order, the modified order must reflect a resolution consistent with the best interests of the children after consideration of all relevant circumstances, and must be supported by a sound and substantial basis in the record" … .

Here, the mother demonstrated good cause to vacate so much of the order of fact-finding and disposition as, upon her consent to the entry of an order of fact-finding without admission pursuant to Family Court Act § 1051(a), found that she neglected the children and imposed certain conditions upon her custody of them. The mother demonstrated that she had successfully completed the court-ordered programs, that she had fully complied with the conditions of the order of disposition, and that the requested modification of the order of fact-

finding and disposition was in the best interests of the children … . Matter of Emma R. (Evelyn R.), 2019 NY Slip Op 04948, Second Dept 6-19-19

NEGLECT.

MOTHER'S MOTION TO VACATE THE ORDER FINDING SHE HAD NEGLECTED THE CHILDREN SHOULD HAVE BEEN GRANTED; MOTHER DEMONSTRATED SUCCESSFUL EFFORTS TO ADDRESS HER MENTAL HEALTH AND PARENTING SKILLS (SECOND DEPT).

The Second Department, reversing Family Court, determined mother's motion to vacate the order finding she had neglected the children should have been granted:

In May 2018, the mother moved pursuant to Family Court Act § 1061 to vacate so much of the order of fact-finding and disposition as, upon her consent to the entry of an order of fact-finding without admission pursuant to Family Court Act § 1051(a), found that she neglected the children. In support of the motion, the mother submitted, inter alia, (1) letters from her treating clinicians, which established that she had been in psychotherapy since March 2016, she was compliant, and no medication had been ordered, (2) a report from ACS [Administration for Children's Services] indicating that the eldest child particularly enjoyed overnight weekend parental access with the mother, that the mother was compliant with the court-ordered services, and that ACS would not be seeking an extension of supervision for the mother, and (3) a certificate establishing that the mother had completed a parenting skills class. The Family Court denied the mother's motion, and the mother appeals. …

Here, the mother demonstrated good cause to vacate so much of the order of fact-finding and disposition as, upon her consent to the entry of an order of fact-finding without admission pursuant to Family Court Act § 1051(a), found that she neglected the children. The mother demonstrated that she had successfully completed the court-ordered services and programs and that the requested vacatur of the finding of neglect was in the best interests of the children … . Matter of Aaliyah T. (Sheena A. D.), 2019 NY Slip Op 08196, Second Dept 11-13-19

NEGLECT.

MOTHER'S REFUSING TO CONSENT TO AN INDIVIDUALIZED EDUCATION PROGRAM AND HER DELAY IN SCHEDULING AN INDEPENDENT NEUROPSYCHOLOGICAL EVALUATION OF THE CHILD DID NOT CONSTITUTE EDUCATIONAL OR MEDICAL NEGLECT, FAMILY COURT REVERSED (SECOND DEPT).

The Second Department, reversing Family Court, determined the evidence did not support educational neglect or medical neglect on the part of mother. The mother had refused to consent to the Individualized Education Program (IEP) and had delayed in scheduling an independent neuropsychological evaluation, neither amounted to neglect:

Family Court Act § 1012(f) governs parental neglect as related to furnishing a child with an adequate education. Here, the petitioner failed to prove, by a preponderance of the evidence, that the mother had not furnished the child with an adequate education under the statute. Neither the mother's refusal to consent to the IEP for the 2016-2017 school year nor her failure to follow up with independent neuropsychological testing of the child constituted educational neglect under the circumstances presented.

Moreover, the petitioner failed to meet its burden of establishing medical neglect by a preponderance of the evidence (see Family Ct Act §§ 1012[f][i][A]; 1046[b]). While the evidence adduced at the fact-finding hearing demonstrated that the mother delayed in scheduling an independent neuropsychological evaluation of the child, and that the child missed some doses of Adderall while he was staying at his father's home, the evidence did not rise to the level of establishing a failure to supply the child with adequate medical care or demonstrate a resulting impairment or imminent danger of impairment of the child's physical, mental, or emotional condition … . Matter of Jahzir Barbee M. (Racine B.), 2019 NY Slip Op 03050, Second Dept 4-24-19

NEGLECT.

MOTION FOR SUMMARY JUDGMENT ON THE ISSUE OF MOTHER'S NEGLECT SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Family Court, determined petitioner's motion for summary judgment against mother on the issue of neglect should have been denied:

"[I]n an appropriate case, the Family Court may enter a finding of neglect on a summary judgment motion in lieu of holding a fact-finding hearing upon the petitioner's prima facie showing of neglect as a matter of law and the respondent's failure to raise a triable issue of fact in opposition to the motion" … . "Summary judgment, of course, may only be granted in any proceeding when it has been clearly ascertained that there is no triable issue of fact outstanding; issue finding, rather than issue determination, is its function" … .

Here, in support of that branch of its motion which was for summary judgment against the mother on the issue of neglect of the subject child, the petitioner included the evidence submitted at a hearing held pursuant to Family Court Act § 1028. At that hearing, the mother, who is deaf and communicated through a sign language interpreter, gave various explanations for the scratches and other marks on the child's skin. The mother testified that she had difficulty controlling the child, who has been diagnosed with attention deficit hyperactivity disorder and oppositional defiant disorder, and that she accidentally scratched the child while trying to restrain him. Under these circumstances, the evidence at the hearing revealed triable issues of fact as to whether the mother neglected the child. Matter of Joseph Z. (Yola Z.), 2019 NY Slip Op 04957, Second Dept 6-19-19

NEGLECT.

SUMMARY JUDGMENT, BASED IN PART ON THE COLLATERAL ESTOPPEL EFFECT OF RESPONDENT'S CONVICTION FOR ENDANGERING THE WELFARE OF A CHILD, PROPERLY GRANTED (THIRD DEPT).

The Third Department determined petitioner's motion for summary judgment in this neglect proceeding was properly granted. The motion was based in party on respondent's endangering-the-welfare-of-a-child conviction:

… "[A] criminal conviction may be given collateral estoppel effect in a Family Court proceeding where (1) the identical issue has been resolved, and (2) the defendant in the criminal action had a full and fair opportunity to litigate the issue of his or her criminal conduct" … . Defendant does not dispute that he had a full and fair opportunity to litigate his criminal conduct before the trial court … . … In order to find a defendant guilty of endangering the welfare of a child, it must be proven that "[h]e or she knowingly act[ed] in a manner likely to be injurious to the physical, mental or moral welfare of a child less than [17] years old" (Penal Law § 260.10 [1]). In turn, "[t]o establish neglect, [a] petitioner must prove by a preponderance of the evidence that a child's physical, mental or emotional condition was harmed or is in imminent danger of harm as a result of a failure on the part of the parent to exercise a minimum degree of care" … . …

… [T]the factual allegations underlying respondent's conviction were adequate to support the finding of neglect.
Matter of Lilliana K. (Ronald K.), 2019 NY Slip Op 05358, Third Dept 7-3-19

NEGLIGENT PLACEMENT, FOSTER CARE.

COMPLAINT AGAINST A FOSTER CARE AGENCY STATED CAUSES OF ACTION FOR NEGLIGENT PLACEMENT, LOSS OF THE CHILDREN'S SERVICES AND EXPENSES FOR THE CHILDREN'S CARE AND TREATMENT (SECOND DEPT).

The Second Department, modifying Supreme Court, determined that plaintiff, the children's guardian, stated causes of action against the foster care agency, Graham Windham, for negligent placement of the children and for loss of services of the children and expenses for care and treatment of the children:

"Counties and foster care agencies cannot be vicariously liable for the negligent acts of foster parents, who are essentially contract service providers" … . "However, counties and foster care agencies may be sued to recover damages for negligence in the selection of foster parents and in supervision of the foster home"… . Ultimately, to sustain a cause of action for negligent supervision, the plaintiff must establish that the defendant "had sufficiently specific knowledge or notice of the dangerous conduct which caused injury; that is, that the third-party acts could reasonably have been anticipated" … . …

… [A] parent may recover damages measured by the pecuniary loss sustained by the injuries to the child, including the value of the child's services, if any, of which the parent was deprived and reasonable expenses necessarily incurred in an effort to restore the child to health … . Thus, the court should not have directed dismissal, pursuant to CPLR 3211(a)(7), of so much of the third cause of action insofar as asserted against

Graham Windham as sought to recover damages for the loss of the children's services and the expense for their care and treatment. George v Windham, 2019 NY Slip Op 01201, Second Dept 2-20-19

ORDERS OF PROTECTION, NELGECT, APPEALS.

THE ORDER OF PROTECTION WAS NOT SUFFICIENTLY TIED TO THE BEST INTERESTS OF THE CHILD IN THIS NEGLECT PROCEEDING AND SHOULD HAVE BEEN VACATED, ISSUE CONSIDERED ON APPEAL AS AN EXCEPTION TO THE MOOTNESS DOCTRINE (THIRD DEPT).

The Third Department, reversing Family Court in this neglect proceeding, determined that the order of protection requiring respondent putative father to undergo random urine, breath and blood tests was not sufficiently linked to the best interests of the child. Although the issue was moot in respondent's case, the Third Department considered the issue, which is likely to recur, as an exception to the mootness doctrine:

… [U]nder the circumstances of this case, the record does not support Family Court's conclusion that the conditions imposed upon respondent were necessary to further the purposes of protecting the child. At the time that the neglect proceeding was commenced against him and when Family Court entered the temporary order, respondent did not have legal or physical custody of the child; he only had limited parenting time with the child. Yet, the conditions imposed in the temporary order bore no connection to respondent's parenting time with the child (see Family Ct Act §§ 1029 [a]; 1056 [1] [i]…). For example, the temporary order generally required respondent to submit to random urine, breath or other tests upon petitioner's request, rather than requiring that such test occur prior to respondent's parenting time. The conditions were broad and designed to compel respondent to address his alleged alcohol and substance abuse issues. Family Court adopted petitioner's proposed conditions without an adequate connection to or explanation as to how each of the conditions related to the protection of the child. Accordingly, we agree with respondent that the temporary order was improper and that Family Court should have granted respondent's motion to vacate. Matter of Carmine GG. (Christopher HH.), 2019 NY Slip Op 05360, Third Dept 7-3-19

ORDERS OF PROTECTION, CUSTODY, VISITATION.

ORDER OF PROTECTION ISSUED IN THE CRIMINAL PROCEEDING PROHIBITING CONTACT BETWEEN FATHER AND DAUGHTER SHOULD BE SUBJECT TO ANY SUBSEQUENT CUSTODY OR VISITATION ORDERS BY FAMILY OR SUPREME COURT (FOURTH DEPT).

The Fourth Department determined the order of protection prohibiting contact between father and daughter should be subject to orders of Family or Supreme Court:

Here, the order of protection issued in this criminal proceeding bars all contact between defendant and his child, and cannot be modified by a subsequent visitation order of Family Court or Supreme Court unless it is first modified or vacated by the criminal court … . We agree with defendant that, under the circumstances of this case, the order of protection should be subject to any subsequent orders of custody and visitation, and we therefore modify the judgment by amending the order of protection in favor of defendant's biological daughter so that contact will be allowed if ordered by Family or Supreme Court in a custody, visitation or child abuse or neglect proceeding … . People v Smart, 2019 NY Slip Op 01043, Fourth Dept 2-8-19

ORDERS OF PROTECTION, VACATION OF.

THE STAY-AWAY ORDER OF PROTECTION SHOULD NOT HAVE BEEN VACATED BASED SOLELY ON A PSYCHOLOGIST'S REPORTS IN THE ABSENCE OF ANY TESTIMONY (THIRD DEPT).

The Third Department, reversing Family Court, determined that the stay-away order of protection should not have been vacated without further fact-finding. Apparently the order was vacated based upon a psychologist's reports without any testimony:

On … the first day of a combined fact-finding hearing on both petitions, both of the psychologist's reports were received into evidence on consent. Without any testimony being taken, respondent, joined by the attorney for the child, then moved to vacate the stay-away order of protection. Both petitioner and the mother objected, and,

after taking a brief recess, Family Court issued a ruling from the bench vacating the stay-away order of protection, without explanation. …

The record shows that the stay-away order of protection was based on allegations of sexual abuse first reported by the child's therapist and subsequently pursued by petitioner after its caseworkers interviewed the child. The petition speaks to specific acts of sexual abuse, as well as the emotional stress on the child resulting from respondent's threatening behavior towards the mother. The decision to vacate the stay-away order of protection was made on the first day of trial and, although the psychologist's reports were admitted into evidence, petitioner was not precluded from subpoenaing the psychologist for purposes of cross-examination. Moreover, petitioner represented that it intended to call the child's therapist as a witness. Although we are mindful that the psychologist spoke to the therapist as a collateral source and was highly critical of the interview methods utilized by petitioner's caseworkers, this record should have been further developed before a determination was made as to whether it was in the child's best interests to allow respondent unsupervised, overnight parenting time. This is particularly so given respondent's ongoing, threatening behavior towards the mother and others via text message and on social media. Matter of Andreija N. (Michael N.), 2019 NY Slip Op 53957, Third Dept 11-27-19

ORDERS OF PROTECTION, VISITATION.

FAMILY COURT SHOULD NOT HAVE DENIED INCARCERATED FATHER'S PRO SE PETITION SEEKING VISITATION BASED UPON THE EXISTENCE OF TWO ORDERS OF PROTECTION, THE FAMILY COURT ORDER OF PROTECTION, BY LAW, EXPIRED AFTER ONE YEAR, NOT WITHSTANDING A 2022 EXPIRATION DATE IN THE ORDER, AND THE ORDER OF PROTECTION IN THE CRIMINAL MATTER DID NOT PERTAIN TO THE CHILDREN (THIRD DEPT).

The Third Department, reversing Family Court, determined the incarcerated father's petition seeking visitation with his children should not have been dismissed based upon two orders of protection. Although the Family Court order of protection, on its face, was to expire in 2022, it could not, under the law, exceed one year. The Family Court order of protection therefore expired in 2016. As for the order of protection issued in a criminal proceeding, it did not specifically pertain to the children and Family Court does not have the authority to change it:

Family Court, among other things, issued an order of protection that prohibited the father from having contact with the children … and such order expires on January 22, 2022. This expiration date, however, was not permissible. In this regard, because of the biological relationship between the father and the children, the duration of this order of protection could not exceed one year from the disposition of the matter, subject to any further extensions … . … We therefore modify the order of protection to reflect an expiration date of March 2, 2016. …

The order of protection issued in connection with petitioner's criminal matter is likewise inapplicable. We note that Family Court generally does not have the authority to countermand the dictates of a criminal court order of protection … . That said, the order of protection issued against the father in his criminal matter did not specifically pertain to the subject children. Matter of Pedro A. v Gloria A., 2019 NY Slip Op 00010, Third Dept 1-3-19

OUT-OF-STATE PARENT, PLACEMENT WITH, APPEALS.

THE INTERSTATE COMPACT FOR THE PLACEMENT OF CHILDREN (ICPC) APPLIES ONLY TO OUT-OF-STATE ADOPTION OR FOSTER CARE, NOT TO THE PLACEMENT OF A CHILD WITH AN OUT-OF-STATE PARENT; QUESTION CONSIDERED ON APPEAL AS AN EXCEPTION TO THE MOOTNESS DOCTRINE; REGULATION RELIED ON TO APPLY THE ICPC CONFLICTS WITH THE CONTROLLING STATUTE (FIRST DEPT).

The First Department, reversing Family Court, in a full-fledged opinion by Justice Webber, in a matter of first impression, and refusing to follow the Second Department, determined that the Interstate Compact for the Placement of Children (ICPC) applies only to children to be adopted or placed in foster care in another state, not, as here, to the placement of a child with the father in another state. The issue was considered on appeal as an exception to the mootness doctrine because it is likely to reoccur. The First Department held that the controlling statute, Social Services Law 374-a, clearly states that the ICPC applies only to out of state foster care or adoption, and the regulation which states otherwise (Association of Administrators of the Interstate Compact on the Placement of Children. AAICPC, Regulation 3) improperly expands the statutory language:

There is no dispute that the ICPC was intended to provide children in need of foster and adoptive families with more possible placements across state lines. The purpose of the statute was twofold: to assure the placement would be in a child's best interests, and to preclude the "sending State from exporting its foster care

responsibilities to a receiving State" … . Thus the ICPC was enacted to provide children in need of foster and adoptive families with more options, while still paying heed to concerns about the children's welfare.

There is also nothing in the language of the statute or the legislative history to indicate that the ICPC was ever intended to address any individual other than an out-of-state foster or adoptive parent. The language explicitly limits its applicability to out-of-state placements in foster care or as a preliminary to a possible adoption … . The limitation reflects the ICPC's purpose which was to provide "a uniform legislative framework for the placement of children across state lines in foster and/or adoptive homes" … . Matter of Emmanuel B. (Lynette J.), 2019 NY Slip Op 05640, First Dept 7-18-19

PARENTAL ACCESS, DELEGATION OF COURT AUTHORITY.

FAMILY COURT SHOULD NOT HAVE DELEGATED ITS AUTHORITY TO DETERMINE PARENTAL ACCESS TO THE PARTIES AND SHOULD NOT HAVE MADE FINDINGS IN THE ABSENCE OF A HEARING (SECOND DEPT).

The Second Department, reversing and remitting the matter to Family Court, determined the court should not have delegated its authority to determine parental access to the parties and should not have made findings without a hearing:

A court may not delegate its authority to determine parental access to either a parent or a child … . While a child's views are to be considered in determining custody or parental access, they are not determinative … . An access provision which is conditioned on the desires of the children tends to defeat the right of parental access … . Here, the Family Court determined that it would not compel either child to visit with the mother. Because the order appealed from effectively conditions the mother's parental access on the children's wishes and leaves the determination as to whether there should be access at all to the children, it must be set aside … . The Family Court made its determination based only upon its review of the papers, the in camera interviews, and the colloquy with the unrepresented parties, which occurred in the absence of the attorney for the children. The court did not conduct a hearing, did not direct a forensic examination, and did not seek information from the clinicians involved in the lapsed therapeutic visits. Although there are indications in the record that the mother's parenting skills may be less than ideal, and she may bear at least some responsibility for her estrangement from the children, the record before us is inadequate to support the Family Court's refusal to order, at the least, the resumption of therapeutic visits. Furthermore, the court's finding that the father had done all that he could to encourage the children to visit with the mother was based solely upon the in camera interviews and was not based on any sworn

testimony, and the mother was not afforded the opportunity to challenge, either by her own evidence or through cross-examination, the father's assertions. Matter of Mondschein v Mondschein, 2019 NY Slip Op 06395, Second Dept 8-28-19

PARENTAL RIGHTS, TERMINATION OF.

DESPITE MOTHER'S VIOLATION OF SIX CONDITIONS OF A SUSPENDED JUDGMENT, TERMINATING HER PARENTAL RIGHTS WAS NOT IN THE BEST INTERESTS OF HER SPECIAL NEEDS CHILD (SECOND DEPT).

The Second Department, reversing Family Court, noting that mother had violated six conditions of a suspended judgment, determined it was not in the best interests of the child to terminate mother's parental rights. The special needs child had been severely neglected by mother (medical neglect). However, mother demonstrated she genuinely loved the child and had learned how to care for him:

The record evidence demonstrated that the mother had learned how to provide the special care that the child needs and that the mother was emotionally attuned to the child's needs … . Furthermore, the mother obtained stable housing and engaged in counseling … . While the mother expressed her distrust of the preventive services workers and refused to provide releases for her other children's schools, the evidence demonstrated that the mother never denied the preventive services workers access to her home or to her other children.

The mother also made progress in addressing the issues that led to the child being removed from her custody by taking responsibility for the initial neglect that led to the child being removed from her care. Moreover, the mother has cooperated with other services and providers. In addition, the record demonstrates that the mother genuinely loves the child and has shown vigilance in attending to his needs. The testimony at the hearing demonstrated that the mother's interaction with the child was appropriate, the visits were going well, and the interaction between the mother and the child has been positive. The record further demonstrates that the child's siblings are connected to him and desire for him to return to the home. Finally, the mother has a support system in place that she had not had previously. Matter of Markel C. (Kwanza H.), 2019 NY Slip Op 03332, Second Dept 5-1-19

PARENTAL RIGHTS, TERMINATION OF.

EVIDENCE OF MOTHER'S FAILURE TO COMPLY WITH CONDITIONS OF A SUSPENDED JUDGMENT WAS INCOMPLETE, AND, ALTHOUGH THE EVIDENCE OF FATHER'S FAILURE TO COMPLY WAS SUFFICIENT, FAMILY COURT DID NOT TAKE THE BEST INTERESTS OF THE CHILDREN INTO CONSIDERATION, TERMINATION OF PARENTAL RIGHTS REVERSED (THIRD DEPT).

The Third Department, reversing Family Court, determined the evidence did not support the alleged violations of a suspended judgment by mother and the termination of father's and mother's parental rights. The decision is fact-specific and cannot be fairly summarized here. In a nutshell the evidence presented by the petitioner with regard to mother's alleged non-compliance with the suspended judgment was incomplete, and Family Court failed to consider the best interests of the child:

With regard to the mother's engagement in services, the caseworker testified that she had not received a return call from Trinity prior to the hearing and, as such, she was not aware whether the mother had engaged in any alcohol and drug treatment. The mother, however, testified that she made an appointment for an intake at Trinity prior to the filing of the subject motion and had thereafter commenced treatment on November 3, 2017. The caseworker also testified that, as she had also not heard back from the mother's Family Services counselor, she had no information as to whether the mother was engaged in either the protective parenting or the domestic violence programs. With regard to mental health counseling, the mother alleged that she had called and made an appointment prior to the filing of the subject motion, and the caseworker confirmed that the mother did attend an initial intake on November 17, 2017; however, the caseworker was unaware if the mother was following up with any recommended treatment as she had not spoken with the mother's Family Services counselor. * * *

With regard to the father, although we find that Family Court's determination revoking the suspended judgment is supported by a sound and substantial basis in the record … , such noncompliance "does not automatically result in termination of his . . . parental rights" … . Rather, even at this stage of the proceedings, Family Court was required to consider the best interests of the children … . Matter of Nahlaya MM. (Britian MM.), 2019 NY Slip Op 03418, Third Dept 5-2-19

PARENTAL RIGHTS, TERMINATION OF.

THE EVIDENCE PROVIDED BY THE THERAPIST THAT THE CHILDREN SUFFERED FROM PTSD, EXPERIENCED TRAUMA, AND EXPRESSED THEIR DESIRE TO STOP SEEING THEIR FATHER, COUPLED WITH THE CHILDREN'S STATEMENTS THAT THEY WITNESSED ABUSE, WARRANTED TERMINATION OF PARENTAL ACCESS WITH FATHER, FAMILY COURT REVERSED (SECOND DEPT).

The Second Department, reversing Family Court, determined the evidence demonstrated supervised parental access with father should have been terminated:

According to [Family Court], there was no legal authority to suspend the father's parental access with the children premised solely on their therapists' belief that the children witnessed domestic violence and were sexually abused by the father, when no such transgressions had been alleged in the petitions or proven.

A parent's parental access, even supervised, should not be suspended unless there is substantial evidence that the parental access would be detrimental to the welfare of the child … . The determination to suspend a parent's parental access is within the sound discretion of the Family Court based upon the best interests of the child, and its determination will not be set aside unless it lacks a sound and substantial basis in the record … .

Here, the Family Court's determination lacks a sound and substantial basis in the record, which shows that parental access with the father, even if supervised, would not be in the children's best interests. The uncontroverted evidence established that the children suffered from PTSD, experienced both physical and mental manifestations of trauma when having parental access with the father, and expressed their desire to cease parental access with him. In addition, each child corroborated the other's statements regarding the abuse they witnessed in the home. Matter of Mia C. (Misael C.), 2019 NY Slip Op 00270, Second Dept 1-16-19

PARENT-STATUS, CUSTODY, VISITATION, ATTORNEY'S FEES.

RESPONDENT IN THIS CUSTODY AND VISITATION PROCEEDING TO DETERMINE WHETHER SHE HAS STANDING TO ASSERT PARENTAL RIGHTS IS ENTITLED, PURSUANT TO DOMESTIC RELATIONS LAW 237, TO ATTORNEY'S FEES PAID BY THE "MORE MONIED" PETITIONER; RESPONDENT WAS PROPERLY CONSIDERED TO BE A "PARENT" WITHIN THE MEANING OF DOMESTIC RELATIONS LAW 237 FOR THE NARROW PURPOSE OF ENTITLEMENT TO ATTORNEY'S FEES AT THIS PRELIMINARY STAGE OF THE PROCEEDINGS (FIRST DEPT).

The First Department, in a matter of first impression, held that respondent in this custody proceeding was properly considered to be a parent for the narrow purpose of awarding attorney's fees to be paid by the "more monied" party pursuant to Domestic Relations Law 237. The issue whether respondent has standing to assert parental rights was the purpose of the underlying proceeding:

This case raises an issue of first impression for this Court, that is, whether in a proceeding to establish standing to assert parental rights in seeking visitation and custody under Domestic Relations Law § 70 … , the court has discretion to direct the "more monied" party to pay the other party's counsel and expert fees under Domestic Relations Law § 237 before that party has been adjudicated a parent. We find that it does.

Domestic Relations Law § 237(b), which is a statutory exception to the general rule that each party is responsible for her own legal fees … , provides, in relevant part, that "upon any application . . . concerning custody, visitation or maintenance of a child, the court may direct a spouse or parent to pay counsel fees and fees and expenses of experts directly to the attorney of the other spouse or parent to enable the other party to carry on or defend the application or proceeding by the other spouse or parent as, in the court's discretion, justice requires . . . ." This statute, like Domestic Relations Law § 70, does not define the term "parent." * * * … [W]e conclude that highly inequitable results would flow in this case from permitting the party with far greater resources to seek custody as against the child's primary parent without allowing that parent to seek counsel fees. Without determining that she is a parent for purposes beyond the application of Domestic Relations Law § 237(b), we find that Domestic Relations Law § 237(b) must be read to permit the court to direct petitioner to pay respondent's counsel fees as necessary "to enable [her] to. . . defend the application. . . as, in the court's discretion, justice requires, having regard to the circumstances of the case and of the respective parties." Matter of Kelly G. v Circe H., 2019 NY Slip Op 08961, First Dept 12-17-19

PARENT-STATUS, CUSTODY.

DEFINITION OF 'PARENT' IS THE SAME FOR PARENTAL ACCESS AND CUSTODY; JUDICIAL ESTOPPEL AND COLLATERAL ESTOPPEL DOCTRINES PRECLUDED SUPREME COURT'S FINDING THAT FATHER DID NOT HAVE STANDING IN THE CUSTODY MATTER (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the doctrines of judicial estoppel and collateral estoppel precluded Family Court from finding father did not have standing to seek custody of a child. Father had previously been deemed a "parent" in the context of parental access. The definition of "parent" is the same in the context of custody:

In the prior appeal, this Court expressly stated that the father had standing to proceed as Isabella's parent under Domestic Relations Law § 70 based on the doctrine of judicial estoppel … . As the term "parent" has the same definition under Domestic Relations Law § 70 whether the party is seeking custody or parental access … , it is immaterial that our prior determination did not specifically mention custody when it concluded that the father had standing to seek parental access with Isabella. Since the mother is judicially estopped from arguing that the father is not Isabella's parent under Domestic Relations Law § 70, the father was free to seek custody under Domestic Relations Law § 70 as Isabella's "parent with coequal rights" to the mother … . Matter of Paese v Paese, 2019 NY Slip Op 06090, Second Dept 8-7-19

PARENT-STATUS, PARENTING TIME.

FORMER SAME SEX PARTNER WHO AGREED TO THE CONCEPTION OF A CHILD CARRIED BY HER FORMER PARTNER DEMONSTRATED SHE HAD STANDING AS A PARENT TO SEEK PARENTING TIME WITH THE CHILD (THIRD DEPT).

The Third Department, in a full-fledged opinion by Justice Garry, determined that petitioner, who participated in the conception of the child (by artificial insemination) carried by her then same-sex partner, was a "parent" entitled to visitation (parenting time) with the child pursuant to Matter of Brooke S.B. v Elizabeth A.C.C. (28 NY3d 1 [2016]):

… [T]he parties agreed to conceive a child using artificial insemination. Both parties attended appointments with a fertility doctor. In testimony that Family Court found to be credible, petitioner stated that she and respondent agreed to select a sperm donor who would reflect petitioner's ethnic background. There were two inseminations; petitioner was present and injected the sperm on at least one of these occasions. Petitioner's credit card was used to pay the related expenses. … Petitioner attended at least one baby shower where friends and family members of both parties were present. Petitioner attended respondent's prenatal appointments, was present when the child was born, and cut the child's umbilical cord. The child was given two last names, reflecting the parties' two surnames. … Petitioner testified that the child was named, in part, after petitioner's mother. Petitioner assisted in buying items for the child and shared day-care costs with respondent. The two parties are listed as the child's two mothers in some of her medical and immunization records. Respondent testified that she told petitioner that the child would be part of petitioner's life if they continued to reside together and also if they separated, so long as petitioner did not engage in illegal activities, but that if petitioner did so engage, she would not have a role in the child's life.

Upon this record, we find that Family Court correctly determined that petitioner falls within the statutory definition of a parent and, thus, has standing in this proceeding. Contrary to respondent's argument, Family Court did not err in applying the conception test to determine petitioner's standing rather than a "functional" test that would have examined the relationship between petitioner and the child after the child's birth … . The evidence fully establishes that the parties planned jointly for the child's conception, participated jointly in the process of conceiving the child, planned jointly for her birth, and planned to raise her together. Accordingly, petitioner satisfied her burden to prove by clear and convincing evidence that she and respondent entered into an agreement to conceive the child and raise her as co-parents. Thus, she established her standing to seek custody and parenting time under the conception test without regard to her subsequent relationship with the child … . Matter of Heather NN. v Vinnette OO., 2019 NY Slip Op 09325, Third Dept 12-26-19

POSTNUPTIAL AGREEMENTS, UNCONSCIONABILITY.

ALLEGATIONS THAT A POSTNUPTIAL AGREEMENT WAS UNCONSCIONABLE SURVIVED THE MOTION TO DISMISS, THE SUBSTANTIVE AND PROCEDURAL CRITERIA FOR THE DISMISSAL OF COUNTERCLAIMS AND AFFIRMATIVE DEFENSES ALLEGING FRAUD, DURESS, COERCION AND UNCONSCIONABILITY DISCUSSED IN SOME DEPTH (SECOND DEPT).

The Second Department, modifying Supreme Court, dealt with the analytical criteria for motions to dismiss counterclaims and affirmative defenses in the context of a postnuptial agreement which was alleged to have been tainted by fraud, coercion, duress and unconscionability. The "unconscionable" allegations survived the dismissal motion. The decision covers all these substantive and procedural issues in some depth and cannot, therefore, be fairly summarized here:

An unconscionable agreement is "one such as no person in his or her senses and not under delusion would make on the one hand, and as no honest and fair person would accept on the other, the inequality being so strong and manifest as to shock the conscience and confound the judgment of any person of common sense" … . Because of the fiduciary relationship between spouses, postnuptial agreements "are closely scrutinized by the courts, and such agreements are more readily set aside in equity under circumstances that would be insufficient to nullify an ordinary contract" … . "To warrant equity's intervention, no actual fraud need be shown, for relief will be granted if the [agreement] is manifestly unfair to a spouse because of the other's overreaching" … . "Although courts may examine the terms of the agreement as well as the surrounding circumstances to ascertain whether there has been overreaching, the general rule is that [if] the execution of the agreement . . . be fair, no further inquiry will be made'" … .

Here, at this stage of the action, the defendant's pleadings, as amplified by his submissions in opposition to the plaintiff's motion and in support of his cross motion … , are sufficient to allege both procedural and substantive unconscionability. Shah v Mitra, 2019 NY Slip Op 02739, Second Dept 4-10-19

PRESUMPTION OF LEGITIMACY, PATERNITY.

EVEN THOUGH THE PRESUMPTION OF LEGITIMACY WAS NOT REBUTTED WITH RESPECT TO MOTHER'S HUSBAND IN THIS PATERNITY PROCEEDING, FAMILY COURT SHOULD HAVE APPLIED THE DOCTRINE OF EQUITABLE ESTOPPEL UNDER A 'BEST INTERESTS OF THE CHILD' ANALYSIS TO ADJUDICATE THE RESPONDENT, WITH WHOM A CHILD-PARENT BOND HAD DEVELOPED, THE FATHER (SECOND DEPT).

The Second Department, reversing Family Court, determined the doctrine of equitable estoppel should have been invoked by Family Court in this paternity proceeding to find it was in the best interests of the child to adjudicate the respondent, Ricardo R. E., father of the child. The petitioner-mother was married to Jorge E. T. at the time the child was conceived and born. Family Court relied on the presumption of legitimacy to adjudicate Jorge E. T. the father. The Second Department agreed with Family Court's finding that the presumption of legitimacy was not rebutted:

Even if the presumption of legitimacy applies, the Family Court must proceed to an analysis of the best interests of the child before deciding whether to order a test … . To that end, the "paramount concern" in a proceeding to establish paternity is the best interests of the child, and the Family Court should hold a hearing addressed to that determination … . Importantly, biology is not dispositive in a court's paternity determination … . …

… [W]e agree with the Family Court that the petitioner failed to rebut the presumption of legitimacy by clear and convincing evidence … . Nevertheless, regardless of the applicability of the presumption of legitimacy, the Family Court should not have refused to consider the issue of equitable estoppel raised by the petitioner and Ricardo R. E. in response to the husband's assertion of paternity … . As relevant here, the doctrine "is a defense in a paternity proceeding which, among other applications, precludes a man from asserting his paternity when he acquiesced in the establishment of a strong parent-child bond between the child and another man" (… see … Family Ct Act § 522). It is significant that "courts impose equitable estoppel to protect the status interests of a child in an already recognized and operative parent-child relationship" … . While this doctrine is invoked in a variety of situations, "whether it is being used in the offensive posture to enforce rights or the defensive posture to prevent rights from being enforced, [it] is only to be used to protect the best interests of the child" … . For that reason, this dispute does not involve the equities between or among the adults. The case turns exclusively on the best interests of the child … . Matter of Onorina C.T. v Ricardo R.E., 2019 NY Slip Op 03345, Second Dept 5-1-19

RELOCATE, PETITION TO.

A NEW HEARING ON FATHER'S PETITION TO RELOCATE IS REQUIRED BECAUSE THE COURT MAY HAVE PLACED TOO MUCH EMPHASIS ON THE CHILD'S ENROLLMENT IN A PARTICULAR SCHOOL AS THE BASIS FOR GRANTING THE PETITION (THIRD DEPT).

The Third Department, reversing Family Court, determined a new hearing on father's relocation petition was required because the court may have put too much emphasis on the child's enrollment in a particular school:

Family Court determined that it was in the best interests of the child to award the father physical custody of the child and to permit the child to relocate to New York City. In making this determination, we note that the court took into account the child's relationship with the family members in each parties' household, the child's current school and Promise Academy, the parties' relative fitness to provide a safe and healthy environment and the structure in each household to support the child's educational needs. The court, however, conditioned such change of custody and relocation upon the child's enrollment in Promise Academy for the 2017-2018 school year. In our view, by imposing such condition, the court erroneously elevated the child's matriculation at Promise Academy from one factor to be considered in the best interests analysis to the sole dispositive factor. Inasmuch as no one factor is dispositive … , the order must be reversed and a new hearing to be conducted on the father's modification petition within 20 days of this Court's decision. Matter of Lionel PP. v Sherry QQ., 2019 NY Slip Op 02398, Third Dept 2-28-19

RELOCATE, PETITION TO.

MOTHER'S PETITION FOR PERMISSION TO RELOCATE WITH THE CHILD SHOULD NOT HAVE BEEN DISMISSED WITHOUT A HEARING (FOURTH DEPT).

The Fourth Department, reversing Family Court, determined mother's petition for permission to relocate with the child should not have been dismissed without a hearing:

In this proceeding pursuant to Family Court Act article 6, we agree with petitioner mother that Family Court erred in summarily granting respondent father's motion to dismiss her petition to relocate with the parties' child to the Honeoye Falls-Lima Central School District or Livingston County. A prior custody order entered upon

the consent of the parties provided that the mother and the father had joint custody of the child with primary physical residence with the mother, and restricted the mother's residency to certain towns within Monroe County. "Generally, [d]eterminations affecting custody and visitation should be made following a full evidentiary hearing' " … , and we conclude that the allegations in the mother's petition "established the need for a hearing on the issue whether [her] relocation is in the best interests of the child" … .

The mother was not required to demonstrate a change of circumstances inasmuch as she sought permission to relocate with the subject child … . Further, the mother adequately alleged in her petition that relocation was in the best interests of the child inasmuch as she alleged that the cost of housing would be lower in Livingston County, that the child's maternal grandfather would be able to assist the mother with childcare upon her relocation allowing her to return to work, and that the relocation would not interfere with the father's visitation schedule. The court was therefore required to determine whether the proposed relocation was in the child's best interests by analyzing the factors set forth in Matter of Tropea v Tropea (87 NY2d 727, 739-741 [1996] …). Matter of Johnston v Dickes, 2019 NY Slip Op 09208, Fourth Dept 12-20-19

RESETTLED ORDER, JUDGES.

FAMILY COURT WAS WITHOUT AUTHORITY TO ISSUE A RESETTLED ORDER WHICH SUBSTANTIALLY CHANGED THE ORIGINAL ORDER AND WHICH WAS ISSUED WITHOUT THE BENEFIT OF TESTIMONY CONCERNING MOTHER'S SERIOUS MENTAL HEALTH AND SUBSTANCE ABUSE PROBLEMS (THIRD DEPT).

The Third Department, reversing Family Court, determined the court was without authority to issue a resettled order which substantially changed the original order. The original order, which was issued in the absence of testimony, provided that mother's mental health and substance abuse problems be monitored by the Monroe County Probation Department. The Department declined because it does not handle custody matters. Family Court then issued the resettled order requiring mental health and substance abuse treatment for mother and allowing grandmother access to mother's medical records:

"Resettlement of an order is a procedure designed solely to correct errors or omissions as to form or for clarification. It may not be used to effect a substantive change in or to amplify the prior decision of the court" (… see CPLR 2221).

… Family Court's resettled order does "effect a substantive change" and was beyond the court's authority to issue. The underlying petition included serious substance abuse and mental health allegations, but at no point was any actual testimony taken. These concerns were discussed during the stipulation colloquy before Family Court (Ames, J.), but the court ultimately determined to place the mother on probation subject to standard terms and conditions that did not impose independent evaluation requirements. In addition, the court was not authorized to defer to the probation department the decision as to whether the mother should undergo a substance abuse and/or mental health evaluation … . The plain fact of the matter is that the colloquy resulting in the oral stipulation was not definitive on the evaluation issue. "To be enforceable, an open court stipulation must contain all of the material terms and evince a clear mutual accord between the parties" … . Although we are mindful of the court's authority to require a party to undergo an evaluation, the resettled order was issued as a consent order, not as an express directive under Family Ct Act § 251. Given the absence of any record testimony, the resettled order cannot stand. Matter of Joan HH. v Maria II., 2019 NY Slip Op 05737, Third Dept 7-18-19

SPECIAL IMMIGRANT JUVENILE STATUS (SIJS).

CHILD'S MOTION FOR FINDINGS TO ALLOW HIM TO PETITION FOR SPECIAL IMMIGRANT JUVENILE STATUS (SIJS) SHOULD HAVE BEEN GRANTED, THERE WAS EVIDENCE THE CHILD WOULD BE KILLED UPON RETURN TO EL SALVADOR (SECOND DEPT).

The Second Department, reversing Family Court, determined that the motion for an order making the findings necessary for the child to petition for special immigrant juvenile status (SIJS) should have been granted:

Based upon our independent factual review, the record supports a finding that reunification of the child with the father is not a viable option due to parental neglect… . The record demonstrates that when the child lived with the mother and the father in El Salvador, the father would physically mistreat the mother in the presence of the child by hitting her with objects such as a book and shoes, causing her bruising, and that, when the child attempted to defend the mother, the father would hit the child. The child also averred in his affidavit that "[w]hen [the father] would get angry, which was often, he became very violent toward me, yelling at me and punching me," and the mother indicated that she had to send the child to live with his maternal grandmother in El Salvador because she was afraid of what the father would do to the child. The record also demonstrates that the father had provided no financial support for the child since the child was 10 years old. Thus, the father's conduct, including acts of domestic violence perpetrated in the presence of the child, constituted neglect … , which established that the child's reunification with the father is not viable … .

The record also does not support the Family Court's determination that the child failed to show that it would not be in his best interests to return to El Salvador. The child testified that gang members in El Salvador tried to recruit him, but he refused to join, that after his refusal to join, the gang members threatened and assaulted him multiple times, "hurt me[ ] very bad," "left me on the streets after they beat me up," and would have killed him on one occasion if not for a police patrol "coming by that moment," that he was afraid to go outside after the incident when he was almost killed, and that "if I go back [to El Salvador] they will kill me" … . Matter of Lucas F.V. (Jose N.F.), 2019 NY Slip Op 01079, Second Dept 2-13-19

SPECIAL IMMIGRANT JUVENILE STATUS (SIJS).

FAMILY COURT SHOULD HAVE MADE FINDINGS TO ALLOW THE CHILD TO PETITION FOR SPECIAL IMMIGRANT JUVENILE STATUS (SIJS), PARENTAL NEGLECT AND DANGER FROM GANGS IN HONDURAS WAS DEMONSTRATED, APPELLATE COURT CAN MAKE ITS OWN FACTUAL FINDINGS ON A SUFFICIENT RECORD (SECOND DEPT).

The Second Department, reversing Family Court, determined the child's motion for findings enabling him to petition for Special Immigrant Juvenile Status (SIJS) should have been granted:

"This Court's power to review the evidence is as broad as that of the hearing court, and where, as here, the record is sufficiently complete to make our own factual determinations, we may do so" … . Based upon our independent factual review, we conclude that the record supports a finding that reunification of the child with one or both of his parents is not a viable option based upon parental neglect … . The record reflects that the child's parents did not provide him with adequate supervision or medical care, and that they failed to meet the child's educational needs. Furthermore, the record also supports a finding that it would not be in the best interests of the child to return to Honduras, his previous country of nationality or country of last habitual residence. The child indicated that he was assaulted by gang members in Honduras on multiple occasions, once leaving him with a broken rib and a scar on his head, and that he had witnessed a drive-by shooting at his school which resulted in the death of his schoolmate. In addition, the child stated that the gang members tried to recruit him, but he refused to join, and that the gang members were "killing people if they didn't want to join." The child stated that he "felt scared all the time and could no longer live a normal life," and that he "basically stayed inside [his] house all the time" out of fear that he "was going to be attacked again" … . Matter of Victor R. C. O. v Canales, 2019 NY Slip Op 03789, Second Dept 5-15-19

SPECIAL IMMIGRANT JUVENILE STATUS (SIJS).

FAMILY COURT SHOULD HAVE ISSUED AN ORDER MAKING FINDINGS TO ALLOW THE CHILDREN TO PETITION FOR SPECIAL IMMIGRANT JUVENILE STATUS, IT WAS NOT IN THE CHILDREN'S BEST INTERESTS TO RETURN TO HONDURAS (SECOND DEPT).

The Second Department, reversing Family Court, determined the court should have issued an order making findings to allow the child to petition for Special Immigrant Juvenile Status (SIJS):

… [B]ased upon our independent factual review, the record supports a finding that reunification of the children with their mother is not viable due to parental abandonment … . The children testified that the mother left when they were both only three years old, and that they have not seen or spoken to the mother since that time. Thus, the record establishes that the mother has had no involvement with the children for the majority of their lives … .

Further, the record supports a finding that it would not be in the best interests of the children to return to Honduras, their previous country of nationality or country of last habitual residence … . Francis testified that when the children lived with their paternal aunt in Honduras, they were "mistreat[ed] . . . emotionally and physically." The children testified that when they then went to live with their father and stepmother in Honduras, the stepmother beat them and "wouldn't give us food" when the father was not around, and that the stepmother was "verbally abusive," telling the children, among other things, that they were "good for nothing." The record reflects that the children had no one else to take care of them if they returned to Honduras. Consequently, the record demonstrates that it would not be in the best interests of the children to return to Honduras … . Matter of Norma U. v Herman T. R.F., 2019 NY Slip Op 01421, Second Dept 2-27-19

SPECIAL IMMIGRANT JUVENILE STATUS (SIJS).

MOTHER'S MOTION TO AMEND FAMILY COURT'S FINDINGS TO ALLOW THE CHILD TO PETITION FOR SPECIAL IMMIGRANT JUVENILE STATUS AFTER THE UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES NOTIFIED THE CHILD THAT THE FINDINGS DID NOT ADDRESS THE CHILD'S MEMBERSHIP IN THE MS-13 GANG SHOULD NOT HAVE BEEN DENIED WITHOUT A HEARING (SECOND DEPT).

The Second Department, reversing Family Court, determined mother's motion to amend the findings made to allow the child to petition for special immigrant juvenile status (SIJS) should not have been denied without a hearing to address the merits. After Family Court had made the required findings, the child submitted an I-360 petition for special immigrant juvenile status to the United States Citizenship and Immigration Services (USCIS). USCIS notified the child the petition would be denied because of deficiencies in Family Court's findings, including the failure to consider the child's alleged involvement with the MS-13 gang. Mother then made a motion to amend the findings but Family Court denied the motion stating that mother failed to state a sufficient reason for the requested amendments:

Given USCIS's determination, the Family Court, having granted the mother's guardianship petition in the first instance, should have considered the merits of the subject motion as to whether an amendment of the specific findings order was appropriate, and, if so, amended the specific findings order. Although "[t]his Court's power to review the evidence is as broad as that of the hearing court, and where . . . the record is sufficiently complete to make our own factual determinations, we may do so" … , here, the record is insufficient to determine whether the Family Court considered the child's alleged involvement with the MS-13 gang, which would not necessarily preclude a finding that it is not in the child's best interests to be returned to El Salvador. Consequently, the matter must be remitted to the Family Court … for a hearing on that issue and a new determination thereafter of the mother's motion, inter alia, to amend the specific findings order … . Matter of Jose S.J. (Veronica E.J.), 2019 NY Slip Op 00275, Second Dept 1-16-19

SPECIAL IMMIGRANT JUVENILE STATUS (SIJS).

ORDER MAKING THE FINDINGS NECESSARY FOR THE CHILD TO PETITION FOR SPECIAL IMMIGRANT JUVENILE STATUS SHOULD HAVE BEEN GRANTED, CHILD ESCAPED EL SALVADOR BECAUSE OF GANG VIOLENCE AND THREATS (SECOND DEPT).

The Second Department, reversing Family Court, determined the father's motion for an order making the findings necessary for the child to petition for Special Immigrant Juvenile Status (SIJS) should have been granted:

Based upon our independent factual review, we find that the record establishes that the child met the age and marital status requirements for special immigrant status … , and the dependency requirement has been satisfied by the granting of the father's guardianship petition prior to the child's 21st birthday … . Further, we find that reunification of the child with her mother is not a viable option due to parental abandonment … . The record reflects that after the child came to the United States in February 2014, she did not live with the mother because the "mother did not want to support her," and that the child lived in close proximity to the mother, but the mother only visited the child once, in March 2014, and did not visit or even contact the child from that time through the time the father made the subject motion in April 2018. We also find that the record supports a finding that it would not be in the best interests of the child to return to El Salvador, her previous country of nationality or country of last habitual residence. The record reflects that the child was threatened by gang members in El Salvador while walking home from school, that the gang members "wanted to recruit [the child] and have her sell drugs" and told her that "she had to join them or they would murder her and her family," that the gang members started texting her to "extort money from her," that the child was sent to live with a family friend, but the threats continued, and that the child left El Salvador to escape from the gangs … . Matter of Rina M. G.C. (Oscar L.G.–Ana M. C.H.), 2019 NY Slip Op 01407, Second Dept 2-27-19

SPECIAL IMMIGRANT JUVENILE STATUS (SIJS).

PETITION SEEKING FINDINGS ALLOWING THE CHILD TO APPLY FOR SPECIAL IMMIGRANT JUVENILE STATUS (SIJS) SHOULD HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Family Court, determined the petition for findings to enable the child to petition for special immigrant juvenile status (SIJS) should have been granted:

… [R]eunification of the child with her father is not viable due to parental neglect … . The petitioner testified that after the father came to the United States with the child, they lived in the petitioner's home, during which time the father would "drink every day," and that the father eventually returned to El Salvador on his own. The petitioner stated in his affidavit in support of his motion that the father's drinking caused him to become "aggressive," "[h]e hit doors, walls, and started to yell at all times of the night," and that the child became "scared of [the father]." Further, the child stated in her affidavit that the father "[drank] to the point that he could not walk," and testified in court that she did not believe she could live with the father if she returned to El Salvador due to his excessive drinking. Thus, the record demonstrates that the father repeatedly misused alcoholic beverages to the extent of producing a state of intoxication or a "substantial manifestation of irrationality," triggering a presumption that the child was neglected by the father … . Since the presumption of neglect was not rebutted, the Family Court should have found that reunification of the child with the father was not viable due to parental neglect. The record also supports a finding that it would not be in the child's best interests to be returned to El Salvador, where gang members had threatened the father in the presence of the child, made the father "complete tasks and favors for them," and murdered the child's cousin … . Matter of Agustin E. v Luis A.E.S., 2019 NY Slip Op 00273, Second Dept 1-16-19

STIPULATIONS, CUSTODY, PARENTAL ACCESS, ATTORNEY FOR THE CHILD.

COURT-APPROVED CUSTODY AND PARENTAL ACCESS STIPULATION SHOULD NOT HAVE BEEN MODIFIED WITHOUT A HEARING; UPON REMITTAL AN ATTORNEY FOR THE CHILD SHOULD BE APPOINTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the court should not have modified a court-approved stipulation relating to custody and parental access without a hearing. And the Second Department ordered that an attorney for the child be appointed upon remittal:

"Modification of a court-approved stipulation setting forth terms of custody or [parental access] is permissible only upon a showing that there has been a change in circumstances such that a modification is necessary to ensure the best interests and welfare of the child" … . The best interests of the child are determined by a review of the totality of the circumstances … . "Where . . . facts essential to the best interests analysis, and the circumstances surrounding such facts, remain in dispute, a hearing is required" … .

In view of the parties' disputed factual allegations in this case, the Supreme Court improvidently exercised its discretion in granting that branch of the plaintiff's motion which was to modify the stipulation of custody so as to award him final decision-making authority with respect to the child without a hearing to determine whether an award of final decision-making authority to the plaintiff was in the best interests of the child … . Furthermore, under the circumstances of this case, the interests of the child should be independently represented … . Walter v Walter, 2019 NY Slip Op 09056, Second Dept 12-18-19

STIPULATIONS, QUALIFIED DOMESTIC RELATIONS ORDER (QDRO).

THE QUALIFIED DOMESTIC RELATIONS ORDER (QDRO) OBTAINED BY STIPULATION OF SETTLEMENT MUST BE ENFORCED AS WRITTEN, BECAUSE NO PROVISION WAS MADE FOR GAINS OR LOSSES AFTER THE DIVORCE PROCEEDINGS COMMENCED, SUPREME COURT SHOULD NOT HAVE TRANSFERRED THE AGREED AMOUNT PLUS THE GAINS THAT HAD ACCRUED (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined the qualified domestic relations order (QDRO) obtained pursuant to a stipulation of settlement must be enforced as written. Because the stipulation made no provision for the transfer of gains which accrued after the divorce action started, Supreme Court erred by transferring the agreed amount plus the gains:

"A QDRO obtained pursuant to a [stipulation of settlement] can convey only those rights which the parties [agreed to] as a basis for the judgment' " … . Thus, "a court errs in granting a domestic relations order encompassing rights not provided in the underlying stipulation" … . A stipulation of settlement that is incorporated, but not merged, into the judgment of divorce " is a contract subject to the principles of contract construction and interpretation' " … . If the stipulation of settlement is " complete, clear, and unambiguous on its face[, it] must be enforced according to the plain meaning of its terms' " … . Here, the stipulation of settlement clearly and unambiguously made no provision for plaintiff to receive gains or losses on the amount that the stipulation of settlement specified would be transferred to her. Thus, plaintiff is not entitled to any gains on that amount that accrued after the divorce action commenced … . Reber v Reber, 2019 NY Slip Op 04557, Fourth Dept 6-7-19

STIPULATIONS, STIPULATION OF SETTLEMENT, UNCONSCIONABILITY, DIVORCE, SUBPOENAS.

NONPARTY SUBPOENA PROPERLY QUASHED BECAUSE IT DID NOT PROVIDE THE REASONS FOR THE REQUESTED DISCLOSURE, QUESTIONS OF FACT WHETHER STIPULATION OF SETTLEMENT WAS UNCONSCIONABLE AND WHETHER PLAINTIFF EXECUTED THE STIPULATION UNDER DURESS (SECOND DEPT).

The Second Department, modifying Supreme Court in this divorce action, determined: (1) the subpoena for a nonparty was defective because the reasons for the disclosure were not provided; (2) the stipulation of settlement was not demonstrated to be unconscionable as a matter of law; and (3) there were questions of fact whether the stipulation was signed under duress:

Pursuant to CPLR 3101(a)(4), a party may obtain discovery from a nonparty where the matter sought is material and necessary to the prosecution or defense of an action … . A party seeking discovery from a nonparty must apprise the nonparty of the circumstances or reasons requiring disclosure (see CPLR 3101[a][4] …). Here, we disagree with the Supreme Court's determination that the testimony sought from the nonparty was utterly irrelevant [the nonparty was a women with whom defendant allegedly had an affair]. However, we agree with the court's determination that the subpoenas were defective since, among other things, the defendant failed to provide the nonparty with the required explanation of the circumstances or reasons requiring disclosure either on the face of the subpoenas or in any accompanying material (see CPLR 3101[a][4] …). Accordingly, we agree with the court's granting of the nonparty's motion to quash the subpoenas. Gandham v Gandham, 2019 NY Slip Op 02069, Second Dept 3-20-19

SUPPORT, APPEALS.

FATHER SHOULD HAVE BEEN GIVEN THE OPPORTUNITY TO BE HEARD BEFORE THE SUSPENSION OF HIS COMMITMENT TO JAIL FOR NONPAYMENT OF CHILD SUPPORT WAS REVOKED; THE ISSUE IS APPEALABLE EVEN THOUGH FATHER HAS SERVED HIS TERM OF INCARCERATION (SECOND DEPT).

The Second Department, reversing Family Court, determined father should have been given the opportunity to be heard and present witnesses on the issue of whether good cause existed for the revocation of the suspension of his commitment to jail for nonpayment of child support. The court noted that the matter was not academic, even though father has already served his term of incarceration:

… "[D]ue to the enduring consequences which may potentially flow from the revocation of the order suspending the father's commitment" … , these appeals are not academic, even if the father has served his term of incarceration before the appeals are determined.

Turning to the merits, "[t]he court may suspend an order of commitment upon reasonable conditions and is also authorized to revoke such suspension at any time for good cause shown" (… see Family Ct Act § 455[1]). However, given the liberty interest at stake, the Family Court, before revoking a suspension, must provide to a respondent an opportunity to be heard and to present witnesses on the issue of whether good cause exists to revoke the suspension … . Here, because the father was deprived of this opportunity, we must reverse the orders appealed from and remit the matter to the Family Court, Kings County, for a hearing and a determination thereafter of whether good cause exists to revoke the suspension. Matter of Zhuo Hong Zheng v Hsin Cheng, 2019 NY Slip Op 04958, Second Dept 6-19-19

SUPPORT, ARREARS, CIVIL CONTEMPT.

BY THE TIME OF SENTENCING FOR CONTEMPT FOR FATHER'S WILLFUL VIOLATION OF A SUPPORT ORDER, FATHER HAD PAID ALL THE ARREARS, FAMILY COURT SHOULD NOT HAVE ORDERED HIS INCARCERATION (THIRD DEPT).

The Third Department, reversing Family Court, determined Family Court should not have ordered father incarcerated for 20 days for contempt for willful violation of a support order because, at the time of sentencing, father had paid all the arrears:

Upon finding that a respondent has willfully failed to obey a lawful order of support, Family Court may "commit the respondent to jail for a term not to exceed six months" (Family Ct Act § 454 [3] [a]). "Such a sentence is in the nature of a civil contempt, which 'may only continue until such time as the offender, if it is within his or her power, complies with the support order'" (… see Family Ct Act § 156 …). Inasmuch as the father paid his child support arrears in full prior to the imposition of the sentence, Family Court abused its discretion by issuing the order of commitment … . Matter of Marotta v Casler, 2019 NY Slip Op 03417, Third Dept 5-2-19

SUPPORT, ARREARS.

FATHER'S SUSPENDED JAIL SENTENCE FOR FAILURE TO PAY CHILD SUPPORT ARREARS SHOULD NOT HAVE BEEN REVOKED WITHOUT PROVIDING FATHER THE OPPORTUNITY TO PRESENT EVIDENCE RE: HIS INABILITY TO PAY (THIRD DEPT).

The Third Department, reversing Family Court, determined father's suspended jail sentence should not have been revoked without an inquiry into father's inability to pay the child support arrears:

… [T]he Warren County Department of Social Services, acting on behalf of the mother, submitted a request for an order of commitment based upon the father's failure to comply with the support order or pay the arrears. The father … filed a petition seeking modification of the support order based upon his ongoing medical issues. During a hearing on the modification petition, it was revealed that the father's child support obligation had ended and that he was seeking an adjustment to pay the arrears until he could return to work. It was also disclosed that the proceedings on the order of commitment had been adjourned pending the father's sale of certain real property. … When these proceedings resumed, the father indicated that he did not have a contract to sell the real

property or any means to pay the child support arrears. Family Court adjourned the proceedings to enable the father to undergo surgery, but directed him to return to court with a certified check for the child support arrears in the amount of $12,467.57. When the father did not appear in court on the adjourned date, Family Court issued a warrant and an order of commitment directing respondent's confinement in jail for 60 days. …

We agree with the father that Family Court erred in revoking the suspension of his jail sentence without first affording him the opportunity to present evidence on his inability to pay the arrears (see Family Ct Act § 433 [a] …). … [T]he record does not reflect that Family Court conducted the necessary evidentiary hearing or undertook a sufficient inquiry as to the father's inability to pay the child support arrears. Matter of Eddy v Eddy, 2019 NY Slip Op 06825, Third Dept 9-26-19

SUPPORT, ARREARS.

SUPPORT MAGISTRATE SHOULD NOT HAVE AWARDED CHILD SUPPORT TO FATHER; MOTHER WAS ENTITLED TO ARREARS UNDER THE CIRCUMSTANCES OF THIS CASE (FOURTH DEPT).

The Fourth Department concluded the support magistrate should not have awarded father child support because mother and father shared custody equally and father had the greater income and assets. The Fourth Department determined, in this circumstance, mother should be awarded arrears based upon the child support she should not have been ordered to pay:

… [M]other that she is entitled to a credit against any arrears from the order for the amount of child support erroneously awarded to the father from April 2, 2015 until January 1, 2016, and we therefore remit the matter to Family Court to determine the amount of arrears and the credit to be applied thereto. Although there is a strong public policy against recoupment of child support overpayments … , we conclude that the requested credit is appropriate under the limited circumstances of this case. Here, the record establishes that the mother had significantly less income and received certain public benefits, while the father received substantial disability and pension benefits and had significant assets … . Moreover, granting the mother's request "will not detract from [the father] fulfilling the needs of the child[ ] while [he is] in [the father's] care" and, indeed, will relieve the mother of an erroneously-imposed financial obligation, thereby allowing her to use her funds to maintain a stable household for the child and meet his reasonable needs during visitation … . Matter of Rapp v Horbett, 2019 NY Slip Op 05447, Fourth Dept 7-5-19

SUPPORT, ATTORNEY'S FEES.

EVEN THOUGH FATHER PAID WHAT HE OWED WHEN MOTHER FILED A PETITION FOR UNPAID CHILD SUPPORT, MOTHER WAS ENTITLED TO ATTORNEY'S FEES (SECOND DEPT).

The Second Department, reversing Family Court, determined Family Court improvidently exercised its discretion when it denied mother's request for attorney's fees. Father was in arrears but paid what was owed after mother filed a petition for the unpaid child support. Mother was entitled to attorney's fees despite the fact that father withheld payment because of a dispute about cell phone bills and college expenses:

Pursuant to Family Court Act § 438(a), a court, in its discretion, may award reasonable attorneys' fees in an enforcement proceeding. The denial of an award of attorneys' fees to the mother in this case was an improvident exercise of discretion. The father paid the sum demanded for arrears in satisfying his child support obligations, but only after the mother was forced to expend attorneys' fees to commence an enforcement proceeding. The fact that the father was engaged in a dispute over whether he should be credited for payments for cell phone expenses and college expenses paid before the entry of the parties' judgment of divorce did not authorize him to engage in self-help by withholding child support payments that he ultimately did not dispute were due and owing. Matter of Mensch v Mensch, 2019 NY Slip Op 00126, Second Dept 1-9-19

SUPPORT, CIVIL CONTEMPT, APPEALS.

FATHER WAS ENTITLED TO A HEARING ON WHETHER HE WILLFULLY VIOLATED A CHILD SUPPORT ORDER, ALTHOUGH FATHER COMPLETED THE SENTENCE OF INCARCERATION, THE APPEAL IS NOT MOOT BECAUSE OF THE STIGMA OF A CIVIL CONTEMPT FINDING (FOURTH DEPT).

The Fourth Department, reversing Family Court, determined father was entitled to a hearing on whether he willfully violated a child support order. The Fourth Department noted that. although father had completed the sentence of incarceration, the appeal was not moot because of the consequences which could flow from a finding of civil contempt:

We agree with the father … that the court erred when it determined that the father's alleged violation of the child support order was willful because it did not afford the father with the opportunity to be heard and present

witnesses (… see generally Family Ct Act §§ 433, 454 [1]). Although "[n]o specific form of a hearing is required, . . . at a minimum the hearing must consist of an adducement of proof coupled with an opportunity to rebut it" … . Moreover, "[i]t is well settled that neither a colloquy between a respondent and [the] [c]ourt nor between a respondent's counsel and the court is sufficient to constitute the required hearing" … .

Here, none of the parties' appearances on the violation petition consisted "of an adducement of proof coupled with an opportunity to rebut it" … . At most, there was merely "a colloquy" between the father and Support Magistrate, which is insufficient to constitute the required hearing . Moreover, there is nothing in the record to establish … petitioner mother provided admissible evidence with respect to the father's alleged willful failure to pay child support, nor is there any admissible evidence submitted by the Support Collection Unit (see generally Family Ct Act § 439 [d] …). Also, the father was never given the opportunity to present evidence rebutting the allegations in the petition. Matter of Green v Lafler, 2019 NY Slip Op 08306, Fourth Dept 11-15-19

SUPPORT, CIVIL CONTEMPT, ATTORNEYS, RIGHT TO COUNSEL.

COURT SHOULD HAVE INQUIRED INTO FATHER'S ELIGIBILITY FOR ASSIGNED COUNSEL IN THE CONTEMPT PROCEEDINGS STEMMING FROM FATHER'S FAILURE TO PAY CHILD SUPPORT, FATHER WAS DEPRIVED OF HIS RIGHT TO COUNSEL, NEW HEARING ORDERED (SECOND DEPT).

The Second Department, ordering a new hearing, determined father was deprived of is right to counsel in a contempt proceeding stemming from his failure to pay child support:

A respondent in a contempt proceeding before the Family Court "has the right to the assistance of counsel," including "the right to have counsel assigned by the court" if "he or she is financially unable to obtain the same" (Family Ct Act § 262[a]). "Where a party indicates an inability to retain private counsel, the court must make inquiry to determine whether the party is eligible for court-appointed counsel" … . "The deprivation of [a parent's] fundamental right to counsel requires reversal, without regard to the merits of [his or] her position" … .

We agree with the father's contention that he was deprived of his right to counsel. After the Support Magistrate adjourned the hearing for the express purpose of allowing the father to retain counsel, the father appeared at the

next hearing date without counsel and informed the Support Magistrate that he could not afford to hire an attorney because he had lost his job following the last court date. The Support Magistrate should have inquired into the father's current financial circumstances, including his expenses, to determine whether he had become eligible for assigned counsel … . After the matter was referred to the Family Court, the court should have inquired into the father's financial circumstances, including his expenses, to determine whether he was eligible for assigned counsel in light of his contention that he could not afford to retain an attorney because he was unemployed … . Although the court later assigned the father an attorney, the court failed to provide the "attorney a reasonable opportunity to appear," as the court assigned the attorney midway through the final court appearance, after the fact-finding hearing had concluded, after the Support Magistrate had made its credibility and factual findings, and after the court had decided to incarcerate the father … . Indeed, the court denied the assigned attorney's request for an adjournment … . Matter of Worsdale v Holowchak, 2019 NY Slip Op 02104, Second Dept 3-20-19

SUPPORT, DEFAULT, APPEALS.

THERE IS NO APPEAL FROM A DEFAULT STEMMING FROM FAILURE TO APPEAR, MUST MOVE TO VACATE THE DEFAULT (THIRD DEPT).

The Third Department, dismissing the appeal, explained that where a party in default for failing to appear wishes to appeal, the party must first move to vacate the default:

Respondent appeared by telephone before the Support Magistrate for arraignment, an appearance and a hearing, following which the Support Magistrate concluded that respondent had willfully violated the support order and recommended that he be incarcerated. The matter was referred to Family Court for confirmation. Respondent requested permission to give electronic testimony. Family Court denied that application both in writing and orally and directed, on the record, that respondent must appear in person for the hearing. When respondent did not appear, the court conducted the hearing in his absence, found that he willfully violated the support order and committed him to jail for 180 days. Respondent appeals.

Family Court properly found respondent in default … . Although respondent's counsel appeared and offered the explanation that respondent could not afford to travel to New York, the court had already heard and rejected that excuse in connection with respondent's application to give electronic testimony and directed him to appear in person for the hearing. When respondent failed to do so, the court did not abuse its discretion by finding him in default … . "[T]he proper procedure would be for [respondent] to move to vacate the default and, if said motion

is denied, take an appeal from that order" … . Because no appeal lies from an order entered on default, we must dismiss this appeal … . Matter of Ulster County Support Collection Unit v Beke, 2019 NY Slip Op 01864, Third Dept 3-14-19

SUPPORT, JUDGES, SUA SPONTE.

FAMILY COURT DID NOT HAVE AUTHORITY TO SUA SPONTE VACATE A CONSENT ORDER IN THIS SUPPORT PROCEEDING, VACATION OF THE CONSENT ORDER AND THE RESULTING COMMITMENT ORDER REVERSED (SECOND DEPT).

The Second Department, reversing Family Court, determined the court did have the authority to issue a sua sponte order vacating a consent order:

Upon the father's admission to a willful violation of the support order and upon the father's representation that he was employed, an order of disposition was entered upon the parties' consent, finding the father to be in willful violation of the support order and committing him to a term of incarceration of five months, but suspending his commitment on the condition that he complied with the support order (hereinafter the consent order). Shortly after the consent order was entered, the Family Court received a telephone call, ostensibly from the father's purported employer, informing the court that the father was not, in fact, employed. The court, over the father's objection, sua sponte issued an order vacating the consent order (hereinafter the sua sponte order). The court then proceeded to a willfulness hearing, at the conclusion of which it issued the second order of disposition, finding the father to be in willful violation of the support order and directing that he be committed to the Orange County Jail for a period of six months unless he paid the purge amount of $19,839 (hereinafter the commitment order). …

As the father correctly contends, the Family Court lacked authority to issue the sua sponte order vacating the consent order (see CPLR 5019[a]) …). Moreover, the court issued the sua sponte order on the basis of unsworn statements made during a telephone call between the court and the father's purported employer … . Accordingly, the sua sponte order must be reversed, and the commitment order, which was based in part on the sua sponte order, must be reversed as well. Matter of Schiavone v Mannese, 2019 NY Slip Op 01419, Second Dept 2-27-19

SUPPORT, MAINTENANCE, SEPARATION AGREEMENT, UNCONSCIONABILITY.

FINANCIAL DISCLOSURE AND A HEARING WERE NECESSARY TO DETERMINE WHETHER THE SEPARATION AGREEMENT WAS INVALID, SUPPORT AND MAINTENANCE AGREED TO BY PLAINTIFF WIFE WAS LESS THAN PLAINTIFF'S APARTMENT RENTAL (SECOND DEPT).

The Second Department, reversing Supreme Court, determined a hearing was necessary to determine whether a separation agreement was invalid (unconscionable). The plaintiff wife did not have an attorney when the agreement was negotiated, but she consulted an attorney who advised her the support and maintenance were not sufficient to meet her needs. The amount of support and maintenance agreed to was less than the monthly rental for plaintiff's apartment:

Given that the agreement's support provisions were insufficient to cover the rent for the marital residence and other basic needs of the plaintiff and the children, as well as the lack of financial disclosure regarding the value of the defendant's business, condominium, and actual income, questions of fact existed as to whether the separation agreement was invalid, sufficient to warrant a hearing … . Given the lack of any financial disclosure, the Supreme Court should have exercised its equitable powers and directed disclosure regarding the parties' finances at the time the agreement was executed, to be followed by a hearing to test the validity of the separation agreement … . Mizrahi v Mizrahi, 2019 NY Slip Op 03040, Second Dept 4-24-19

SUPPORT, SEPARATION AGREEMENT, CHOICE OF LAW.

DESPITE THE PROVISION IN THE SEPARATION AGREEMENT REQUIRING THAT ANY MODIFICATION OF SUPPORT APPLY NEW JERSEY LAW, BECAUSE ALL PARTIES RESIDED IN NEW YORK WHEN THE MODIFICATION APPLICATION WAS MADE, NEW YORK LAW CONTROLS (FOURTH DEPT).

The Fourth Department, reversing (modifying) Family Court, determined that. despite the choice of law provision in the separation agreement, New York law applied to any modification of child support. The family

lived in New Jersey when the separation agreement, providing that New Jersey law would control support modification, was executed. But all parties were living in New York when the application for modification was made:

… [W]e conclude that the court had jurisdiction pursuant to the Uniform Interstate Family Support Act ([UIFSA] Family Ct Act art 5-B) to resolve the issues raised in the mother's petition and objections … . The UIFSA unequivocally provides that where, as here, the parents reside in this state "and the child does not reside in the issuing state, a tribunal of this state has jurisdiction to enforce and to modify the issuing state's child support order in a proceeding to register that order" … . Furthermore, we agree with the mother that New York law must be applied to determine the father's child support obligation here inasmuch as the statute further provides that "[a] tribunal of this state exercising jurisdiction under this section shall apply . . . the procedural and substantive law of this state to the proceeding for enforcement or modification" (Family Ct Act § 580-613 [b]). …

Although courts will generally enforce a choice of law clause " so long as the chosen law bears a reasonable relationship to the parties or the transaction' " … , courts will not enforce such clauses where the chosen law violates " some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal' " … . It is long settled that New York has a "strong public policy that obligates a parent to support his or her child" . Under New York law, child support obligations are required to be calculated pursuant to the Child Support Standards Act ([CSSA] Family Ct Act § 413), and " [t]he duty of a parent to support his or her child shall not be eliminated or diminished by the terms of a separation agreement' " … . In addition, whereas … Jersey law provides that child support obligations generally end when a child reaches the age of 19 … , in New York, "[a] parent's duty to support his or her child until the child reaches the age of 21 years is a matter of fundamental public policy" … . Under the circumstances, and given that the parties do not have a valid agreement to opt out of the CSSA (see generally Domestic Relations Law § 240 [1-b] [h]), we conclude that enforcement of the parties' choice of law provision would violate those strong New York public policies. Matter of Brooks v Brooks, 2019 NY Slip Op 03164, Fourth Dept 4-26-19

SUPPORT, VISITATION.

FAMILY COURT SHOULD NOT HAVE CREDITED TO FATHER CHILD SUPPORT PAYMENTS HE MADE WHEN MOTHER WAS INTERFERING WITH HIS VISITATION (THIRD DEPT).

The Third Department noted that Family Court should not have credited back to father child support payments he made during the period when mother was interfering his visitation. Such a suspension of child support can only be made prospectively:

… Family Court erred in suspending the father's child support obligation from June 21, 2017 to February 8, 2018 and ordering the money collected during that period to be credited back to the father. Although a court may suspend child support payments for a period where "the custodial parent has 'wrongfully interfered with or withheld visitation'" … , absent special circumstances, not present here, the suspension must be prospective …. We further find that even where, as here, child support payments are suspended due to a parent's interference, the "strong public policy against restitution or recoupment of support payments" is applicable … . Family Court therefore had no authority to "credit[] back" to the father the payments he made during the period of suspension against his current support obligation or the arrears … . Matter of Kanya J. v Christopher K., 2019 NY Slip Op 06030, Third Dept 8-1-19

SUPPORT, ARREARS.

CHILD SUPPORT ARREARS PROPERLY AWARDED TO MOTHER, BUT THE AMOUNT SHOULD HAVE BEEN CALCULATED THROUGH THE HEARING DATE (FIRST DEPT).

The First Department noted that, although child support arrears were properly awarded to petitioner (mother), the amount of the arrears should have been calculated through the date of the hearing:

By submitting evidence that respondent [father] was delinquent in his support payments … , petitioner established prima facie that respondent willfully violated his child support obligations. Respondent failed to rebut this prima facie showing by presenting evidence of his inability to pay … . He testified to a loss of income but failed to provide evidence of either his lost employment or his efforts to find new employment … . Further, contrary to respondent's contention, whether respondent eventually satisfied his arrears has no bearing on the court's finding of willfulness … , particularly in light of his previous violations of his support obligations. …

Petitioner correctly argues that child support arrears accrued through the date of the hearing on remand, and should be included in the award of arrears, as required by Family Court Act § 459 and in the children's best interests . Therefore, we remand for recalculation of the amount in arrears … . Matter of Eve S.P. v Steven N.S., 2019 NY Slip Op 08130, First Dept 11-12-19

SUPPORT.

CHILD SUPPORT STANDARDS ACT (CSSA) WAS INCORRECTLY APPLIED TO INCOME ABOVE THE STATUTORY CAP (FOURTH DEPT).

The Fourth Department, reversing (modifying) Supreme Court, determined that the court did not correctly apply the Child Support Standards Act (CSSA):

… [T]he court erred in applying the Child Support Standards Act (CSSA) to the combined parental income in excess of the statutory cap … . It is well settled that "blind application of the statutory formula to [combined parental income] over [the statutory cap], without any express findings or record evidence of the [child's] actual needs, constitutes an abdication of judicial responsibility and renders meaningless the statutory provision setting a cap on strict application of the formula"… . Here, in awarding child support on income above the statutory cap, the court considered only the father's financial situation. "[T]he court made no factual findings that the child[ ] [had] financial needs that would not be met unless child support were ordered to be paid out of parental income in excess of [the statutory cap]," and we conclude that, "even if the court had made such a finding, there is no evidence in the record to support it" … . Therefore, in the exercise of our discretion, we fix the father's basic child support obligation on the basis of the combined parental CSSA income up to the cap amount … . Benedict v Benedict, 2019 NY Slip Op 01042, Fourth Dept 2-8-19

SUPPORT.

COURTS HAVE THE DISCRETION TO DECLINE TO IMPUTE INCOME TO A PARENT WHO HAS VOLUNTARILY REDUCED HIS OR HER INCOME FOR A COMPELLING REASON, HERE, ALTHOUGH FATHER TOOK A LOWER PAYING JOB IN NORTH CAROLINA BECAUSE HIS WIFE TOOK A HIGHER PAYING JOB IN NORTH CAROLINA, FATHER'S CHILD SUPPORT OBLIGATION WAS NOT REDUCED, RATHER THE COURT IMPUTED A PORTION OF THE WIFE'S NEW HIGHER INCOME TO KEEP FATHER'S OBLIGATION AT THE SAME LEVEL (FOURTH DEPT).

The Fourth Department determined the court had the discretion to reduce father's child support payments, even though father voluntarily took a lower paying job in North Carolina where his wife had found a job which increased her income by $30,000. The court's conclusion it did not have the authority to reduce father's child support obligation in this circumstance was itself deemed an abuse of discretion by the Fourth Department. However the Fourth Department didn't change father's obligation, rather it imputed some of the wife's new higher income to the father:

… [C]ourts may decline to impute income when a parent has a voluntary reduction in income and a legitimate and reasonable basis for such a reduction … . Indeed, the general rule that "a parent who voluntarily quits a job will not be deemed without fault in losing such employment . . . should not be inflexibly applied where a parent quits a job for a sufficiently compelling reason" … . …

We thus agree with the father that the court erred when it stated that it was not permitted to reduce the father's child support obligation even if his decision to take a lower-paying job was reasonable. …

It was undisputed that the entire reason the father left his higher-paying job in New York was so that his wife could accept a higher-salaried position in North Carolina, which resulted in a net increase in the income of his new family unit. Inasmuch as the father's voluntary decision to leave his lucrative position for a lesser-paying position "unquestionably improved [his overall] financial condition" … , we conclude that we may impute some portion of the wife's higher salary to the father … . Matter of Montgomery v List, 2019 NY Slip Op 04560, Fourth Dept 6-7-19

SUPPORT.

FAMILY COURT SHOULD NOT HAVE REVIEWED THE SUPPORT MAGISTRATE'S NONFINAL ORDER AND GRANTED FATHER'S OBJECTIONS, FATHER'S ARGUMENT THAT HE WOULD NEED TO PAY ATTORNEY'S FEES AND SPEND TIME AWAY FROM WORK TO LITIGATE THE MATTER DID NOT RISE TO THE LEVEL OF IRREPARABLE HARM NEEDED TO JUSTIFY A REVIEW OF A NONFINAL ORDER (SECOND DEPT).

The Second Department, reversing Family Court, determined that father's objections to the support magistrate's nonfinal order should have been denied and explained the relevant criteria:

Pursuant to Family Court Act § 439(e), "[s]pecific, written objections to a final order of a support magistrate may be filed by either party with the court within thirty days after receipt of the order." "[O]bjections from nonfinal orders made by a Support Magistrate are typically not reviewed unless they could lead to irreparable harm" … . Here, the father's claim that he would be forced to incur attorney fees and spend time away from work litigating a case that would ultimately be dismissed does not rise to the level of irreparable harm … . Therefore, the Family Court should have denied the father's objections to the Support Magistrate's nonfinal order. Matter of Tobing v May, 2019 NY Slip Op 00286, Second Dept 1-16-19

SUPPORT.

IN DISMISSING FATHER'S PETITION AND GRANTING MOTHER'S MOTION TO TERMINATE HER CHILD SUPPORT, FAMILY COURT RELIED ON HEARSAY AND EVIDENCE NOT TESTED BY CROSS-EXAMINATION, MATTER SENT BACK FOR A HEARING ON FATHER'S PETITION TO MODIFY CHILD SUPPORT (SECOND DEPT).

The Second Department, reversing Family Court, determined father's petition for modification of child support should not have been denied and mother's motion to terminate her child support obligations should not have been granted based on hearsay and evidence not tested by cross-examination:

… [F]ather filed a petition to modify the child support order … . The father asserted, as a change of circumstance, that the child was living with him. The mother moved for summary judgment dismissing the father's petition, and for termination of her child support obligation, on the ground of parental alienation, contending that the father had unjustifiably frustrated and interfered with her relationship with the child. * * *

The Family Court, in making its determination that the father alienated the child from the mother, improperly relied on inadmissible information that had been provided at court conferences in earlier proceedings before a different judge. The court also improperly relied on hearsay statements and conclusions by an expert, whose credibility was not tested by either party, from an earlier forensic evaluation, and on statements and conclusions by two therapists, whose opinions and credibility were not tested by either party, made at a conference before a different judge … .

Accordingly, we disagree with the Family Court's determination to grant the mother's motion for summary judgment and for termination of her child support obligation, we reinstate the father's petition to modify the child support order … , and we remit the matter to the Family Court … for a hearing on that petition. Matter of McNichol v Reid, 2019 NY Slip Op 07073, Second Dept 10-2-19

SUPPORT.

MOTHER ALLEGED SHE MADE PAYMENTS TO THIRD PARTIES IN THIS SUPPORT ENFORCEMENT PROCEEDING; FATHER SHOULD NOT HAVE BEEN ORDERED TO REIMBURSE MOTHER WITHOUT PROOF THE PAYMENTS WERE IN FACT MADE BY MOTHER (SECOND DEPT).

The Second Department, reversing Family Court, determined, in this support proceeding, father's objections should have been granted. Although mother alleged she made payments to third parties, she presented no proof of the payments. Therefore mother did not prove father owed those amounts to her:

At a support violation hearing, the petitioner has the initial burden of presenting prima facie evidence of nonpayment of child support … . Here, the father's concession of failure to pay child support constituted prima facie evidence of a violation … . However, a party seeking reimbursement must show that he or she actually paid the sums for which reimbursement is sought … . Since the amount of child support arrears awarded included amounts that the mother claimed to have paid to third parties, and the father did not concede those amounts, the mother was not entitled to a money judgment in the absence of proof that she paid the subject sums,

which would demonstrate that the father was indebted to her for those expenses … . Matter of Barletta v Faden, 2019 NY Slip Op 08998, Second Dept 12-18-19

SUPPORT.

MOTHER'S PETITION FOR AN UPWARD MODIFICATION OF FATHER'S CHILD SUPPORT BASED UPON A CHANGE IN FATHER'S EMPLOYMENT STATUS WAS PROPERLY GRANTED, BUT THE MODIFICATION SHOULD HAVE BEEN MADE RETROACTIVE TO THE DATE OF EMPLOYMENT, NOT THE DATE OF THE PETITION (FOURTH DEPT).

The Fourth Department, reversing Family Court, determined mother's petition for an upward modification of father's support obligation should have been granted in its entirety, i.e., retroactive to the date of the change in father's employment status, not to the date of the petition:

The court erroneously concluded that the modification of child support could only be retroactive to the date petitioner filed the petition. Because it is undisputed that the father did not notify the Support Collection Unit of his change in employment status as required by the prior support order, the court had the authority to modify the child support payments retroactive to the date of his employment … . Matter of Oneida County Dept. of Social Servs. v Abu-Zamaq, 2019 NY Slip Op 08341, Fourth Dept 11-15-19

SUPPORT.

PUBLIC POLICY PRECLUDED RECOVERY OF CHILD SUPPORT OVERPAYMENTS (SECOND DEPT).

The Second Department, reversing Supreme Court, determined that public policy precluded plaintiff from recovering child support overpayments:

"There is strong public policy in this state, which the [Child Support Standards Act] did not alter, against restitution or recoupment of the overpayment of child support" … . The rationale behind this policy is that child support payments are deemed to have been used to support the children, so "no funds exist from which one may

recoup moneys so expended"… . "[R]ecoupment of child support payments is only appropriate under limited circumstances'" … .

The plaintiff failed to demonstrate the existence of any circumstances which counter this state's strong public policy against reimbursement of child support overpayments … . The plaintiff could have requested a modification of his child support obligation in accordance with the stipulation, but failed to do so … . Fortgang v Fortgang, 2019 NY Slip Op 02068, Second Dept 3-20-19

SUPPORT.

SUPPORT MAGISTRATE DID NOT HAVE JURISDICTION TO REDUCE FATHER'S CHILD SUPPORT BY DISTRIBUTING A TAX REFUND (FOURTH DEPT).

The Fourth Department determined the Support Magistrate did not have jurisdiction to reduce father's child support by distributing a tax refund:

We agree with the mother, however, that the court erred in denying her … objection to that part of the Support Magistrate's order that, in effect, distributed half of the parties' tax refund to the father by reducing his child support obligation by that amount. We have previously stated that "the jurisdiction of Family Court is generally limited to matters pertaining to child support and custody . . . , and tax deductions or exemptions are not an element of support"… . "[T]he father's entitlement to claim the child[ren] as [] dependent[s] for income tax purposes is not an element of support set forth in Family Court Act article 4, and thus the court lacks jurisdiction" to distribute the parties' tax refund … . Therefore, … we remit the matter to Family Court to recalculate the father's child support obligation without regard to the parties' income tax refund. Matter of Bashir v Brunner, 2019 NY Slip Op 00746, Fourth Dept 2-1-19

SUPPORT.

UNLESS THE PARTIES OPT OUT BY STIPULATION, A CHILD SUPPORT ORDER MAY BE MODIFIED WITHOUT A DEMONSTRATION OF A SUBSTANTIAL CHANGE IN CIRCUMSTANCES IF A PARTY'S INCOME INCREASES BY 15 % OR MORE AND THREE YEARS HAVE PASSED SINCE THE LAST ORDER (SECOND DEPT).

The Second Department noted that a court can modify child support without a substantial change of circumstances where a party's income has increased by 15% or more and three years have passed since the last support order:

Section 451 of the Family Court Act allows a court to modify an order of child support, without requiring a party to allege or demonstrate a substantial change in circumstances, where (1) either party's gross income has changed by 15% or more since the order was entered or modified, or (2) three years or more have passed since the order was entered, last modified, or adjusted (see Family Ct Act § 451[3][b][i]; Domestic Relations Law § 236[B][9][b][2][ii] …). The statutory grounds are not available in the event that the parties specifically opt out of that statutory provision in a validly executed stipulation (see Family Ct Act § 451[3][b]). In this case, the parties, in their stipulation, did not opt out of that statutory provision. Thus, the increase in the father's gross income of more than 15% was sufficient, by itself, to permit the Family Court to modify his child support obligation … . .Matter of Regan v Regan, 2019 NY Slip Op 04702, Second Dept 6-12-19

TEMPORARY REMOVAL.

REMOVAL OF THE CHILD FROM MOTHER'S CARE WAS NOT WARRANTED, NO SHOWING OF AN IMMINENT THREAT TO THE CHILD'S LIFE OR HEALTH (SECOND DEPT).

The Second Department, reversing Family Court, determined the child should not have been removed for the mother's care because there was not showing of an imminent threat to the child's life or health:

Upon a hearing pursuant to Family Court Act § 1027, "temporary removal is only authorized where the court finds it necessary to avoid imminent risk to the child's life or health'" … . "In determining a removal application pursuant to Family Court Act § 1027, the court must engage in a balancing test of the imminent risk with the

best interests of the child and, where appropriate, the reasonable efforts made to avoid removal or continuing removal'" … . "Imminent danger, however, must be near or impending, not merely possible" … .

Here, the petitioner failed to establish that the child would be subjected to imminent risk if he were not removed from the mother's custody pending the outcome of the neglect proceeding … . The Family Court's concerns about, inter alia, whether the mother would keep in contact with the petitioner or return to court for continued proceedings did not amount to an imminent risk to the child's life or health that could not be mitigated by reasonable efforts to avoid removal. Matter of Cameron L. (Ashley L.), 2019 NY Slip Op 09268, Second Dept 12-24-19

VISITATION, APPEALS.

FATHER'S VISITATION SHOULD NOT HAVE BEEN SUBJECT TO MOTHER'S CONSENT; ATTORNEY FOR THE CHILD SHOULD NOT HAVE REFERRED TO EVIDENCE TAKEN IN THE LINCOLN HEARING IN THE APPELLATE BRIEF; THE HEARING TRANSCRIPTS ARE SEALED AND CONFIDENTIAL (THIRD DEPT).

The Third Department, modifying Family Court, determined father's visitation rights should not have been made subject to mother's consent and the attorney for the child should not have referred to the Lincoln hearing in the appellate brief:

Although the order provides the father with the opportunity for frequent and regular unsupervised access, the provision conditioning expansion of visitation to include overnight visitation only upon the mother's consent is an impermissible delegation of authority … . …

… [W]e note our displeasure that the attorney for the children made repeated references to the Lincoln hearing in the appellate brief that he submitted on their behalf … . Family Court's promise of confidentiality should not be lightly breached, and these transcripts are sealed. We again emphasize that "[t]he right to confidentiality during a Lincoln hearing belongs to the child and is superior to the rights or preferences of the parents. Children whose parents are engaged in custody and visitation disputes must be protected from having to openly choose between parents or openly divulging intimate details of their respective parent/child relationships" … . We further note that the breach of the confidentiality of the Lincoln hearing — and of the trust of the children — was exacerbated by the fact that the attorney for the children made certain representations about the children's

testimony that were inconsistent with their statements during the hearing. Matter of Ellen TT. v Parvaz UU., 2019 NY Slip Op 09328, Third Dept 12-26-19

VISITATION, APPEALS.

GRANDMOTHER'S APPEAL OF THE DENIAL OF VISITATION HEARD DESPITE THE FACT THAT GRANDMOTHER HAD BEEN GRANTED VISITATION WHILE THE APPEAL WAS PENDING; DISSENT ARGUED THE EXCEPTION TO THE MOOTNESS DOCTRINE SHOULD NOT HAVE BEEN APPLIED (FOURTH DEPT).

The Fourth Department affirmed Family Court's denial of grandmother's petition for custody and visitation and heard the appeal despite the fact that grandmother was subsequently granted visitation. The majority applied the exception to the mootness doctrine to hear the appeal. An extensive dissent argued the exception to the mootness doctrine did not apply and the appeal should have been dismissed:

We reject the grandmother's contention that the court erred in denying her petition for custody and granting custody to the mother. "It is well established that, as between a parent and a nonparent, the parent has a superior right to custody that cannot be denied unless the nonparent establishes that the parent has relinquished that right because of surrender, abandonment, persisting neglect, unfitness or other like extraordinary circumstances' " … . Here, the grandmother failed to meet her burden of establishing that extraordinary circumstances exist to warrant an inquiry into whether an award of custody to the grandmother is in the best interests of the child … . In particular, we conclude that the grandmother failed to establish her claim that the mother suffered from unaddressed, serious mental health issues that would warrant a finding of extraordinary circumstances … .

Contrary to the grandmother's further contention, we conclude that, as of the time that the order was entered, the record supports the court's determination that it was in the best interests of the subject child to deny the grandmother visitation "in view of grandmother's failure to abide by court orders, the grandmother's animosity toward the [mother], with whom the child[now] reside[s], and the fact that the grandmother frequently engaged in acts that undermined the subject child[]'s relationship with" the mother … . It is well settled that "a court's determination regarding custody and visitation issues, based upon a first-hand assessment of the credibility of the witnesses after an evidentiary hearing, is entitled to great weight and will not be set aside unless it lacks an evidentiary basis in the record" … , and we perceive no basis for disturbing the court's determination here … . Matter of Smith v Ballam, 2019 NY Slip Op 07170, Fourth Dept 10-4-19

VISITATION, DELEGATION OF COURT AUTHORITY.

FAMILY COURT SHOULD NOT HAVE DELEGATED AUTHORITY TO FATHER CONCERNING VISITATION AND SHOULD NOT HAVE INVOLVED MOTHER'S BOYFRIEND IN KEEPING FATHER INFORMED ABOUT MOTHER'S HEALTH (THIRD DEPT).

The Third Department, modifying Family Court, determined Family Court should not have delegated authority to father to control some aspects of visitation, and should not have involved mother's boyfriend, a non-party, in keeping father informed about mother's medical or mental issues:

The court's authority to set visitation cannot be delegated to a party … . We agree that the father can choose to temporarily suspend visitation while the mother is hospitalized for a mental health condition. However, Family Court went too far in giving the father — who is not a doctor or otherwise trained in recognizing and treating mental health conditions — that same authority in the vague situations where the mother is "decompensating or otherwise having an issue with her bipolar condition," or permitting him to require supervision of visitation in the aftermath of those situations without further court intervention. We have no doubt that if the father believes or is informed that the mother is unstable, he will seek court permission to withhold or limit visits to protect the child … . The court also erred in directing the mother's boyfriend — a nonparty, over whom the court had not obtained jurisdiction — to advise the father of any medical or mental issues that the mother may experience "as they are occurring or as soon as practicable thereafter" … . Matter of Aree RR. v John SS., 2019 NY Slip Op 07818, Third Dept 10-31-19

VISITATION, DELEGATION OF COURT AUTHORITY.

FAMILY COURT SHOULD NOT HAVE LET A PARTY DETERMINE THE AMOUNT OF SUPERVISED CONTACT MOTHER IS TO BE ALLOWED, AND FAMILY COURT SHOULD NOT HAVE CONDITIONED FURTHER PETITIONS BY MOTHER ON PERMISSION FROM THE COURT (FOURTH DEPT).

The Fourth Department determined Family Court should not have delegated its authority to order the amount of supervised contact with the children mother is to be allowed and should not have conditioned further petitions by mother on permission from the court:

… [T]he court erred in granting her only so much supervised contact as was "deemed appropriate" by petitioners. The court is "required to determine the issue of visitation in accord with the best interests of the children and fashion a schedule that permits a noncustodial parent to have frequent and regular access" … . "In so doing, the court may not delegate its authority to make such decisions to a party" … , which the court did here by delegating to petitioners its authority to set a supervised visitation schedule. We therefore … remit the matter to Family Court to determine the supervised visitation schedule.

… [T]he court erred in ordering that any petition filed by the mother to modify or enforce the custody orders must have a judge's permission to be scheduled. "Public policy mandates free access to the courts" … , and it is error to restrict such access without a finding that the restricted party "engaged in meritless, frivolous, or vexatious litigation, or . . . otherwise abused the judicial process" … . Here, it is undisputed that the mother had not commenced any frivolous proceedings. In the absence of such a finding, it was error for the court to restrict the mother's access to the court … . Matter of Lakeya P. v Ajja M., 2019 NY Slip Op 00761, Fourth Dept 2-1-19

VISITATION.

A NEGATIVE INFERENCE SHOULD NOT HAVE BEEN DRAWN BASED UPON MOTHER'S FAILURE TO TESTIFY, SHE HAD NO FIRST-HAND KNOWLEDGE OF THE FACTS UNDERLYING FATHER'S PETITION TO MODIFY VISITATION, FATHER DID NOT DEMONSTRATE A CHANGE IN CIRCUMSTANCES AND DID NOT DEMONSTRATE MODIFICATION WOULD BE IN THE BEST INTERESTS OF THE CHILDREN, JUDGE DID NOT MAKE THE REQUIRED FACTUAL FINDINGS, FATHER'S PETITION SHOULD NOT HAVE BEEN GRANTED (FOURTH DEPT).

The Fourth Department, reversing Family Court, determined father did not demonstrate a change in circumstances that warranted visitation in his home, supervised by his new wife. The modified visitation was not demonstrated to be in the best interests of the children. The existing visitation arrangement, supervised by grandmother, was long-standing and was working well. In addition, the Fourth Department held that the fact that mother did not testify should not have been the basis of a negative inference. Mother had no knowledge of the circumstances underlying father's petition:

Family Court erred in drawing a negative inference against [mother] based on her failure to testify at the hearing. The mother had no relevant testimony to offer inasmuch as she had no personal knowledge of the allegations in the modification petition … . Thus, we conclude that a negative inference against the mother was unwarranted because she did not "withhold[] evidence in [her] possession or control that would be likely to support [her] version of the case" … . …

Although the court correctly identified in its decision the applicable standard for modification of an existing custody and visitation order and referenced several circumstances that generally may support a court's finding of a sufficient change in circumstances, the court failed to make express findings relative to the change in circumstances alleged by the father in his petition. Notwithstanding that failure, "we have the authority to review the record to ascertain whether the requisite change in circumstances existed' " … . …

Although the father's marriage, new home, and diagnosis with sleep apnea are changes that have occurred since the time of the stipulation, those changes to the father's personal circumstances do not " reflect[] a real need for change to ensure the best interest[s] of the child[ren]' " … . …

… [T]there is no sound and substantial basis in the record to support the court's determination that the children's best interests warranted replacing the visitation supervisor, their grandmother, with the father's new wife and

permitting the father to select any location for his visits with the children … . Matter of William F.G. v Lisa M.B., 2019 NY Slip Op 00774, Fourth Dept 2-1-19

VOID MARRIAGE, MAINTENANCE, EQUITABLE DISTRIBUTION.

ALTHOUGH THE MARRIAGE WAS A NULLITY, DEFENDANT IS ENTITLED TO MAINTENANCE AND EQUITABLE DISTRIBUTION (SECOND DEPT).

The Second Department, reversing Supreme Court, determined that defendant's motion for maintenance and equitable distribution should have been granted, despite the finding that the marriage was a nullity because the plaintiff-husband was not yet legally divorced when he married defendant:

The Supreme Court erred in denying the defendant's request for maintenance and equitable distribution on the ground that the marriage was a nullity. Domestic Relations Law § 236 expressly provides that, "[i]n any action or proceeding brought . . . during the lifetime of both parties to the marriage to . . . declare the nullity of a void marriage, . . . the court may direct either spouse to provide suitably for the support of the other" … . The statute further provides that "the court, in an action wherein all or part of the relief granted is . . . declaration of the nullity of a marriage, . . . shall determine the respective rights of the parties in their separate or marital property, and shall provide for the disposition thereof in the final judgment" … . Valente v Cabral, 2019 NY Slip Op 08241, Second Dept 11-13-19