NEW YORK APPELLATE DIGEST, LLC

Year in Review
Family Law 2020

An Organized Compilation of the Summaries of Selected Decisions Addressing Family Law Released by Our Appellate Courts in 2020 and Posted on the New York Appellate Digest Website in 2020. The Entries in the Table of Contents Link to the Summaries Which Link to the Decisions on the Official New York Courts Website. Click on "Table of Contents" in the Header on Any Page to Return There.

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The Fourth Department, reversing Family Court, determined mother's request for an adjournment:

… [T]he court abused its discretion in failing to grant her attorney's request for an adjournment … . Under the unique circumstances of this case, i.e., that the court was aware of the mother's history of mental illness, that this was the first request for an adjournment on the mother's behalf, and that the child's situation would remain unaltered if the adjournment had been granted, the court improperly denied the request for an adjournment … . In addition, we conclude that the court abused its discretion in failing to grant an adjournment because of the serious concerns about the mother's competency to assist in her own defense, which raised an issue whether it was necessary for the court to continue the appointment of a guardian ad litem … . We therefore reverse the corrected order and remit the matter to Family Court for further proceedings on the petition. Matter of Hayden A. (Karen A.), 2020 NY Slip Op 06917, Fourth Dept 11-20-20

ADOPTION, ADULT, CONSENT.

DOMESTIC RELATIONS LAW 111 GIVES A COURT THE DISCRETION TO DISPENSE WITH AN ADULT ADOPTEE'S CONSENT TO ADOPTION; HERE PETITIONERS WERE PROPERLY ALLOWED TO ADOPT MARION T., A 66-YEAR-OLD NON-VERBAL WOMAN WITH A SIGNIFICANT DEVELOPMENTAL DISABILITY (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge DiFiore, over a concurrence and an extensive dissent, determined that the lower court rulings that Domestic Relations Law 111 (1)(a) gives a court the discretion to dispense with the adoptee's consent to an adoption. Here the petitioners sought to adopt Marion T, a non-verbal 66-year-old women with a significant developmental disability.

[The} issue turns on the proper interpretation of Domestic Relations Law (DRL) § 111(1)(a), which generally requires the consent of an "adoptive child" who is over 14 years old but gives the court discretion to dispense with that consent. We agree with the Appellate Division that, in appropriate circumstances, the statute permits a court to approve an adoption even absent the consent of an adult adoptee. Because that discretion was not abused here and there is record support for the affirmed best interests finding, we affirm. Matter of Marian T. (Lauren R.), 2020 NY Slip Op 06932, CtApp 11-23-20

APPEALS, DECISION MET REQUIREMENTS OF AN ORDER AND WAS THEREFORE APPEALABLE.

THE MAJORITY NOTED THAT A DECISION IS NOT AN APPEALABLE PAPER BUT HELD THE DECISION HERE IN THIS DIVORCE CASE MET THE ESSENTIAL REQUIREMENTS OF AN ORDER AND WAS THEREFORE APPEALABLE; THE DISSENT DISAGREED (FOURTH DEPT).

The Fourth Department, over a dissent, determined that, although a decision is not an appealable paper, the decision in this divorce action was close enough to an order to support an appeal. The dissent disagreed:

As a preliminary matter, although not raised by the parties and although "[n]o appeal lies from a mere decision" (… see generally CPLR 5501 [c]; 5512 [a]), we conclude that the paper appealed from meets the essential requirements of an order, and we therefore treat it as such … .

From the dissent:

In 1987, this Court held that "[n]o appeal lies from a mere decision" (Kuhn v Kuhn, 129 AD2d 967, 967 [4th Dept 1987]). In reaching that conclusion, we relied on, inter alia, CPLR 5512 (a), titled "appealable paper," which provides that "[a]n initial appeal shall be taken from the judgment or order of the court of original instance." Until today, we have routinely followed that settled principle … . * * *

Here, the record includes a decision that is denominated only as a decision and has no ordering paragraphs and, in his notice of appeal, plaintiff explicitly appeals "from the Decision" (emphasis added). My colleagues in the majority believe that the decision is an appealable paper because it meets "the essential requirements of an order." To support that proposition, the majority relies on Matter of Louka v Shehatou (67 AD3d 1476 [4th Dept 2009]), wherein this Court determined that a letter would be treated as an order inasmuch as "the Referee filed the letter with the Family Court Clerk and . . . the letter resolved the motion and advised the father that he had a right to appeal" (id. at 1476). Although the decision here was filed and resolved the motion, there was no directive in the decision that plaintiff had the right to appeal from it. Furthermore, I submit that almost all written decisions at least attempt to resolve the issues presented by the parties and many of those decisions are also filed. Nicol v Nicol, 2020 NY Slip Op 00740, Fourth Dept 1-31-20

APPEALS, MOTHER FAILED TO TIMELY APPEAL TERMINATION OF PARENTAL RIGHTS.

THE 3RD DEPARTMENT REFUSED TO AMEND THE NOTICE OF APPEAL TO INSERT AN ORDER FROM WHICH NO APPEAL HAD BEEN TAKEN; APPEAL DISMISSED (THIRD DEPT).

The Third Department, dismissing respondent mother's appeal, determined mother failed to timely appeal the order terminating her parental rights. Mother submitted a notice of appeal after she was served with the April 2018 permanency hearing order, not within 35 days of her being served with the November 2016 order terminating her parental rights:

Respondent contends that the affidavit submitted with her notice of appeal demonstrates that she intended to appeal the November 2016 order terminating her parental rights, rather than the April 5, 2018 permanency hearing order. Accordingly, respondent asks this Court to "construe [her appeal] as such, and deem it timely filed." Despite this request, the order terminating respondent's parental rights was entered and mailed to respondent in November 2016, 18 months before her May 2018 notice of appeal. Thus, even if we were to construe it as respondent requests, because the notice of appeal was not filed and served "within 35 days after

the order was mailed" to respondent, it was untimely and we lack jurisdiction to hear the appeal … . Further, despite respondent's contention that her affidavit accompanying the notice of appeal demonstrates her intent to appeal the order terminating her parental rights, this affidavit explicitly and repeatedly references the permanency hearing order. Although this Court "may treat a notice of appeal which contains an inaccurate description of the judgment or order appealed from as valid," it may not, as respondent requests, "amend a notice of appeal so as to insert therein an order from which no appeal has in fact ever been taken" … . Matter of Alan VV. (Amanda RR.), 2020 NY Slip Op 03574, Third Dept 6-26-20

APPEALS, PRESERVATION OF ERROR.

THE MAJORITY HELD THE ISSUES WHETHER MOTHER HAD MADE ALLEGATIONS OF DOMESTIC ABUSE IN A SWORN PLEADING OR WHETHER MOTHER HAD PROVEN DOMESTIC ABUSE ALLEGATIONS AGAINST FATHER WERE NOT PRESERVED FOR APPEAL; THE DISSENT ARGUED THE ISSUES WERE PRESERVED AND WOULD REMIT FOR A BEST INTERESTS OF THE CHILD ANALYSIS (CT APP).

The Court of Appeals, over a detailed and comprehensive dissent, affirmed the award of custody to father, finding that the issues raised on appeal by mother were not preserved. Defendant mother argued she had made allegations of domestic abuse in a sworn pleading (petition) and, therefore, pursuant to Domestic Relations Law 240(1)(a), the court was required to consider the effect of the domestic violence on the best interests of the child:

Defendant failed to preserve her arguments regarding Domestic Relations Law § 240 (1) (a). As a result, the parties never litigated, and Supreme Court did not pass upon, or make any findings with respect to, whether a withdrawn family offense petition constitutes "a sworn petition" for purposes of this statute or whether defendant proved allegations of domestic violence "by a preponderance of the evidence" (Domestic Relations Law § 240 [1] [a]) — issues that are essential to the arguments defendant now raises. Record evidence supports the affirmed custody award. * * *

From the dissent:

Because the issue is preserved, I would reverse and remit to Supreme Court for a new best interest of the child analysis consistent with the framework of Domestic Relations Law § 240 (1) (a), and any development of the record as needed. Cole v Cole, 2020 NY Slip Op 03489, CtApp 6-23-20

ATTORNEYS, CHILD SUPPORT, RIGHT TO COUNSEL.

THE SUPPORT MAGISTRATE SHOULD HAVE INQUIRED FURTHER WHEN FATHER SAID HE WISHED TO HAVE AN ATTORNEY BUT COULD NOT AFFORD ONE; THE SUPPORT MAGISTRATE TOLD FATHER HE WAS NOT ENTITLED TO APPOINTED COUNSEL BECAUSE HE WAS WORKING; FATHER WAS DEPRIVED OF HIS RIGHT TO COUNSEL (SECOND DEPT).

The Second Department, reversing Family Court, determined the Support Magistrate should have inquired further when father said he wanted an attorney but could not afford one. The Support Magistrate told father he was not entitled to an appointed attorney because he was employed:

The Support Magistrate should have inquired further into the father's financial circumstances, including, but not limited to, inquiring about his expenses because the father expressed a desire to have an attorney appointed … . 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 … . Here, despite the father's statements at the pretrial appearance that he could not afford to hire private counsel and would like to have an attorney appointed, the Support Magistrate adjourned the matter for a hearing. Under these circumstances, the father was deprived of his right to counsel and reversal is required … . Matter of Goodine v Evans, 2020 NY Slip Op 02668, Second Dept 5-6-20

ATTORNEYS, APPEARANCE BY ATTORNEY, FATHER NOT IN DEFAULT, CUSTODY.

BECAUSE FATHER'S ATTORNEY APPEARED IN THE CUSTODY PROCEEDING FATHER WAS NOT IN DEFAULT AND THE ORDER WAS THEREFORE APPEALABLE (FOURTH DEPT).

The Fourth Department determined father was not in default because his attorney appeared. Therefore the custody order was appealable:

Petitioner father commenced this proceeding seeking to modify a prior order of custody that, inter alia, awarded sole legal and physical custody of the subject child to respondent mother. The father now appeals from an order that, inter alia, continued sole legal and physical custody of the subject child with the mother.

We agree with the father that Family Court erred in entering the order upon his default based on his failure to appear in court. The record establishes that the father "was represented by counsel, and we have previously determined that, [w]here a party fails to appear [in court on a scheduled date] but is represented by counsel, the order is not one entered upon the default of the aggrieved party and appeal is not precluded" … . Matter of Williams v Richardson, 2020 NY Slip Op 01975, Fourth Dept 3-20-20

ATTORNEYS, ATTORNEY FOR THE CHILD, FAILURE TO CONSULT WITH THE CHILDREN.

ON APPEAL, THE ATTORNEY FOR THE CHILD DID NOT FULFILL HIS OBLIGATION TO CONSULT WITH THE CHILDREN TO DETERMINE THEIR WISHES OR TO ADEQUATELY EXPLAIN WHY CONSULTATION WAS NOT POSSIBLE; HE WAS RELIEVED OF HIS ASSIGNMENT (THIRD DEPT).

The Third Department, relieving the attorney for the child (AFC) of responsibility for the appeal, determined the AFC did not fulfill his responsibilities under the Rules of the Chief Judge (22 NYCRR 7.2):

The Rules of the Chief Judge require that an AFC in a custody or visitation proceeding "must zealously advocate the child's position" (22 NYCRR 7.2 [d]; see 22 NYCRR 7.2 [c]), and further provide that, "[i]f the child is capable of knowing, voluntary and considered judgment, the [AFC] should be directed by the wishes of the child, even if the [AFC] believes that what the child wants is not in the child's best interests" … . The Rules establish only two circumstances in which an AFC may adopt a position that does not reflect the child's wishes — specifically, when he or she "is convinced either that the child lacks the capacity for knowing, voluntary and considered judgment, or that following the child's wishes is likely to result in a substantial risk of imminent, serious harm to the child" … . …

The AFC here wholly failed to fulfill the obligations imposed by these provisions upon this appeal. The only stated basis for his determination to advocate for the children's best interests rather than for their wishes was their ages. However, it was the AFC's obligation to "consult with and advise the child[ren] to the extent of and in a manner consistent with [their] capacities" … . At 10, the older child was certainly old enough to be capable of expressing her wishes, and whether the younger child, at 6, had the capacity to do so was not solely dependent upon her calendar age, but also upon such individual considerations as her level of maturity and verbal abilities … . … Here, the AFC's brief is devoid of any indication of the children's wishes, with no reference to 22 NYCRR 7.2 or to the analysis that this rule requires an AFC to undertake before advocating for a position that does not express the child's wishes … . …

Additionally, although the record reveals that the AFC met with the children during the Family Court proceeding, it does not appear that he met or spoke with them again during the appeal … . Matter of Jennifer VV. v Lawrence WW., 2020 NY Slip Op 02136, Third Dept 4-2-20

ATTORNEYS, ATTORNEY FOR THE CHILD, NEGLECT PETITION.

ATTORNEY FOR THE CHILD PROPERLY ALLOWED TO ADOPT THE NEGLECT PETITION AFTER THE PETITIONER REQUESTED THE WITHDRAWAL OF THE PETITION (THIRD DEPT).

The Third Department, reversing Family Court, determined the attorney for the child (AFC) was properly allowed to proceed with the neglect petition after the petitioner requested to withdraw the petition. However the evidence of educational and medical neglect was insufficient:

… [W]e perceive no error or abuse of discretion in Family Court declining to dismiss the petitions and allowing the attorney for the children to adopt the petitions and proceed on them (see Family Ct Act § 1032 [b] …). Turning to the merits, as relevant here, a party seeking to establish neglect must prove, by a preponderance of the evidence, that a child's "physical, mental or emotional condition has been impaired or is in imminent danger of becoming impaired as a result of the failure of his [or her] parent . . . to exercise a minimum degree of care . . . in supplying [him or her] with adequate . . . education in accordance with the provisions of part one of article [65] of the [E]ducation [L]aw, or medical . . . care, though financially able to do so or offered financial or other reasonable means to do so" … . Matter of Abel XX. (Jennifer XX.), 2020 NY Slip Op 02129, Third Dept 4-2-20

ATTORNEYS, ATTORNEY FOR THE CHILD, POSITIONS CONTRARY TO CHILDREN'S WISHES.

THE ATTORNEY FOR THE CHILD (AFC) TOOK AND ADVOCATED POSITIONS WHICH WERE CONTRARY TO THE WISHES OF THE CHILDREN; NEW CUSTODY HEARING ORDERED WITH A NEW AFC (SECOND DEPT).

The Second Department, in a full-fledged opinion by Justice Christopher, determined the attorney for the children (AFC) took a position contrary to the children's wishes in this custody action, requiring a new hearing and the appointment of a new AFC:

An AFC is required to "zealously advocate the child's position" (22 NYCRR 7.2[d] …). In order to determine the child's wishes, the AFC must "consult with and advise the child to the extent of and in a manner consistent with the child's capacities, and have a thorough knowledge of the child's circumstances" (22 NYCRR 7.2[d][1]). The rules further state that " the [AFC] should be directed by the wishes of the child, even if the [AFC] believes that what the child wants is not in the child's best interests' and that the [AFC] should explain fully the options available to the child, and may recommend to the child a course of action that in the [AFC]'s view would best promote the child's interests'" … . * * *

… [T]he AFC's representation was in direct contravention of her clients' stated parameters. Throughout the course of the proceedings, she failed to advocate on behalf of her clients, who were 13 and 11 years old at the time of the hearing, and who were both on the high honor roll and involved in extracurricular activities. The AFC actively pursued a course of litigation aimed at opposing their stated positions. She joined the plaintiff in opposing the introduction of evidence and witnesses in support of the defendant's case. When the defendant sought to introduce evidence in defense of the plaintiff's allegations that the defendant provided the children with unnecessary medical care, the AFC joined the plaintiff in opposing the introduction of the defendant's evidence. The AFC also opposed the introduction of evidence that may have supported one child's claim that the plaintiff attempted to strangle her. The AFC objected to the testimony of school personnel for the purpose of explaining the children's seemingly excessive school absences. The AFC's questions of the plaintiff during cross-examination were designed to elicit testimony in support of the plaintiff's case, in opposition to her clients' wishes. Silverman v Silverman, 2020 NY Slip Op 04338, Second Dept 7-29-20

ATTORNEYS, ATTORNEY'S FEES, APPEALS.

STATEMENT MADE IN PRIOR APPELLATE DECISION IN THE SAME MATTER TO THE EFFECT NO ONE QUESTIONED THE NUMBER OF HOURS PUT IN BY THE ATTORNEY FOR THE CHILD WAS DICTA AND THEREFORE SHOULD NOT HAVE BEEN CONSIDERED THE LAW OF THE CASE ON REMITTAL; THE FOURTH DEPARTMENT REDUCED THE NUMBER OF BILLABLE HOURS (FOURTH DEPT).

The Fourth Department, reducing the amount of attorney's fees awarded by Supreme Court, noted that a statement made by the Fourth Department in a prior appeal in the same matter was dicta and therefore should not have been treated as the law of the case by Supreme Court. In the prior decision the Fourth Department stated that no one had questioned the number of hours the attorney (Reedy) had worked on the case as the attorney for the child. Supreme Court took that statement to mean the number of hours could not be reduced by the court on remittal:

Our prior order unequivocally directed the court to calculate the amount of Reedy's fees. An award of attorney's fees must be "calculated on the basis of the . . . hours actually and reasonably spent on the matter by . . . counsel, multiplied by counsel's reasonable hourly rate" … . In assessing the reasonableness of the hours spent by counsel, the issue "is not whether hindsight vindicates an attorney's time expenditures, but whether, at the time the work was performed, a reasonable attorney would have engaged in the same time expenditures" … . Thus, upon remittal the court was, inter alia, to determine an award of attorney's fees that adequately reflected both the time spent and whether such time "was reasonably related to the issues litigated" … . Here, especially in light of Reedy's prior concession that the amount sought was excessive, we conclude that the court abused its discretion in fixing the amount of fees without determining the reasonableness of the number of hours included in Reedy's fee request … .

Contrary to respondent's contention, the court's statement in its earlier decision that "[n]o one has questioned the number of hours [Reedy] has claimed" did not become law of the case. The doctrine of law of the case "applies only to legal determinations that were necessarily resolved on the merits in a prior decision" … . Consequently, the doctrine does not apply where, as here, the court makes statements that are "mere

dicta" … . Inasmuch as the court's ultimate ruling in its earlier decision was that Reedy was not entitled to compensation as a private pay AFC, the court's statement about the number of hours that he worked was dictum. Stefaniak v Zulkharnain, 2020 NY Slip Op 00961, Fourth Dept 2-7-20

ATTORNEYS, INEFFECTIVE ASSISTANCE, CHILD SUPPORT, COMMITMENT.

FATHER DID NOT RECEIVE EFFECTIVE ASSISTANCE OF COUNSEL IN THIS CHILD SUPPORT PROCEEDING RESULTING IN HIS COMMITMENT TO THREE MONTHS IN JAIL; NEW HEARING ORDERED (SECOND DEPT).

The Second Department, reversing Family Court, determined father did not receive effective assistance of counsel in this child support proceeding which committed father to three months in jail for violation of the child support order:

We agree with the father that he was deprived of the effective assistance of counsel at a hearing on the mother's petition for violation of an order of child support. In support proceedings such as this one, "the appropriate standard to apply in evaluating a claim of ineffective assistance is the meaningful representation standard"… . Here, the father's defense at the hearing was that because of a back injury, he was unable to continue working as a mail carrier beginning in January 2018 and that, prior to obtaining a new position at the post office in March 2019, he searched for different work. Notably, despite being advised on multiple occasions that the father was required to provide a financial disclosure affidavit, tax forms, proof that he was diligently searching for employment, and certified medical records, counsel failed to procure the father's medical records or provide the court with any relevant financial documentation. The father's counsel also failed to call any witnesses to testify as to the effects of the father's back injury, subpoena his treating physician, or obtain a medical affidavit. The Family Court made specific reference to the lack of any credible medical testimony, financial disclosure affidavit, tax returns, or proof of a job search in its determination that the father failed to refute the mother's prima facie showing of willfulness. Counsel's failure to obtain relevant medical information or to procure financial and job search records

that may have supported the father's contention constituted a failure to meaningfully represent the father, and he is entitled to a new hearing on the violation petition … . Matter of Miller v DiPalma, 2020 NY Slip Op 00140, Second Dept 1-8-20

ATTORNEYS.

MOTHER SHOULD HAVE BEEN ADVISED OF HER RIGHT TO COUNSEL IN THIS CUSTODY PROCEEDING (SECOND DEPT).

The Second Department, reversing Family Court, determined mother should have been advised of her right to counsel in this custody proceeding:

"Family Court Act § 262 provides certain parties to particular Family Court proceedings with a statutory right to counsel. If the party in question falls within one of the enumerated subdivisions thereto, he or she must be advised by the court, before proceeding, that he or she has the right to representation, the right to seek an adjournment to confer with counsel and the right to assigned counsel if he or she cannot afford to retain counsel" … . The deprivation of a party's fundamental right to counsel in a custody or visitation proceeding requires reversal, without regard to the merits of the unrepresented party's position … .

Here, the mother clearly fell within one of the enumerated subdivisions of Family Court Act § 262 because she was the respondent in a custody modification proceeding. Therefore, the Family Court should have advised the mother of her right to counsel. Matter of Follini v Currie, 2020 NY Slip Op 08062, Second Dept 12-30-20

CHILD ABUSE, CORROBORATION OF CHILD'S OUT-OF-COURT STATEMENTS BY EXPERT.

EXPERT WITNESSES CORROBORATED THE CHILD'S OUT-OF-COURT STATEMENTS IN THIS CHILD SEXUAL ABUSE CASE; THE PETITION, DISMISSED BY FAMILY COURT, REINSTATED AND A FINDING OF ABUSE MADE BY THE APPELLATE COURT (SECOND DEPT).

The Second Department, reversing Family Court, determined that the child's prior out-of-court statements should have been admitted in this child sexual abuse proceeding. The expert witnesses corroborated the child's statements:

"A child's prior out-of-court statements may provide the basis for a finding of abuse, provided that these hearsay statements are corroborated, so as to ensure their reliability'" . "Any other evidence tending to support the reliability of the previous statements . . . shall be sufficient corroboration" (Family Ct Act § 1046[a][vi]). " The Family Court has considerable discretion in deciding whether a … out-of-court statements alleging incidents of abuse have been reliably corroborated'" … . Although deference is to be given to the hearing court's determinations as to credibility … , where that court's credibility determination is not supported by the record, "this Court is free to make its own credibility assessments and overturn the determination of the hearing court" … .

Contrary to the Family Court's determination, the testimony of the petitioner's expert witnesses, including the validating expert witness … , provided sufficient corroboration of the subject child's numerous and consistent out-of-court statements regarding the father's sexual abuse of her, and together with the testimony of the petitioner's caseworker, established by a preponderance of the evidence that the father sexually abused the child … . Further, the court failed to give sufficient consideration to the inconsistent and evasive nature of the father's testimony … . Matter of Tazya B. (Curtis B.), 2020 NY Slip Op 01341, Second Dept 2-26-20

CHILD ABUSE, SEVERE ABUSE, FAILURE TO SEEK MEDICAL CARE.

SEVERE ABUSE FINDING SUPPORTED BY FATHER'S FAILURE TO SEEK IMMEDIATE MEDICAL CARE FOR THE SERIOUSLY INJURED CHILD (FOURTH DEPT).

The Fourth Department, over a dissent, determined the evidence supported the severe abuse finding against father on the ground father delayed in seeking medical attention for the child's severe injuries:

Family Court's finding of severe abuse was based on two incidents in which the father found the older child at the bottom of the basement stairs in the morning. After the first incident, the older child sustained back and leg injuries, torso abrasions and facial bruising that was so severe that she could not open her eyes all the way. After the second incident, the child had two lacerations across the front of her neck that required significant medical attention. * * *

A finding of severe abuse requires clear and convincing evidence that a child was found to be abused "as a result of reckless or intentional acts of the parent committed under circumstances evincing a depraved indifference to human life, which result in serious physical injury to the child as defined in [Penal Law § 10.00 (10)]" (Social Services Law § 384-b [8] [a] [i]; see Family Ct Act §§ 1046 [b] [ii]; 1051 [e]). Here, the older child suffered severe injuries, including cuts to her throat that required a significant amount of medical attention and serious bruising. The act of cutting the older child's throat twice demonstrates that the actor did so because he or she simply did not care whether grievous harm would result to the older child. Even assuming, arguendo, that the evidence did not establish that the father was the one who inflicted those injuries, we conclude that the evidence demonstrates that he was in the home when the older child sustained her serious physical injuries and that he offered no compelling explanation for what caused them or why he failed to seek immediate medical help for her after discovering those injuries … .

We disagree with the dissent's view that petitioner was required to present evidence that the father's delay in seeking medical treatment exacerbated the older child's

injuries or complicated the older child's medical treatment. Matter of Mya N. (Reginald N.–Sadie H.), 2020 NY Slip Op 04266, Fourth Dept 7-24-20

CHILD SUPPORT, ARREARS, COMMITMENT.

FATHER HAD BROUGHT HIS CHILD SUPPORT PAYMENTS CURRENT; FAMILY COURT DID NOT HAVE THE AUTHORITY TO IMPOSE A SUSPENDED JAIL SENTENCE CONDITIONED ON PAYMENT OF FUTURE CHILD SUPPORT (THIRD DEPT).

The Third Department, reversing Family Court, determined that once father had paid the child support arrears the court did not have the authority to impose a suspended jail sentence:

… [T]he father … is aggrieved by … the order suspending [the jail] sentence upon the condition that he comply with the support order for three years. A jail sentence imposed for a party's civil contempt in failing to comply with an order — such as the father's willful failure to pay support as ordered — is not punitive and only serves "the remedial purpose of compelling compliance" with the order … . There was "no remedial purpose to be served by continued confinement" or the threat thereof once the father had brought his support payments current … and, indeed, the order of commitment should not have been issued because the father had already "complie[d] completely with the underlying support order" … . Family Court accordingly erred in suspending the sentence and was obliged to discharge it without condition. Matter of Dupuis v Costello, 2020 NY Slip Op 06992, Third Dept 11-25-20

CHILD SUPPORT, ARREARS, COMMITMENT.

FATHER HAD PAID ALL THE CHILD SUPPORT HE OWED; THE SENTENCE OF INCARCERATION SHOULD NOT HAVE BEEN IMPOSED (SECOND DEPT).

The Second Department, reversing Family Court, determined that the court should not have imposed a sentence of incarceration on father because father had paid all of the child support he owed:

We disagree … with the Family Court's imposition of a sentence of incarceration upon its finding of willfulness since the parties agreed at the hearing that the father had paid the full amount due and owing. Although the court is empowered to impose a sentence of incarceration of up to six months for willful failure to comply with a support order (see Family Ct Act § 454[3][a] …), such incarceration may only continue until the offender complies with the support order (see Judiciary Law § 774[1] …). Here, the court sentenced the father to a period of incarceration of 40 days, to be suspended under certain conditions, after the parties already had agreed that the father had paid all that was due and owing at that time. Under such circumstances, no period of incarceration should have been imposed … . Accordingly, since the court imposed a sentence of incarceration in contravention of Judiciary Law § 774(1), that provision of the … order must be deleted. Matter of Augliera v Araujo, 2020 NY Slip Op 03510, Second Dept 6-24-20

CHILD SUPPORT, ARREARS, COMMITMENT.

FATHER SHOULD NOT HAVE BEEN SENTENCED TO JAIL FOR NONPAYMENT OF CHILD SUPPORT BECAUSE HE HAD PAID THE ARREARS BEFORE THE ORDER OF COMMITMENT WAS ISSUED (THIRD DEPT).

The Third Department, reversing Family Court, determined it was an abuse of discretion to sentence father to jail for failure to pay child support after father paid the arrears:

The father contends that Family Court abused its discretion by imposing a 90-day jail sentence for the father's willful violation of the prior support order. We agree. Where a willful violation has been found, Family Court may "commit the respondent to jail for a term not to exceed six months" … . "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" … . Here, the father presented payment at the hearing for the full amount of arrears owed and, therefore, Family Court abused its discretion when it issued the order of commitment … . Matter of Rondeau v Jerome, 2020 NY Slip Op 07960, Third Dept 12-24-20

CHILD SUPPORT, COMMITMENT AND PROBATION.

SENTENCE WHICH INCLUDED BOTH JAIL TIME AND PROBATION FOR VIOLATION OF A CHILD SUPPORT ORDER IS ILLEGAL; AN ILLEGAL SENTENCE IS APPEALABLE WITHOUT PRESERVATION OF THE ERROR (SECOND DEPT).

The Second Department, reversing Family Court, determined the imposition of a jail sentence and probation for father's failure to pay support in violation of a court order was illegal. An illegal sentence is appealable without preservation of the error:

Although the father failed to preserve his challenge to the legality of his sentence, a challenge to an unlawful sentence is not subject to the preservation rule … . Family Court Act § 454 expressly delineates the authority of the Family Court to impose either probation or a term of incarceration upon a finding of a willful violation of an order of support, not both (… Family Court Act § 454[3]). Thus, the Family Court was without authority to impose both a jail term and probation (see Family Court Act § 454[3] …). Since the father completed his 90-day term of incarceration, that portion of his sentence imposing probation must be vacated … . Matter of Lopez v Wessin, 2020 NY Slip Op 00137, Second Dept 1-8-20

CHILD SUPPORT, CONFIRMATION OF WILLFULNESS HEARING, ADJOURNMENTS.

DENIAL OF MOTHER'S REQUEST TO PRESENT EVIDENCE OF HER FINANCIAL SITUATION WAS AN ABUSE OF DISCRETION; MOTHER WAS FACING INCARCERATION FOR VIOLATING HER CHILD SUPPORT OBLIGATIONS; NEW CONFIRMATION OF WILLFULNESS HEARING ORDERED (SECOND DEPT).

The Second Department, reversing Family Court, determined it was an abuse of discretion to deny mother's request to present evidence of her financial situation and her request for an adjournment to obtain additional proof of her financial situation in this child support proceeding. Mother was facing incarceration for violation of her support obligations:

… [A]lthough the mother appeared in person before the Family Court at the confirmation of willfulness hearing, and proffered documentary and testimonial evidence in support of her assertion that she was indigent and unable to pay child support, the court did not permit the mother to adduce any evidence regarding her financial situation, and denied her request for an adjournment to obtain additional evidence of her inability to work. This was an abuse of discretion … . Since the mother was facing a potential period of incarceration of up to six months in the event that the court determined that her failure to pay child support was willful (see Family Ct Act § 454[3][a]), the mother's testimony was "essential to the court's determination as to whether she had had the ability to pay or willfully disobeyed the prior support order" … . If the mother had been given an opportunity to substantiate her claimed inability to pay, and she had done so, the court would have been constrained to deny the father's petition … . Matter of Palombelli v Guglielmo, 2020 NY Slip Op 05903, Second Dept 10-21-20

CHILD SUPPORT, DEATH OF PAYEE.

FATHER'S CHILD SUPPORT OBLIGATION DID NOT CEASE UPON MOTHER'S DEATH; MATERNAL GRANDFATHER'S PETITION SEEKING TO BE MADE THE CHILD-SUPPORT PAYEE RETROACTIVE TO MOTHER'S DEATH PROPERLY GRANTED (SECOND DEPT).

The Second Department determined father's child support obligations did not cease upon the death of mother. The maternal grandparents were awarded sole custody of the child. The maternal grandfather's petition seeking to be made the payee of father's child support was properly granted, retroactive to the date of mother's death:

Since a child support obligation is owed to the child, not to the payee spouse, "the death of the payee spouse does not terminate the obligation" … . Here, the death of the mother did not terminate the father's continuing obligation under the order of support dated December 4, 2014, to support the children. It would be contrary to the statutory scheme of the Family Court Act and the important public policies it embodies for the father to no longer be liable for unpaid child support payments accrued after the mother's death where, as here, "he neither had custody of the child[ren] nor sought to otherwise modify his child support obligation during the relevant period" … . Matter of Sultan v Khan, 2020 NY Slip Op 02929, Second Dept 5-20-20

CHILD SUPPORT, SERVICE OF PETITION.

PETITIONER HAD THE BURDEN TO PROVE RESPONDENT WAS SERVED; THE SUPPORT MAGISTRATE REVERSED THE BURDEN OF PROOF; NEW HEARING ORDERED (SECOND DEPT).

The Second Department, ordering a new hearing, determined the Support Magistrate did not apply the correct standard to whether respondent (father) was served with the petition seeking an order of filiation and child support. The burden of proof of proper service was on mother:

The Support Magistrate did not apply the correct standard in weighing the evidence adduced at the hearing. "It is well established that it is the plaintiff [or the petitioner] who bears the ultimate burden of proving by preponderating evidence that jurisdiction over the defendant [or the respondent] was obtained" … . The plaintiff or the petitioner may sustain that burden, inter alia, by introducing the affidavit of service and the testimony of the process server, or evidence demonstrating that the process server is unavailable or that diligent efforts were made to locate the process server to no avail … . Here, the mother, as the party who commenced this proceeding, was the party who bore the burden of proving that jurisdiction was obtained over the father. At the conclusion of the hearing, however, the Support Magistrate denied that branch of the father's motion which was pursuant to CPLR 5015(a)(4) to vacate the order of support, finding that he failed to credibly meet his burden of proving that he was not served with the petition … . Matter of Kathleen T.K. v Eric C.S., 2020 NY Slip Op 02266, Second Dept 4-9-20

CHILD SUPPORT, UNION DUES.

FATHER'S NONVOLUNTARY UNION DUES SHOULD HAVE BEEN DEDUCTED FROM HIS INCOME FOR CALCULATION OF CHILD SUPPORT (SECOND DEPT).

The Second Department, reversing (modifying) Family Court, determined father's nonvoluntary union dues should have been deducted from his income for the calculation of child support:

Although no deduction from income for union dues is specifically mandated by the Family Court Act, there is an allowable deduction for "unreimbursed employee business expenses except to the extent said expenses reduce personal expenditures" (Family Ct Act § 413[1][b][5][vii][A]). Nonvoluntary union dues may be deducted under this category … . "However, such expenses are properly deducted from parental income in calculating child support obligations only when proven, usually by tax returns accompanied by records and receipts" … .

At the hearing, counsel for the mother consented to the deduction of the father's nonvoluntary union dues from the father's income for the purposes of calculating

his child support and related financial obligations. Thus, the Family Court should have granted the father's objection to so much of the Support Magistrate's order as failed to deduct the father's nonvoluntary union dues from his income in calculating his child support and related financial obligations. Matter of Julien v Ware, 2020 NY Slip Op 00414, Second Dept 1-22-20

CUSTODY, ATTORNEY FOR THE CHILD ADVOCATED AGAINST THE CHILDREN'S WISHES.

THE CHILDREN WISHED TO REMAIN WITH MOTHER BUT CUSTODY WAS AWARDED TO FATHER; THE ATTORNEY FOR THE CHILD AGREED FATHER SHOULD HAVE CUSTODY; MOTHER REQUESTED A LINCOLN HEARING WHICH WAS DENIED; THE DISSENT ARGUED A LINCOLN HEARING SHOULD HAVE BEEN HELD (FOURTH DEPT).

The Fourth Department determined custody of the children was properly granted to father, against the children's wishes. The attorney for the child (AFC) informed the court of the children's wishes but supported custody by the father. The mother unsuccessfully argued a Lincoln hearing should have been held. The dissent agreed that a Lincoln hearing was necessary:

The mother further contends that the court erred in declining to conduct a Lincoln hearing. Inasmuch as the AFC expressed the children's wishes to the court … , the children were both of young age … , and there are indications in the record that they were being coached on what to say to the court … , we perceive no abuse of discretion in the court's denial of the mother's request for a Lincoln hearing … .
* * *

From the dissent:

While the decision whether to conduct a Lincoln hearing is discretionary, it is " often the preferable course' " to conduct one … . Indeed, a child's preference, although not determinative, is an "important" factor that provides the court, while considering the potential for influence and the child's age and maturity, "some indication of what is in the child's best interests" … . In addition, the in camera testimony of a child

may ” on the whole benefit the child by obtaining for the [court] significant pieces of information [it] needs to make the soundest possible decision’ ” … .

In this case, the children were 10 and 7 years old, respectively, at the time of the proceeding, ages at which a child’s “wishes [are] not necessarily entitled to the great weight’ we accord to the preferences of older adolescents . . . [but are], at minimum, entitled to consideration’ ” … . Most importantly, the Attorney for the Children (AFC) substituted his judgment for that of the children and advocated that custody be transferred from the mother to the father, despite the fact that the children had been in the mother’s custody since birth and the fact that the father admitted to having committed an act of domestic violence against the mother. While the AFC did inform the court of the children’s expressed wishes to live with the mother, in my view, the court should have conducted a Lincoln hearing to consider those wishes and the reasons for them. Matter of Muriel v Muriel, 2020 NY Slip Op 00776, Fourth Dept 1-31-20

CUSTODY, AWARD TO NONPARENT, ESTRAORDINARY CIRCUMSTANCES FINDING REQUIRED.

FAMILY COURT SHOULD NOT HAVE AWARDED CUSTODY OF THE CHILDREN TO A NONPARENT WITHOUT FIRST MAKING A FINDING WHETHER EXTRAORDINARY CIRCUMSTANCES EXISTED; THE ISSUE WAS NOT PRESERVED, APPEAL HEARD IN THE INTEREST OF JUSTICE (FOURTH DEPT).

The Fourth Department, reversing Family Court, determined Family Court did not make the required initial finding of extraordinary circumstances before awarding custody of the children to a nonparent. Although the issue was not preserved, it was heard in the interest of justice:

” [A]s 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 . . . The nonparent has the burden of proving that extraordinary circumstances exist, and until such circumstances are

shown, the court does not reach the issue of the best interests of the child' " … . That rule " applies even if there is an existing order of custody concerning that child unless there is a prior determination that extraordinary circumstances exist' " … . A prior consent order does not by itself constitute a judicial finding or an admission of extraordinary circumstances … . There is no indication in the record that the court previously made a determination of extraordinary circumstances … . Matter of Byler v Byler, 2020 NY Slip Op 04025, Fourth Dept 7-17-20

CUSTODY, CHILDREN OUT-OF-STATE, JURISDICTION.

FAMILY COURT SHOULD NOT HAVE SUMMARILY DISMISSED MOTHER'S PETITION FOR CUSTODY OF CHILDREN LIVING OUT-OF-STATE WITHOUT FIRST DETERMINING WHETHER IT HAD EXCLUSIVE, CONTINUING JURISDICTION OVER CUSTODY ISSUES (SECOND DEPT).

The Second Department determined Family Court should not have dismissed mother's petition seeking sole custody of the children, who lived out-of-state, without first making a ruling on whether it had continuing jurisdiction over custody issues:

On November 22, 2016, the Family Court issued an order (hereinafter the custody order) awarding, inter alia, joint legal custody of the subject children to the mother and the children's godmother, with primary physical custody and final decision-making authority to the godmother. …

Pursuant to the Uniform Child Custody Jurisdiction and Enforcement Act, codified in article 5-A of the Domestic Relations Law, a court in this State which has made an initial custody determination has exclusive, continuing jurisdiction over that determination until it finds, as is relevant here, that it should relinquish jurisdiction because the child does not 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] …). …

… Family Court should not have summarily dismissed the mother's petition on the ground that the children had been living with the godmother in Pennsylvania, without considering whether it had exclusive, continuing jurisdiction pursuant to Domestic Relations Law § 76-a (1) … , and affording the mother an opportunity to present evidence as to that issue … . Matter of Hodge v Hodges-Nelson, 2020 NY Slip Op 02926, Second Dept 5-20-20

CUSTODY, CONSENT, HEARING REQUIRED TO ASSESS MOTHER'S ABILITY TO CONSENT, ATTORNEYS, ATTORNEY FOR THE CHILD CANNOT VETO CONSENT OF THE PARTIES.

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

The Third Department, reversing Family Court, determined the consent custody order, involving mother, aunt and great-aunt, may have been invalid because mother may have been unable to consent due to some unspecified disability, The Third Department noted that consent orders are generally not appealable, but here there was a question about the validity of the consent. The Third Department also noted that the attorney for the child (AFC), who disagreed with the consent order, does not have the power to veto the consent of the parties:

We must first note that, as a general rule, no appeal lies from an order entered on consent … . Further, although Family Court cannot relegate the AFC to a meaningless role, the AFC cannot veto a proposed settlement reached by the parties, particularly after the AFC, as here, was given a full and fair opportunity to list objections to the proposed arrangement on the record … .

Here, however, we find substantial cause to question the validity of the mother's consent to Family Court's order. In the course of the appearances, the parties all appeared to acknowledge that the mother lacks the ability to care for the child on her own due to some disability, although the mother's attorney objected to such a

characterization in the absence of a legal determination. The AFC expressed concern about the effect of this disability on the mother's "ability to . . . consent to anything." Further, Family Court stated that "[the mother is] not in a position to make decisions." In our view, this statement directly and expressly calls into question the mother's ability to consent to the modification order … . In this context, the troubling allegations of inappropriate sexual contact raised by the AFC are particularly serious and significant. Our limited record thus does not demonstrate that the mother's consent to the order was valid and, if not, that the court had "sufficient information to undertake a comprehensive independent review of the child's best interests" … . Accordingly, in these highly unusual circumstances, we remit for a hearing and further development of the record on the issue of the mother's ability to consent, and, if necessary, as to whether the custody proposal meets the requisite standard of promoting the best interests of the child. Matter of Erica X. v Lisa X., 2020 NY Slip Op 01224, Third Dept 2-20-20

CUSTODY, FORUM NON CONVENIENS.

NEW YORK DETERMINED TO BE AN INCONVENIENT FORUM IN THIS CUSTODY MATTER (FOURTH DEPT).

The Fourth Department noted the record was sufficient to allow the appellate court to determine whether New York was an inconvenient forum in this custody matter. Mother had moved to California with the child after father abused mother in New York. Father filed the custody petitions in New York. After considering the statutory factors the Fourth Department found New York to be an inconvenient forum. With respect to one of the factors–the location of the relevant evidence–the court wrote:

The location of relevant evidence and, to some extent, the ability of the court in each state to decide matters expeditiously also favor California as the appropriate forum. The majority of the evidence pertaining to the best interests analysis in this custody matter is located in California. Although evidence relating to certain domestic violence incidents is, as noted above, more readily available in New York, most other relevant information regarding the child's best interests, such as her school performance, response to therapy, the indigenous tribe she belongs to, and her

relationship with her extended family, is in California … . It does not appear that the child has any connection with New York other than the father and a paternal grandmother. Further, the Attorney for the Child in New York was having trouble providing effective representation to the child inasmuch as it was difficult to communicate with the child by telephone … . Matter of Coia v Saavedra, 2020 NY Slip Op 03325, Fourth Dept 6-12-20

CUSTODY, HEARING WITHOUT FATHER.

FAMILY COURT SHOULD NOT HAVE HELD A CUSTODY HEARING WITHOUT FATHER'S PARTICIPATION (FOURTH DEPT).

The Fourth Department, reversing Family Court, determined Family Court should have held a custody hearing without father's participation:

During an appearance at which Family Court specifically stated that it was not "making any findings" and that it would make findings only after a future hearing, the father apparently grew frustrated with the proceedings and walked out of court. As the father was leaving, the court warned him that it would issue a permanent order in his absence. Thereafter, the court proceeded to hold a hearing, take testimony from the mother, and issue its determination on custody and visitation.

"It is axiomatic that 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[s] of the child[ren]" … . Indeed, custody determinations "require a careful and comprehensive evaluation of the material facts and circumstances in order to permit the court to ascertain the optimal result for the child. The value of a plenary hearing is particularly pronounced in custody cases in light of the subjective factors—such as the credibility and sincerity of the witnesses, and the character and temperament of the parents—that are often critical to the court's determination" … . Matter of Williams v Davis, 2020 NY Slip Op 00777, Fourth Dept 1-31-20

CUSTODY, HEARINGS.

MOTHER'S PETITION TO MODIFY THE PARENTAL ACCESS SCHEDULE SHOULD NOT HAVE RULED ON WITHOUT HOLDING A HEARING, CRITERIA EXPLAINED (SECOND DEPT).

The Second Department, reversing Family Court, determined the judge should not have ruled in this custody proceeding without holding a hearing. Mother had filed a petition seeking modification of the parental access schedule:

"Custody determinations . . . require a careful and comprehensive evaluation of the material facts and circumstances in order to permit the court to ascertain the optimal result for the child" … . Accordingly, "custody determinations should '[g]enerally' be made 'only after a full and plenary hearing and inquiry'" … . This 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" … .

Although the Court of Appeals has "decline[d] . . . to fashion a 'one size fits all' rule mandating a hearing in every custody case statewide," it has cautioned that a court "opting to forgo a plenary hearing must take care to clearly articulate which factors were—or were not—material to its determination, and the evidence supporting its decision" … . The Court of Appeals has, therefore, criticized the "undefined and imprecise 'adequate relevant information' standard" as entailing "an unacceptably-high risk" of resulting in custody determinations that neither "conform to the best interest of a child" nor "adequately protect" a parent's "fundamental right . . . 'to control the upbringing of a child'"… . Accordingly, "[w]here . . . facts material to the best interest analysis, and the circumstances surrounding such facts, remain in dispute, a custody hearing is required" … .

Here, the record demonstrates disputed factual issues so as to require a hearing on the issue of the father's parental access … . Moreover, the Family Court, in making its determinations without a hearing, relied upon the hearsay statements and conclusions of the forensic evaluator, whose opinions and credibility were untested by the parties. Contrary to the contention of the mother and the attorneys for the children, "the court's mere reliance upon 'adequate relevant information,' as

opposed to admissible evidence, was erroneous" … . Matter of Corcoran v Liebowitz, 2020 NY Slip Op 08058, Second Dept 12-30-20

CUSTODY, JURISDICTION, CHILD'S CONNECTIONS TO NEW YORK.

NEITHER NEW YORK NOR PENNSYLVANIA IS THE HOME STATE OF THE CHILD IN THIS CUSTODY CASE; NEW YORK HAS JURISDICTION BECAUSE OF THE CHILD'S CONNECTIONS TO THE STATE; FAMILY COURT REVERSED (SECOND DEPT).

The Second Department, reversing Family Court, determined neither New York nor Pennsylvania was the "home state" of the child under the statutes and, under the circumstances, New York has jurisdiction to make an initial custody determination:

… [A]lthough the child was living in New York for six consecutive months immediately before this proceeding was commenced, he was not living with a parent in this state for that time period, because the mother did not move to New York until January 2018. Moreover, the maternal great grandmother was not a "person acting as a parent," as that term is defined by statute, because she had not been awarded legal custody of the child by a court and did not claim a right to legal custody of the child … . …

Pennsylvania did not have jurisdiction over the matter. Pennsylvania also did not qualify as the home state of the child, since the child had been living in New York for more than six months prior to the commencement of the proceeding (see Domestic Relations Law § 76[1][a] …). Thus, the child did not have a home state at the time of commencement. In such a case, New York may exercise jurisdiction if "(i) the child . . . and at least one parent . . . have a significant connection with this state other than mere physical presence; and (ii) substantial evidence is available in this state concerning the child's care, protection, training, and personal relationships" (Domestic Relations Law § 76[1][b] …).

The record demonstrates the child's and the mother's significant connection with New York, as well as the availability of substantial evidence in this state, which is where the child and the mother continue to reside with the maternal great

grandmother, and where the child is enrolled in school and is seen by a pediatrician … . Matter of Defrank v Wolf, 2020 NY Slip Op 00126, Second Dept 1-8-20

CUSTODY, MODIFICATION FOR RELOCATION.

FATHER'S PETITION TO MODIFY CUSTODY TO ALLOW HIS RELOCATION TO NORTH CAROLINA SHOULD NOT HAVE BEEN GRANTED; CRITERIA EXPLAINED (FOURTH DEPT).

The Fourth Department, reversing Family Court, determined father's petition to modify custody to allow his relocation to North Carolina should not have been granted:

In its decision, the court considered the relevant Tropea factors but erred in applying those factors to the facts and circumstances in the case at bar. Contrary to the court's determination, the father "failed to establish that the child's life would be enhanced economically, emotionally and educationally by the proposed relocation" … . While the father established that he will enjoy greater economic job opportunities in North Carolina, those nominal financial gains will be negated by the greater cost of living in the area of North Carolina where he will be relocating. Additionally, as noted by the court, the father had unrealistic goals for housing in North Carolina. Notably, the father testified that he was presently paying monthly rent of $900 for a home in Olean, New York, but wanted to purchase a home in North Carolina for between $200,000 and $250,000. He acknowledged that he could not afford a home within that price range on his own and would need the financial assistance of family, his employer, and his fiancée. There is no evidence in the record, however, that anyone had committed to providing that needed assistance or had the financial ability to do so. The father also failed to establish that the child would receive a better education in North Carolina inasmuch as there is no evidence in the record comparing the schools in North Carolina to those in Olean, New York … . Furthermore, the father admitted that he had "zero" family living in North Carolina. On the other hand, the father's mother currently lives in Olean, New York, and the father's aunt lives nearby in Wellsville, New York. The maternal grandmother, great-grandmother and great-grandfather all live in Olean, New York. The father therefore failed to establish

that he and the child would receive similar support residing in North Carolina … . In our view, the only factor that fully supported the father's request for relocation was a "fresh start," away from Olean, New York, where he and the mother struggled with an opiate addiction. That factor, standing alone, is insufficient to warrant relocation … . Gasdik v Winiarz, 2020 NY Slip Op 06918, Fourth Dept 11-20-20

CUSTODY, MODIFICATION FOR RELOCATION.

MOTHER'S PETITION FOR A MODIFICATION OF CUSTODY TO ALLOW RELOCATION SHOULD NOT HAVE BEEN DISMISSED WITHOUT A HEARING (FOURTH DEPT).

The Fourth Department, reversing Family Court, determined mother's petition for a modification of custody to accommodate relocation should not have been dismissed without holding a hearing:

… [T]he mother alleged that she had specific employment advancement opportunities at her job in Monroe County, and "economic necessity . . . may present a particularly persuasive ground for permitting the proposed move" … . In addition, the mother alleged that the relocation would enhance the child's extracurricular activities, a factor that may support a relocation … . In addition, the Attorney for the Child indicated that the child favored the relocation, another factor that may support a relocation petition … . Consequently, the petition sufficiently alleged that the relocation would be in the child's best interests … , and the court erred in dismissing it on the ground that it did not. Finally, to the extent that the decision indicates that the court dismissed the petition on the ground that the mother failed to allege a sufficient change in circumstances, that was error … . Matter of Betts v Moore, 2020 NY Slip Op 06907, Fourth Dept 11-20-20

CUSTODY, MODIFICATION, CHANGE IN CIRCUMSTANCES.

MOTHER PRESENTED SUFFICIENT EVIDENCE OF A CHANGE IN CIRCUMSTANCES TO JUSTIFY AWARDING HER SOLE CUSTODY OF THE CHILDREN (SECOND DEPT).

The Second Department, reversing Family Court, determined there was sufficient evidence of a change of circumstances to award mother sole custody of the children:

… [T]he Family Court's determination, in effect, that there had been no change in circumstances requiring a transfer of legal custody to the mother and a modification of the father's parental access lacks a sound and substantial basis in the record … . The record reflects that the children's relationship with the father has deteriorated since the issuance of the custody order … , that the father had threatened to strike the children with a belt, and that the father denigrated the mother in the presence of the children … . Moreover, the children, who were 11 and 13 years old at the time of the hearing, indicated a strong preference to reside with the mother … . Matter of Georgiou-Ely v Ely, 2020 NY Slip Op 02049, Second Dept 3-25-20

CUSTODY, MODIFICATION, CUSTIODY CHANGE CANNOT BE IMPOSED AS PUNISHMENT.

THE CONDITIONAL DIRECTIVE THAT FATHER BE AWARDED SOLE CUSTODY IF MOTHER DID NOT RETURN FROM SWEDEN WITH THE CHILD IS NOT ENFORCEABLE; A CHANGE IN CUSTODY MUST BE BASED ON THE BEST INTERESTS OF THE CHILD AND SHOULD NOT BE USED TO PUNISH A PARENT (SECOND DEPT).

The Second Department, reversing Family Court, determined the conditional directive that sole custody of the child be awarded to father if mother did not return from Sweden with the child within 30 days was not enforceable. There was no application for a change of custody before the court. The conditional directive was issued to punish mother for moving to and remaining in Sweden and was not based upon the best interests of the child:

The paramount concern in any custody determination is the best interests of the child, under the totality of the circumstances … . Reversal or modification of an existing custody order " should not be a weapon wielded as a means of punishing a recalcitrant' or contemptuous parent" … . In addition, "where no party has moved for a change in custody, a court may not modify an existing custody order in a non-emergency situation absent notice to the parties, and without affording the custodial parent an opportunity to present evidence and to call and cross-examine witnesses" … .

Here, the Family Court's conditional directive that sole legal and physical custody of the child shall be transferred to the father if the mother did not return the child to New York City within 30 days was meant to punish the mother and was not based on the court's determination of the best interests of the child. The court should not have considered a change in custody in the absence of an application for such relief with notice to the mother …. Further, the court's conditional award of custody to the father was improper in light of the court's determination otherwise that it was in the child's best interests to remain in the custody of the mother, and considering, among other things, that the mother had always been the child's primary caretaker, the father did not have overnight visits with the child, and the court had previously expressed concerns about the father's ability to care for the child for an extended period of time … . Matter of Ross v Ross, 2020 NY Slip Op 03668, Second Dept 7-1-20

CUSTODY, MODIFICATION, HEARING.

MOTHER PRESENTED SUFFICIENT EVIDENCE IN SUPPORT OF HER PRO SE PETITION FOR A MODIFICATION OF CUSTODY TO WARRANT A HEARING (THIRD DEPT).

The Third Department, reversing Family Court, determined that mother presented enough evidence in her pro se petition for a modification of custody to warrant a hearing:

"A parent seeking to modify an existing custody order first must demonstrate that a change in circumstances has occurred since the entry thereof that is sufficient to warrant the court undertaking a best interests analysis in the first instance; assuming

this threshold requirement is met, the parent then must show that modification of the underlying order is necessary to ensure the child's continued best interests" … . "[I]n determining whether a pro se petitioner made a sufficient evidentiary showing to warrant a hearing, we construe the pleadings liberally and afford the petitioner the benefit of every favorable inference. As a general matter, custody determinations should be rendered only after a full and plenary hearing" … .

In her petition, the mother alleged, among other things, that the father repeatedly attempted to take the child with him to a prison to visit an inmate who was convicted of murder and on at least one occasion was successful. She also asserted that the child had no desire to accompany the father on these visits and, in fact, they caused the child significant distress. Furthermore, the mother alleged in her petition that the father has refused to allow any additional parenting time, despite numerous requests, and that he has threatened to take away her court-ordered parenting time. Finally, the mother averred that she has completed therapeutic counseling, is continuing with further therapy and is a fit parent. We find that the pro se petition is sufficient to warrant an evidentiary hearing based on these allegations. "We also note that the prior custody order was entered upon consent of the parties and there has not . . . been a plenary hearing regarding custody" since 2014 … . Matter of Kimberly H. v Daniel I., 2020 NY Slip Op 03830, Third Dept 7-9-20

CUSTODY, MODIFICATION, IN CAMERA INTERVIEW WITH CHILD.

FAMILY COURT SHOULD NOT HAVE RELIED SOLELY ON THE IN CAMERA INTERVIEW WITH THE EIGHT-YEAR-OLD CHILD IN THIS MODIFICATION OF CUSTODY CASE, MATTER REMITTED (FIRST DEPT).

The First Department, reversing Family Court and remanding the case, determined the evidence did not support a finding that there had been a change in circumstance sufficient to warrant awarding sole custody to father. The court noted that Family Court should not have relied solely on the in camera interview with the eight-year-old child:

The court based its finding solely on an in camera interview with the child, then eight years old, and the hearsay testimony of the father. The transcript of the in camera interview shows that the child made inconsistent statements about where he spent the majority of his time. However, even if he had made a definitive declaration, the Court of Appeals has admonished that courts should "not use any information, which has not been previously mentioned and is adverse to either parent, without in some way checking on its accuracy during the course of the open hearing," because "there are grave risks involved in these private interviews. A child whose home is or has been torn apart is subjected to emotional stresses that may produce completely distorted images of its parents and its situation. Also, its feelings may be transient indeed, and the reasons for its preferences may indicate that no weight should be given the child's choice. Without a full background on the family and the child, these interviews can lead the most conscientious Judge astray" … .

In fact, this admonition is well taken in this case, where the record provides a substantial basis for concluding that either or both parents spoke to the child about the proceeding before his interview with the court. Matter of Edwin E.R. v Monique A.-O., 2020 NY Slip Op 06347, First Dept 11-5-20

CUSTODY, MODIFICATION, LINCOLN HEARING.

UNDER THE CIRCUMSTANCES, A LINCOLN HEARING WILL PROVIDE INFORMATION PERTINENT TO FATHER'S PETITION FOR A MODIFICATION OF THE CUSTODY ORDER, MATTER REMITTED (THIRD DEPT).

The Third Department, reversing Family Court, remitted the matter to determine whether a change in circumstance warranted a modification of the child custody order. The order did not address where the child should attend school after eighth grade and father sought an modified order allowing the child to attend a public high school and expanding his parenting time. Family Court refused to use information learned in a Lincoln hearing in connection with the father's burden to show a change in circumstances. The Third Department remitted the matter noting that a Lincoln hearing, under the circumstances, would provide the court with pertinent information:

… [T]he father established a change in circumstances requiring a thorough best interests analysis. To that end, it is undisputed that there is no current order governing where the child is to attend school. Also, the father's uncontested testimony established that the father and the mother cannot reach an agreement as to where the child should attend school, thus requiring judicial intervention … . …

Family Court erred in denying the father's motion requesting a Lincoln hearing to aid in the court's determination of whether a change in circumstances had occurred. "Although a child's wishes can support the finding of a change in circumstances, they are but one factor and are not determinative" … . Although "[t]he decision whether to conduct such a hearing is discretionary, . . . it is 'often the preferable course' to conduct one" … . Here, given that the child was 14 years old at the time of the fact-finding hearing and had expressed a preference to attend public school, that this preference was one of the changed circumstances alleged by the father and that the attorney for the child joined in the father's request for the Lincoln hearing, a Lincoln hearing "would have provided the court with significant pieces of information it needed to make the soundest possible decision" … . Matter of Edwin Z. v Courtney AA., 2020 NY Slip Op 05987, Third Dept 10-22-20

CUSTODY.

DENIAL OF FATHER'S PETITION FOR CUSTODY WAS NOT SUPPORTED BY THE EVIDENCE (FOURTH DEPT).

The Fourth Department, reversing Family Court, held that the denial of father's petition for a change in custody (from mother to father) was not supported by the evidence:

Here, the only factor that weighs in favor of respondent mother is the existing custody arrangement, which had been in place for a lengthy period of time … . Although the subject child has a brother at the mother's house, that is not a factor that favors the mother because "both parties have other children, [and thus] an award of [primary residential] custody to either party would necessarily separate the child at issue from some of her siblings" … .

The remaining factors favor awarding primary residential custody to the father. During the time that the mother had primary residential custody, the child performed poorly at school and experienced a significant increase in her depression … . Additionally, due to the mother's work schedule, the child was required to arise before 5:00 a.m. and to thereafter be taken to a relative's house, where the child stayed for two hours before going to school. Also, the mother is admittedly unable to assist the child with school work, or to schedule or attend the child's medical and mental health counseling appointments. The father, in contrast, is able to provide a more stable home for the child and is currently helping the child with those measures.

Furthermore, the child expressed a desire to reside with the father. Although the "[c]ourt is . . . not required to abide by the wishes of a child to the exclusion of other factors in the best interests analysis" … , we conclude that "the wishes of the [14]-year-old child are . . . entitled to great weight where, as here, the age and maturity [of the child] would make [her] input particularly meaningful" … . In addition, although the position of the AFC is not determinative, it is a factor to be considered … , and the AFC here has supported the child's wish to live with the father both in Family Court and on appeal. Matter of Alwardt v Connolly, 2020 NY Slip Op 02574, Fourth Dept 5-1-20

CUSTODY.

MOTHER'S PETITION FOR A MODIFICATION OF THE CUSTODY ORDER SHOULD NOT HAVE BEEN DISMISSED AT THE CLOSE OF MOTHER'S CASE; REMITTED FOR A CONTINUED HEARING (SECOND DEPT).

The Second Department, reversing Family Court, determined mother's petition to modify the custody order should not have been dismissed at the close of the mother's case:

A party seeking modification of an existing custody order must demonstrate that there has been a change in circumstances such that modification is required to protect the best interests of the child … . The best interests of the child are determined by a review of the totality of the circumstances … . In deciding an application to dismiss

a petition for failure to establish a prima facie case, the court must accept the petitioner's evidence as true and afford the petitioner the benefit of every favorable inference that can reasonably be drawn therefrom … .

Here, accepting the mother's evidence as true and affording her the benefit of every favorable inference, the mother presented sufficient prima facie evidence of a change of circumstances which might warrant modification of custody in the best interests of the child … . There was evidence that the mother had moved from the country of Jamaica and was now living in Staten Island with her husband and family. Further, the mother presented evidence that the stepmother had used corporal punishment on the child between the date of the custody order and the filing of the mother's petition, despite the fact that the custody order expressly prohibited the parties from using or tolerating the use of corporal punishment on the child. Matter of Campbell v Blair, 2020 NY Slip Op 00270, Second Dept 1-17-20

DECLARATION OF PARENTAGE, MARRIED SAME-SEX COUPLE.

FAMILY COURT DOES NOT HAVE SUBJECT MATTER JURISDICTION TO DECLARE THE PARENTAGE OF A CHILD BORN TO A MARRIED SAME-SEX COUPLE BECAUSE THE CHILD WAS NOT BORN "OUT-OF-WEDLOCK;" RECENTLY ENACTED LEGISLATION WILL SOON ALLOW SUCH A PETITION IN FAMILY COURT AND THE PARTIES MAY NOW SEEK A DECLARATORY JUDGMENT ON THE ISSUE IN SUPREME COURT, WHICH HAS SUBJECT MATTER JURISDICTION (THIRD DEPT).

The Third Department, in a full-fledged opinion by Justice Devine, determined Family Court did not have subject matter jurisdiction over the petition to declare petitioners, a same-sex married couple, as the legal parents of the child conceived with donated sperm. Although the Family Court Act allows the court to determine "paternity" for a female parent, the court's jurisdiction in that regard is limited to children born out-of-wedlock. The Third Department noted that legislation will soon allow a Family Court petition for a judgment of parentage and Supreme Court has jurisdiction to hear an application for a declaratory judgment on the issue:

… [T]he Legislature has only empowered Family Court to hear "proceedings to determine [parentage] and for the support of children born out-of-wedlock" … and further defined a child in Family Ct Act article 5 as one "born out of wedlock" … . Petitioners were married at all relevant times, and their child was not born out of wedlock. …

We note the recent enactment of Family Ct Act article 5-C, which will soon allow a petition for a judgment of parentage … . Moreover, if petitioners articulate how "an adjudication of the merits will result in immediate and practical consequences to" them … , they are presently free "to bring a declaratory judgment action in Supreme Court to determine the status of the child and the rights of all interested parties" … . Matter of Alison RR, 2020 NY Slip Op 06002, Third Dept 10-22-20

DIVORCE, ADULTERY.

THE WIFE'S COUNTERCLAIM FOR ADULTERY IN THIS DIVORCE ACTION, WHICH, IF PROVEN, WOULD HAVE HAD SUBSTANTIAL FINANCIAL CONSEQUENCES FOR THE HUSBAND, SHOULD HAVE BEEN DISMISSED; THE HUSBAND AND THE WOMAN WHO WAS THE SUBJECT OF THE WIFE'S ALLEGATIONS SUBMITTED AFFIDAVITS DENYING ANY SEXUAL RELATIONSHIP; THE WIFE'S AFFIDAVIT WAS BASED ENTIRELY ON PROXIMITY–THE WOMAN WAS THE FAMILY'S BABYSITTER–AND WAS OTHERWISE UNSUPPORTED (SECOND DEPT).

The Second Department, reversing Supreme Court, in a full-fledged opinion by Justice Dillon, determined the husband's motion for summary judgment dismissing the wife's adultery counterclaim should have been granted in this divorce action. Whether the husband committed adultery was an important issue because of the significant financial consequences agreed to in the post-nuptial agreement, including the award to the wife of 80% of the husband's future gross income and 80% of all marital assets. The wife alleged the husband committed adultery with the family's babysitter, R.I. The husband and R.I. submitted affidavits denying any sexual relationship:

… [T]he wife's focus on the husband's "opportunity" to commit adultery amounts to the husband's mere proximity to R.L. at various times and places. Clearly, R.L. was the family babysitter and, in that capacity, could be expected to be in the husband's presence on many occasions, including occasional overnight stays. The wife offers no facts or evidence — whether objective, inferential, or otherwise — of any adulterous conduct between the husband and R.L. beyond their mere physical proximity to one another. The wife's affidavit provides no dates, describes no suspicious circumstance with any detail or particularity, identifies no particular relevant social event, and identifies no witness who observed conduct or heard comments between the husband and R.L. that might inferentially support a claim of adultery against the husband. There is no investigator, no photograph, and no suspicious documents, texts, emails, or social media posts. Put another way, the wife's opposition to summary judgment amounts to mere unilateral speculation, conjecture, guess, and surmise stemming from the husband's and R.L.'s mere proximity to one another, without anything more. The wife's conclusory affidavit cannot substitute for admissible evidence even recognizing, as we do, that the adultery counterclaim is premised upon circumstantial evidence and the court's role in determining summary judgment is that of issue-finding … . Agulnick v Agulnick, 2020 NY Slip Op 07335, Second Dept 12-9-20

DIVORCE, ORDER PROHIBITING DISPARAGEMENT.

ORDER PROHIBITING DEFENDANT HUSBAND FROM DISPARAGING PLAINTIFF WIFE TO THIRD PARTIES WAS AN UNCONSTITUTIONAL PRIOR RESTRAINT OF SPEECH; ORDER SHOULD BE MODIFIED TO PROHIBIT DISPARAGING PLAINTIFF TO PLAINTIFF'S PATIENTS (SECOND DEPT).

The Second Department, reversing (modifying) Supreme Court, determined the order issued in this divorce proceeding prohibiting defendant husband from discussing, demeaning or disparaging plaintiff wife to third parties was an unconstitutional prior restraint of speech. Plaintiff, a psychologist, wanted to prohibit defendant from talking to her patients. The Second Department held the

order should be modified to limit the prohibition disparaging plaintiff to plaintiff's patients:

The defendant correctly contends that the portion of the order granting that branch of the plaintiff's motion which was for an order directing the defendant not to discuss, demean, or disparage the plaintiff to any third parties, including but not limited to the plaintiff's patients, was an unconstitutional prior restraint on speech. A prior restraint on speech is a law, regulation or judicial order that suppresses speech on the basis of the speech's content and in advance of its actual expression … . Any imposition of prior restraint, whatever the form, bears a "heavy presumption against its constitutional validity, and a party seeking to obtain such a restraint bears a correspondingly heavy burden of demonstrating justification for its imposition" … . An injunctive order issued in the area of First Amendment rights must be couched in the narrowest terms that will accomplish the pin-pointed objective permitted by constitutional mandate and the essential needs of the public order … . The order must be tailored as precisely as possible to the exact needs of the case … . Here, the Supreme Court's prior restraint on speech was overbroad, and not tailored as precisely as possible to the exact needs of this case. The plaintiff, a psychologist, was concerned about damage to her professional reputation due to the defendant's allegedly demeaning statements to her patients. The court's objective can be achieved by modifying the order to provide only that the defendant shall not discuss, demean, or disparage the plaintiff to her patients … . Karantinidis v Karantinidis, 2020 NY Slip Op 05039, Second Dept 9-23-20

DIVORCE, PIECEMEAL DECISION-MAKING CRITICIZED.

THE 2ND DEPARTMENT CRITICIZED THE PIECEMEAL DECISION-MAKING BY SUPREME COURT IN THIS COMPLEX DIVORCE PROCEEDING WHICH RESULTED IN AN INADEQUATE RECORD ON APPEAL; HOWEVER THE 2ND DEPARTMENT ADDRESSED MANY OF THE FACTUAL ISSUES IN A DETAILED OPINION WORTH READING BUT IMPOSSIBLE TO SUMMARIZE HERE (SECOND DEPT).

The Second Department, in a detailed, fact-specific opinion by Justice Scheinkman, criticized the piecemeal approach to the decisions made by Supreme Court in this

divorce proceeding, which resulted in an inadequate record for the appellate court. The Second Department took it upon itself to resolve the factual issues which could be gleaned from the record. The factual discussion is too detailed to fairly summarize here. With respect to the piecemeal decision-making and the inadequate record on appeal the court wrote:

These appeals and cross appeal, as well as the two other appeals in the same case also decided today, are a graphic illustration of the prolixity that may ensue when a complicated matrimonial case is cabined into constituent parts which are heard and decided piecemeal by the Supreme Court. The court bifurcated the trial into phases but, in the end, only conducted one of the two promised phases of the trial. Because some of the issues did not lend themselves to a neat division, the issues, and the court's seriatim determination of them, overlap. As a consequence of the incremental approach to the serial determination of the significant issues raised, which were followed by sequential appeals and cross appeals from the various orders and the final judgment, which appeals are prosecuted on voluminous appendices and supplemental appendices, this Court has not been provided with either a clear, comprehensible, and accessible record or a unified, comprehensive analysis by each party as to what determinations were made by the Supreme Court and which of those decisions each party accepts or challenges. Moreover, with respect to equitable distribution of the parties' substantial investment assets, the judgment of divorce entered by the court merely incorporated by reference its prior decisions, without specifying what is actually ordered, adjudged, and decreed, except that it set forth certain deviations from those prior decisions. Since the decisions conflict with each other in important respects, it is unclear what the court actually directed as to the equitable distribution of major and valuable assets. Kaufman v Kaufman, 2020 NY Slip Op 05732, Second Dept 10-14-20

DIVORCE, SEPARATE PROPERTY.

HUSBAND DID NOT DEMONSTRATE ENTITLEMENT TO 50% OF THE APPRECIATION OF WIFE'S SEPARATE PROPERTY IN THIS DIVORCE ACTION (FIRST DEPT).

The First Department, reversing (modifying) Supreme Court in this divorce action, determined 50% of the appreciation of the wife's separate property should not have been distributed to the husband:

The court improperly distributed 50% of the appreciation of the wife's separate real property because the husband failed to establish his entitlement to it. The husband argues that he is entitled to 50% of the appreciation of the property on the ground that he actively contributed toward the renovations of the property. However, the husband fails to provide any nexus between his alleged contributions and the property's appreciation in value. The husband relies on the testimony of a city tax assessor, who testified only as to the property's passive appreciation, specifically, that the property appreciated in value based on comparative sales in the area, and did not testify that any appreciation in value was due to the renovations done to the property. Indeed, the assessor could not have testified as to whether the property appreciated due to the renovations because he never entered the property to view any of the renovations and he did not take such renovations into account when making his assessment. Gordon v Anderson, 2020 NY Slip Op 00034, First Dept 1-2-20

DIVORCE, TEMPORATY MAINTENANCE.

SUPREME COURT SHOULD NOT HAVE DEVIATED FROM THE FORMULA FOR DETERMINING TEMPORARY SPOUSAL MAINTENANCE IN THIS DIVORCE PROCEEDING WITHOUT MAKING A FINDING THAT USING THE FORMULA WOULD RESULT IN AN UNFAIR AMOUNT (SECOND DEPT).

The Second Department, reversing (modifying) Supreme Court in this divorce proceeding, determined Supreme Court should not have deviated form the temporary

spousal maintenance formula without making a finding the formula resulted in an unjust or inappropriate amount:

"The formula to determine temporary spousal maintenance that is outlined in Domestic Relations Law § 236(B)(5-a)(c) is intended to cover all of a payee spouse's basic living expenses, including housing costs, the costs of food and clothing, and other usual expenses" … . Here, the Supreme Court's directive that the defendant pay pendente lite maintenance in the sum of $6,940 per month plus real estate taxes, homeowner's insurance, and homeowner's association fees on the marital residence resulted in a double shelter allowance, since the formula used to calculate the presumptive temporary maintenance award is intended to cover all of the plaintiff's basic living expenses, including housing costs … . It was error to deviate in this manner from the guideline amount of temporary maintenance without making a finding that such amount was unjust or inappropriate based upon the factors enumerated in Domestic Relations Law § 236(B)(5-a)(h) … . Capozzoli v Capozzoli, 2020 NY Slip Op 05715, Second Dept 10-14-20

EDUCATIONAL NEGLECT.

EDUCATIONAL NEGLECT FINDING FOR EIGHT-YEAR-OLD WAS SUPPORTED; BUT THE DERIVATIVE EDUCATIONAL NEGLECT FINDING FOR THE FOUR-MONTH-OLD WAS NOT (SECOND DEPT).

The Second Department, reversing (modifying) Family Court, held the educational neglect finding was supported for the eight-year-old child, but the derivative educational neglect finding for four-month-old child was not supported:

The record demonstrates that the older child was absent 48 days and was late 78 other days during the 2016-2017 school year. The record also shows that the older child was reported to be failing and had previously repeated the first grade. Thus, the petitioner met its prima facie burden of establishing educational neglect of the older child by submitting unrebutted evidence of that child's excessive absences and tardiness … . The mother's excuses for the older child's absences and tardiness did not constitute a reasonable justification for the child's excessive absences and

tardiness … . Moreover, the court drew the strongest negative inference against the mother for her failure to testify … .

However, under the circumstances of this case, we disagree with the Family Court's determination that proof of the mother's educational neglect of the older child is proof that she derivatively neglected the younger child. "Although Family Court Act § 1046(a)(i) allows evidence of abuse or neglect of one sibling to be considered in determining whether other children in the household were abused or neglected, the statute does not mandate a finding of derivative neglect" … . Here, there is no likelihood that the educational neglect of the older child, who was eight years old at the time of the proceeding, had any detrimental impact on the younger child, who was four months old at the time of the events in issue. Thus, the preponderance of the evidence did not support a finding that the mother derivatively neglected the younger child, who was not of school age or even close to being so … . Matter of Nevetia M. (Tiara M.), 2020 NY Slip Op 03515, Second Dept 6-24-20

EMANCIPATION, TERMINATION OF CHILD SUPPORT.

FATHER AND MOTHER SUBMITTED INADMISSIBLE EVIDENCE TO SUPPORT THEIR SUMMARY JUDGMENT MOTIONS ON THE ISSUE WHETHER THE CHILDREN WERE CONSTRUCTIVELY EMANCIPATED; FATHER'S MOTION FOR SUMMARY JUDGMENT ON HIS PETITION TO TERMINATE HIS CHILD SUPPORT OBLIGATIONS WAS PROPERLY DENIED BUT MOTHER'S PETITION FOR SUMMARY JUDGMENT DISMISSING FATHER'S PETITION SHOULD NOT HAVE BEEN GRANTED (FOURTH DEPT).

The Fourth Department, reversing Family Court, determined father's motion for summary judgment on his petition to terminate his child support obligations based on the children's constructive emancipation was properly denied, and mother's motion for summary judgment dismissing father's petition should not have been granted. The basis for both rulings was the inadmissible evidence submitted by father and mother:

… [W]e conclude that the father did not meet his initial burden on his motion of establishing that their refusal to visit with him was unjustified … . Inasmuch as the father's own submissions suggest that the subject children did not want to visit him due to their purported knowledge of the sex abuse allegations, his submissions failed to eliminate all material issues of fact … . Indeed, the father failed to establish that his behavior "was not a primary cause of the deterioration in his relationship with [the subject] children" … . Thus, we conclude that the court properly denied his motion.

We also conclude that the court should not have granted that part of the mother's motion seeking summary judgment dismissing the petition. The court erred in relying on the unsworn letters from the subject children's psychologist because they were not in admissible form … . Without the letters from the children's psychologist, we conclude that the mother failed to meet her initial burden on her motion of establishing that the children were justified in abandoning the father by refusing to attend visitation. Like the father, the mother did not submit any admissible evidence establishing the reasons for the children's decision not to visit the father. We therefore modify the amended order accordingly. Matter of Timothy M.M. v Doreen R., 2020 NY Slip Op 06886, Fourth Dept 11-20-20

FAMILY OFFENSE, CLOSE RELATIONSHIP, JURISDICTION OF FAMILY COURT.

PETITIONER DID NOT HAVE THE STATUTORILY REQUIRED CLOSE RELATIONSHIP WITH THE RESPONDENT IN THIS FAMILY OFFENSE PROCEEDING; FAMILY COURT DID NOT HAVE SUBJECT MATTER JURISDICTION (FIRST DEPT).

The First Department, reversing Family Court, determined Family Court did not have subject matter jurisdiction over this family offense proceeding because the petitioner and the respondent were not members of the same family or household and had not been in an intimate relationship:

The court lacks subject matter jurisdiction over this family offense proceeding brought by the foster mother of respondent's biological children. Petitioner failed to

establish that she and respondent, who are not members of the same family or household, are or have been in an intimate relationship (see Family Court Act § 812[1][e] …). Petitioner testified that she did not even know respondent's first name. It appears from the record that petitioner's contact with respondent has been limited to scheduling visitation with the children at the agency and, perhaps, interacting with respondent when she went to petitioner's home to pick up the children for visits. Matter of Veronica C. v Ariann D., 2020 NY Slip Op 03612, First Dept 6-25-20

GUARDIANS, SOCIAL SERVICES LAW, SUBSIDIES FOR CHILDREN.

AMENDMENT TO SOCIAL SERVICES LAW EXTENDING SUBSIDIES FOR CHILDREN CARED FOR BY A GUARDIAN UNTIL AGE 21 SHOULD HAVE BEEN APPLIED RETROACTIVELY; THE MATTER IS APPEALABLE AS OF RIGHT (FIRST DEPT).

The First Department, reversing Family Court, determined the amendment to Social Services Law 458-b allowing monthly subsidies for children cared for by guardians to be extended to age 21 (from 18) should be applied retroactively. The matter was deemed appealable as of right:

… [T]he order is appealable as of right, because it is an order of disposition that terminates the children's guardianship placement once the children reach the age of 18 and terminates the proceeding itself … . In any event, this Court can deem a notice of appeal from the denial of the motion a request for permission to appeal and we would grant that request … . …

A review of the legislative history supports the conclusion that the amended statute is remedial in nature. … [W]e can discern from the legislative history that the intent was to remove the disparity created between foster/adoptive parents and guardians since foster/adoptive parents are able to obtain subsidies notwithstanding the age of the child at the time of fostering or adoption.

The mere fact that the amended statute is remedial in nature is not determinative as to whether it should be applied retroactively … . … [A] remedial amendment will only be applied retroactively if it does not impair vested rights … .

… [T]he amendment does not create a new entitlement; rather it expands "existing benefits to a class of persons arbitrarily denied those benefits by the original legislation" … . There is no dispute that had the children been adopted by the grandmother and remained with her under the auspices of foster care, or had the grandmother proceeded with guardianship after they turned 16, they would have been entitled to subsidies until the children turned 21. Matter of Jaquan L. (Pearl L.), 2020 NY Slip Op 00213, First Dept 1-9-20

HEARSAY EXCEPTION, NOT APPLICABLE IN FAMILY OFFENSE PROCEEDINGS.

THE HEARSAY EXCEPTION IN ARTICLE 10 OF THE FAMILY COURT ACT DOES NOT APPLY IN ARTICLE 8 FAMILY OFFENSE PROCEEDINGS; ORDER OF PROTECTION REVERSED (SECOND DEPT).

The Second Department, reversing the Family Court's order of protection imposed after a finding appellant had committed a family offense, determined the finding was based upon inadmissible hearsay. The hearsay exception in Article 10 of the Family Court Act does not apply to family offense (Article 8) proceedings:

In a family offense proceeding, "[o]nly competent, material and relevant evidence may be admitted in a fact-finding hearing" (Family Ct Act § 834). In child protective proceedings brought pursuant to articles 10 and 10-A of the Family Court Act, there is a statutory hearsay exception for "previous statements made by the child relating to any allegations of abuse or neglect" (Family Ct Act § 1046[a][vi]). "[A]lthough the hearsay exception contained in Family Court Act § 1046(a)(vi) has been applied in the context of custody proceedings commenced pursuant to Family [Court] Act article 6 where the basis of the custody proceeding is founded on neglect or abuse such that the issues are inextricably interwoven," section 1046(a)(vi) is inapplicable in a family offense proceeding pursuant to Family Court Act article 8 … . …

… Dhanmatie Godfrey filed a family offense petition against Zahamin Bahadeur, in which she alleged that Bahadeur committed a family offense against one of her children. The only evidence presented by Godfrey in support of the allegations in the family offense petition were the child's inadmissible hearsay statements, as testified to by Godfrey. The Family Court erred in admitting the child's hearsay statements into evidence because the hearsay exception set forth in Family Court Act § 1046(a)(vi) does not apply in family offense proceedings pursuant to Family Court Act article 8 … . Matter of Godfrey v Bahadeur, 2020 NY Slip Op 05750, Second Dept 10-14-20

JUDGES, BIAS, EXCESSIVE INTERFERENCE.

JUDGE EXHIBITED BIAS AGAINST MOTHER AND INTERFERED EXCESSIVELY IN THE CUSTODY HEARING; NEW HEARING ORDERED BEFORE A DIFFERENT JUDGE (SECOND DEPT).

The Second Department, reversing Family Court, determined the judge was biased against mother and excessively interfered in the custody hearing:

The record of the proceedings supports the mother's contention that the Family Court was biased against her, depriving her of a fair and impartial hearing. Although the mother's claim of bias is not preserved for appellate review … . Here, the record demonstrates that the court predetermined the outcome of the case during the hearing and took an adversarial stance against the mother by, among other things, interjecting itself into the proceedings by cross-examining the mother on matters irrelevant to a determination of custody, including referring to the mother as "emotionally excessive" and inquiring as to how many online dating web sites the mother utilized at the time she met the father and as to when the mother and the father became intimate. The court also asked the mother, "so you were looking to start a relationship with someone?" and then commented, "And so you were married at the time?" Although the father was also married to someone when he began his relationship with the mother, no such questions or comments were directed to him by the court. The court's inquiry of the mother exceeded 30 pages of transcript over the course of the two-day hearing. Although the court also questioned the father, the

first inquiry related to setting up a parental access schedule for the father while the hearing was pending and the second set of inquiries appeared designed to elicit testimony from the father that was unfavorable to the mother, including one instance where the court intimated that the mother was practicing "extortion" against the father in order to gain an advantage in the proceedings … . Matter of Siegell v Iqbal, 2020 NY Slip Op 02084, Second Dept 3-25-20

JUDGES, CUSTODY/PARENTAL ACCESS, HEARINGS REQUIRED.

THE EVIDENCE WAS INSUFFICIENT TO JUSTIFY THE RULINGS IN THIS CUSTODY/PARENTAL ACCESS CASE, HEARINGS SHOULD HAVE BEEN HELD; THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT THE IMPOSITION OF SANCTIONS FOR FRIVOLOUS CONDUCT (SECOND DEPT).

The Second Department, reversing Supreme Court in this custody/parental access proceeding, determined Supreme Court should have conducted hearings because the evidence relied upon was insufficient. The Second Department further found there was insufficient evidence to support the sanctions imposed for allegedly frivolous conduct:

We disagree with the Supreme Court's determination (1) awarding the defendant sole legal custody of the parties' child, (2) denying that branch of the plaintiff's cross motion which was to direct therapeutic parental access with the child, (3) directing that parental access between the plaintiff and the child "shall take place in accordance with [the child's] preferences," and (4) granting the defendant's motion for a restraining order prohibiting the plaintiff from interfering with the child's life at school, without first conducting an evidentiary hearing … . …

Here, the record demonstrates unresolved factual issues so as to require a hearing on the issues of custody and parental access … . Moreover, in making its custody and parental access determination, the Supreme Court relied on the hearsay statements and conclusions of the forensic evaluator, whose opinions and credibility were untested by either party … . * * *

… [P]ursuant to 22 NYCRR 130-1.1, sanctions may be imposed against a party or the party's attorney for frivolous conduct. Conduct 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" … . "A party seeking the imposition of a sanction or an award of an attorney's fee pursuant to 22 NYCRR 130-1.1(c) has the burden of proof" … .

Here, contrary to the Supreme Court's determination, the defendant failed to establish that the plaintiff's conduct during the underlying motion practice was frivolous … . Brin v Shady, 2020 NY Slip Op 00256, Second Dept 1-17-20

JUDGES, NEGLECT, ATTORNEYS, APPEARANCE BY ATTORNEY, DEFAULT, EVIDENCE, DENIAL OF DUE PROCESS.

BECAUSE MOTHER'S ATTORNEY APPEARED MOTHER WAS NOT IN DEFAULT; FAMILY COURT'S REFUSAL TO ADMIT DOCUMENTARY EVIDENCE OFFERED BY MOTHER'S ATTORNEY DEPRIVED MOTHER OF DUE PROCESS (SECOND DEPT).

The Second Department, reversing Family Court, determined mother was not in default because her attorney appeared and the court's refusing to admit documentary evidence offered by mother's attorney deprived mother of her right to due process of law:

The mother failed to appear … when continued fact-finding on the permanent neglect petition was scheduled, and an adjournment was granted. When the mother failed to appear on the next hearing date, … the mother's counsel stated that she would be participating in the proceeding on the mother's behalf and sought to admit into evidence certain documents. … [T]he mother was, therefore, not in default with respect to the fact-finding hearing … .

The Family Court's refusal to permit the mother's counsel to admit into evidence the documentary evidence on behalf of the mother based upon the mother's failure

to appear … , violated the mother's right to due process. " A parent has a right to be heard on matters concerning her [or his] child and the parent's rights are not to be disregarded absent a convincing showing of waiver'" … . Matter of Amira W.H. (Tamara T.H.), 2020 NY Slip Op 02264, Second Dept 4-9-20

JUDGES, RE-OPEN NEGLECT HEARING.

FAMILY COURT SHOULD HAVE REOPENED THE NEGLECT HEARING WHEN MOTHER ARRIVED AT COURT SHORTLY AFTER SUMMATIONS (SECOND DEPT).

The Second Department, reversing Family Court, determined Family Court should have reopened the neglect hearing when mother arrived just after summations:

The Family Court conducted a fact-finding hearing over the course of several days, during which the mother was present, and the maternal grandmother and a DSS caseworker testified. On the fifth day of the hearing, the mother was late in arriving to court because she allegedly was traveling by bus from Georgia to New York, and the bus was delayed. The mother's counsel notified the court of the mother's transportation issue, and of her intention to testify, and requested an adjournment. The court denied the adjournment request and directed that the hearing proceed as scheduled. The mother arrived shortly after summations, but the court did not reopen the hearing to afford the mother the opportunity to testify.

Following the hearing, the Family Court found that the mother neglected the child. …

A finding of neglect constitutes "a permanent and significant stigma" which might indirectly affect the mother's status in future proceedings … . The Family Court has the authority to reopen a Family Court Act article 10 proceeding to allow a party to present additional testimony at a fact-finding hearing … .

Under the circumstances of this case, the Family Court should have exercised its discretion to reopen the fact-finding hearing to afford the mother the opportunity to

present her case. Matter of Katie P.H. (Latoya M.), 2020 NY Slip Op 02265, Second Dept 4-9-20

JUDGES, REQUIRED FINDINGS NOT MADE, CUSTODY, GRANDPARENT.

FAMILY COURT DID NOT MAKE THE REQUISITE FINDINGS IN THIS CUSTODY MATTER WHERE A GRANDPARENT WAS SEEKING CUSTODY, MATTER REMITTED; ASSUMING FAMILY COURT'S ORDER WAS NOT FINAL, THE NOTICE OF APPEAL WAS DEEMED AN APPLICATION FOR LEAVE TO APPEAL; THE DISSENT ARGUED THE ORDER IS NOT APPEALABLE (FOURTH DEPT).

The Fourth Department, remitting the matter, over a dissent, determined Family Court should not have the requisite findings in this custody matter where a grandparent was seeking custody. Family Court had ordered the parties to stipulate to the custody arrangement noting that , if the parties do not agree, a hearing would be held. The dissent argued the order was not final and therefore was not appealable. The majority, assuming the order was not final, deemed the notice of appeal to be an application for leave to appeal:

With respect to the merits of the mother's contentions regarding the court's award of joint custody to the father and the maternal grandmother, we conclude that the court failed to set forth "those facts upon which the rights and liabilities of the parties depend" … , specifically its analysis of whether extraordinary circumstances existed to warrant an inquiry into whether an award of joint custody to the maternal grandmother was in the best interests of the child. " 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 . . . The nonparent has the burden of proving that extraordinary circumstances exist, and until such circumstances are shown, the court does not reach the issue of the best interests of the child' " … . Thus, we agree with the mother that the court erred in not determining whether extraordinary circumstances existed before awarding joint custody to the maternal grandmother.

The maternal grandmother here had the burden of establishing extraordinary circumstances, which remains the case "whether the nonparent is seeking sole custody or joint custody with one of the parents" … .

We conclude that " [t]he absence of the required findings precludes proper appellate review' " … . Matter of Steeno v Szydlowski, 2020 NY Slip Op 01808, Fourth Dept 3-13-20

JUDGES, SANCTIONS, PRECLUDING EVIDENCE, CUSTODY.

ALTHOUGH FATHER MISSED PLEADING AND DISCLOSURE DEADLINES, THERE WAS NO EVIDENCE THE OMISSIONS WERE WILLFUL; THEREFORE PRECLUDING FATHER FROM PRESENTING EVIDENCE IN THE CUSTODY MODIFICATION PROCEEDING WAS TOO SEVERE A SANCTION (THIRD DEPT).

The Third Department, reversing Family Court, determined father should not have been precluded from offering evidence in the modification of custody proceeding. Although father missed several court-imposed deadlines for responding papers and disclosure, the sanction was too severe:

… [A]lthough the father failed to comply with court-ordered deadlines for responsive pleadings and discovery, the record lacks any evidence of willfulness on the part of the father to warrant a drastic sanction of complete preclusion … . The father was represented by assigned counsel at the May 7, 2018 conference during which the initial discovery schedule was established. Shortly thereafter, the mother served a first demand for interrogatories and combined discovery demand. … In the meantime, the father was assigned new counsel who appeared for the July 16, 2018 conference, at which time the deadlines were extended. At the fact-finding hearing, the father's counsel stated that delay in responding "is predominantly my fault and I will make that very explicitly clear on the record." In light of the preliminary conference orders, counsel also made the meritless assertion that the mother's discovery demands were ineffective for lacking court authorization. On the other hand, counsel did serve a response to the interrogatories — although that response was unverified. In light of the foregoing, we cannot conclude that the father's

conduct was willful. Additionally, "modification of custody determinations requires a full and comprehensive hearing with the parties given the opportunity to present in open court evidence as to the best interest[s] of the child" … . Here, the preclusion of all of the father's testimony renders it difficult to determine the best interests of this child (see id.). Based on the foregoing, we remit the matter for a new hearing. Matter of Tara DD. v Seth CC., 2020 NY Slip Op 01227, Third Dept 2-20-20

JUDGES, SUA SPONTE, CUSTODY, MODIFICATION, HEARING SHOULD HAVE BEEN HELD, SANCTIONS.

FAMILY COURT RESOLVED CONFLICTING EVIDENCE AND CREDIBILITY ISSUES WITHOUT A HEARING, FAILED TO ACCEPT ALLEGATIONS IN A PRO SE MODIFICATION OF CUSTODY PETITION AS TRUE, IMPOSED A SANCTION FOR A VIOLATION OF A CUSTODY ORDER WHICH IS NOT ALLOWED BY THE CONTROLLING STATUTES, AND FAILED TO TAKE THE BEST INTERESTS OF THE CHILDREN INTO ACCOUNT (THIRD DEPT).

The Third Department, reversing Family Court, noted several errors in these proceedings which began with father's violation of custody petitioner followed by two modification of custody petitions by mother. All the petitions were brought pro se. Family Court erred: (1) in dismissing mother's modification petitions without a hearing; (2) in failing to accept as true and liberally construe mother's pro se allegations; (3) in making factual findings and credibility determinations in the absence of a hearing on the modification petitions; (4) and in imposing an impermissible sanction on mother for an alleged violation of a custody order:

Family Court did not liberally construe the mother's pro se petitions, accept her allegations as true, afford her the benefit of every possible inference or resolve credibility issues in her favor when determining the motions to dismiss. …

… [R]ather than accept the mother's allegations as true, Family Court improperly made factual findings and credibility determinations, inappropriately resolving the

conflicting versions of events, as set forth in the mother's petitions and the father's supporting affidavits, against the mother and in favor of the father … . …

… [T]he only available penalty that Family Court may impose for a willful violation of a custodial order without a concurrent modification petition pending is a monetary fine and/or a period of imprisonment (see Judiciary Law § 753 [A]; Family Ct Act § 156 …). However, Family Court sanctioned the mother by modifying the joint legal order of custody and granting the father sole legal custody of the children without determining whether there had been a change in circumstances. In addition, Family Court failed to engage in any discernible analysis of whether a modification was in the best interests of the children. Matter of Gerard P. v Paula P., 2020 NY Slip Op 04515, Third Dept 8-13-20

JUDGES, SUA SPONTE, HEARING REQUIRED, CHILD'S COMMUNICATION WITH INCARCERATED FATHER.

FAMILY COURT, SUA SPONTE, SHOULD NOT HAVE DISMISSED INCARCERATED FATHER'S PETITION ALLEGING MOTHER'S NONCOMPLIANCE WITH AN ORDER MANDATING COMMUNICATION WITH THE CHILD WITHOUT HOLDING A HEARING (THIRD DEPT).

The Third Department, reversing Family Court, should not have, sua sponte, dismissed, without a hearing, father's petition alleging mother's noncompliance with provisions of an order requiring communication between child and father, who is incarcerated:

Where, as here, a petition sets forth facts of willful noncompliance which, if established at a hearing would provide a basis for the relief sought, Family Court must afford the petitioner an opportunity to be heard … . The father alleged that he is being denied his routine monthly phone call, as well as calls at Christmas and the child's birthday, as required by the consent order. Accepting the representations from counsel for the mother and the attorney for the child that missed calls were made up and that the child no longer wishes to communicate with the father and chooses not to respond to his correspondence, Family Court concluded that there

were no contested facts and dismissed the petition. In doing so, the court failed to address the mother's obligation under the consent order to encourage the child to communicate with the father. Whether she failed to do so as alleged remains a disputed contention necessitating relevant testimony, not simply the arguments of counsel. Nor did the court address the father's claim that the mother failed to provide updated photographs and school records. In our view, the court erred in dismissing the petition without a hearing … . Matter of Shannon X. v Koni Y., 2020 NY Slip Op 01215, Third Dept 2-20-20

JUDGES, SUA SPONTE, RELIEF NOT REQUESTED, DISMISSAL OF PETITION.

COURT SHOULD NOT HAVE DISMISSED, SUA SPONTE, FATHER'S MODIFICATION OF CUSTODY PETITION FOR FAILURE TO STATE A CAUSE OF ACTION BECAUSE MOTHER DID NOT REQUEST THAT RELIEF; THE THIRD DEPARTMENT CONSIDERED AND DENIED MOTHER'S MOTION FOR SUMMARY JUDGMENT (THIRD DEPT).

The Third Department, reversing Family Court, determined the judge, sua sponte, should not have dismissed father's modification of custody petition for failure to state a cause of action because mother did not request that relief. The Third Department went on to consider mother's motion for summary judgment and deny it:

"[A] motion for summary judgment may be utilized in a Family Ct Act article 6 proceeding, but such a motion should be granted only when there are no material facts disputed sufficiently to warrant a trial" … . "In a custody modification proceeding, the controlling 'material fact' is whether or not there is a change in circumstances so as to warrant an inquiry into whether the best interests of the children would be served by modifying the existing custody arrangement" … .

Here, the mother failed to meet her initial summary judgment burden. There can be no dispute that only five months had elapsed since entry of the March 2018 order and, as such, the "automatic" change in circumstances provision incorporated in that order had not been triggered. The father, however, sought modification based upon

several other alleged changes in circumstance, including that the mother had been disparaging the father in front of the children in violation of the March 2018 order and that she is living in a homeless shelter. The mother, in her motion for summary judgment, makes no mention of these allegations or otherwise attempts to refute them in any way. Matter of Anthony F. v Christy G., 2020 NY Slip Op 01228, Third Dept 2-20-20

JUDGES, SUA SPONTE, SANCTIONS.

SUPREME COURT SHOULD NOT HAVE GRANTED SOLE CUSTODY TO FATHER, SHOULD NOT HAVE SANCTIONED MOTHER FOR PERJURY ALLEGEDLY COMMITTED IN A DIFFERENT COURT PROCEEDING, AND SHOULD NOT HAVE ORDERED RELIEF NOT REQUESTED BY A PARTY (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined: (1) father should not have been awarded sole custody of the children for 60 days because no change of circumstances was alleged or demonstrated; (2) the court should not have, sua sponte, directed a child be deprived of cell phone and other electronic devices and be barred from outside-the-home activities; (3) the court should not have have directed mother to pay a fine to father for perjury; (4) the court did not have the authority to sanction mother for frivolous conduct (perjury); (5) the court should not have awarded attorney's fees to father:

… [T]he court summarily punished the mother by sanctioning her after it determined that she committed perjury during her testimony before a Judicial Hearing Officer in Family Court with respect to the temporary order of protection and during her testimony at the hearing on the petition before Supreme Court. Assuming, arguendo, that perjury would support a finding of contempt, we conclude that the court could not properly find the mother in criminal contempt based on her testimony in Family Court, nor could the court summarily punish the mother for civil or criminal contempt based on that testimony, inasmuch as it occurred out of the court's "immediate view and presence" … . Insofar as the order may be deemed to sanction the mother for civil or criminal contempt that occurred in the presence of Supreme Court, we conclude that, because "due process requires that . . . the contemnor be

afforded an opportunity to be heard at a meaningful time and in a meaningful manner' " … , and the court failed to provide notice that it was considering finding the mother in contempt or an opportunity to be heard thereon, the court erred in imposing such sanction … . …

Assuming, arguendo, that sanctions for frivolous conduct may be based on a party's perjury, we conclude that the regulation permitting the imposition of such sanctions specifically provides that it "shall not apply to . . . proceedings in the Family Court commenced under article . . . 8 of the Family Court Act" … . …

In awarding attorney's fees to the father, the court did not state, and we cannot determine on this record, whether it did so based upon the custodial stipulation between the parties or pursuant to statute. Consequently, we are unable " to determine whether the award was within the proper exercise of the court's discretion' " … . Ritchie v Ritchie, 2020 NY Slip Op 03316, Fourth Dept 6-12-20

JUDGES, SUA SPONTE, TERMINATION OF PARENTAL RIGHTS WITHOUT PSYCHOLOGICAL EVALUATION, MENTAL ILLNESS.

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

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

Pursuant to Social Services Law § 384-b (6) (e), the court is required to order the parent, alleged to be mentally ill, to be examined by a qualified psychiatrist or psychologist and shall take testimony from the appointed expert … . Significantly, paragraph (c) of subdivision 6 prohibits a determination as to the legal sufficiency of the proof until such testimony is taken … . An exception exists "[i]f the parent

refuses to submit to such court-ordered examination, or if the parent renders himself [or herself] unavailable . . . by departing from the state or by concealing himself [or herself] therein" … . In such instance, "the appointed psychologist or psychiatrist, upon the basis of other available information, . . . may testify without an examination of such parent, provided that such other information affords a reasonable basis for his [or her] opinion" … . * * *

… [W]e conclude that Family Court erred in proceeding with the termination of respondent's parental rights without the statutorily-required examination. Horenstein pointed out that there was no basis to find that respondent refused to be evaluated. Nor did respondent make herself unavailable "by departing from the state or by concealing [herself] therein" … . To the contrary, her placement in CDPC was involuntary and, despite her release by December 1, 2017, no further attempt was made to schedule an evaluation. Because the statutory exception does not apply, Family Court lacked authority to determine the legal sufficiency of the proof without a contemporaneous evaluation … . Even though respondent raised no objection at the hearing, this statutory mandate requires that we remit the matter to Family Court for a new hearing and determination … . Matter of Rahsaan I. (Simone J.), 2020 NY Slip Op 01212, Third Dept 2-20-20

JUDGES, UNCONSTITUTIONAL ORDER RE RELIGION, CUSTODY CONDITIONS.

FATHER SHOULD NOT HAVE BEEN DIRECTED TO COMPLY WITH THE 'CULTURAL NORMS' OF HASIDIC JUDAISM WHEN THE CHILDREN STAY WITH HIM (SECOND DEPT).

The Second Department, reversing Supreme Court, determined father should not have been directed to comply with the "cultural norms" of Hasidic Judaism when the children stay with him:

We agree with the father that, by directing him to comply with the "cultural norms" of Hasidic Judaism during his periods of parental access, the Supreme Court ran afoul of constitutional limitations by compelling the father to himself practice a religion, rather than merely directing him to provide the children with a religious

upbringing (see Cohen v Cohen, 177 AD3d at 852; Weisberger v Weisberger, 154 AD3d at 53). While the court referred to the "cultural norms" by which the children were raised, the testimony at the hearing made clear that the "cultural norms" referenced were that each parent would comply with the religious requirements of Hasidic Judaism. Under this Court's decisions in Weisberger and on the prior appeal, the court's directive that the father himself comply with these religious practices was an unconstitutional modification of the religious upbringing provision in the judgment of divorce, which must be reversed … . Cohen v Cohen, 2020 NY Slip Op 02263, First Dept 4-9-20

JUDGES, VISITATION IMPROPERLY DENIED BASED ON EMOTIONAL OUTBURSTS.

DENYING VISITATION TO MOTHER WHO HAD NOT SEEN THE CHILD IN NINE YEARS BUT HAD GAINED EMPLOYMENT AND STOPPED ABUSING DRUGS WAS NOT SUPPORTED BY SUFFICIENT EVIDENCE; FAMILY COURT GAVE UNDUE WEIGHT TO THE FORENSIC EVALUATOR'S FINDINGS AND TO MOTHER'S EMOTIONAL OUTBURSTS AT THE HEARING (THIRD DEPT).

The Third Department, reversing Family Court, determined the denial of visitation to mother in this modification-of-visitation proceeding was not supported by the evidence. Mother had not seen the child in nine years but demonstrated she was employed and had stopped abusing drugs. Family Court gave undue weight to the findings of a forensic evaluator and to mother's emotional state during the hearing:

In our view, the forensic evaluator essentially acquiesced to the father's preferences that the child have no contact with the mother and, in effect, gave them a higher priority over any court directive. Any unwillingness by the father to facilitate visitation does not demonstrate that the child's welfare would be placed in harm if visitation between the mother and the child occurred and in no way rebuts the presumption that visitation with the mother is in the best interests of the child. In view of the flaws in the forensic evaluator's report, it should have been given minimal consideration.In our view, the forensic evaluator essentially acquiesced to the father's preferences that the child have no contact with the mother and, in effect,

gave them a higher priority over any court directive. Any unwillingness by the father to facilitate visitation does not demonstrate that the child's welfare would be placed in harm if visitation between the mother and the child occurred and in no way rebuts the presumption that visitation with the mother is in the best interests of the child. In view of the flaws in the forensic evaluator's report, it should have been given minimal consideration.

Family Court also found that the mother could not control her emotions during the trial. Although we do not discount a parent's emotional stability as one factor in the best interests analysis, there was little evidence, if any, indicating that the mother displayed the same emotional outbursts either with the children that she had just regained custody of or outside the courtroom setting. Accordingly, under the circumstances of this case, any inability of the mother to control her emotions at the hearing has little relevance … . Matter of Jessica D. v Michael E., 2020 NY Slip Op 02133, Third Dept 4-2-20

JUDGMENT OF DIVORCE VS SEPARATION AGREEMENT.

FATHER'S CHILD SUPPORT OBLIGATIONS CONTROLLED BY THE JUDGMENT OF DIVORCE, NOT THE CONFLICTING PROVISIONS OF THE SEPARATION AGREEMENT (THIRD DEPT).

The Third Department, reversing Family Court, determined the provisions in the judgment of divorce, not the separation agreement, controlled father's child support obligations:

Although the parties entered into a separation agreement directing what the husband was to pay for child support, the subsequent judgment of divorce specifically provided that "the child support obligations of the parties hereto shall be as directed by the [c]orrective [o]rder of [s]upport . . . entered on November 16, 2017." A conflict therefore exists between the separation agreement and the subsequently entered judgment of divorce. In such circumstance, the judgment of divorce controls … .

Although Family Court was without jurisdiction to modify the terms of the separation agreement (see Kleila v Kleila, 50 NY2d 277, 282 [1980]), the fact that the corrective order of support was denominated as an order by Family Court or that it emanated from a Family Court proceeding does not mean the terms therein are invalid. The parties voluntarily consented to the terms in the corrective order of support. Additionally, there is nothing in the record indicating that the parties disputed any of those terms. Under these circumstances, and because the judgment of divorce specifically stated that the parties' child support obligations were to be determined by the corrective order of support, we are not of the view that Family Court modified the separation agreement. Sherman v Sherman, 2020 NY Slip Op 05993, Third Dept 10-22-20

JURISDICTION, NO PETITION BEFORE THE COURT.

AS NO PETITION WAS BEFORE THE COURT, FAMILY COURT LACKED SUBJECT MATTER JURISDICTION AND THEREFORE DID NOT HAVE THE AUTHORITY TO ORDER A FORENSIC EVALUATION (THIRD DEPT).

The Third Department, reversing Family Court, determined Family Court did not have subject matter jurisdiction when it issued a forensic evaluation because no petition was before the court:

Petitioner (hereinafter the father) and respondent (hereinafter the mother) are the parents of two children (born in 2004 and 2006). In July 2018, the parties stipulated in open court to a settlement of the father's modification of custody petition and violation petitions then pending in Family Court. The parties stipulated to, among other things, suspension of the collection of accrued child support arrears and, as relevant here, agreed to engage in family counseling and to a protocol for the selection of a therapist. The transcript of the parties' stipulation of settlement was incorporated by reference into a consent order entered in March 2019. Thereafter, the parties failed to agree on the selection of a therapist, prompting the father to request that the court appoint as a therapist a licensed psychiatrist versed in parental alienation. In June 2019, the court appointed a psychologist, but the psychologist declined to provide counseling services. By letter, the father then, among other

things, requested that the court order a forensic evaluation by a different licensed psychologist. After converting the father's request to an application for a court-ordered forensic evaluation, the court ordered a forensic evaluation over the mother's objection. The mother appealed from that order, and we granted the mother's subsequent motion for a stay of Family Court's order pending resolution of this appeal … . * * *

Less than one year after the stipulation was incorporated by reference into a consent order, Family Court … ordered a forensic evaluation, citing the "unusual situation" whereby the parties stipulated to — and the court ordered — counseling and all efforts failed. This was error, as no petition had been filed by the father since the March 2019 consent order was entered, and no proceedings were therefore pending to provide Family Court with jurisdiction to render the appealed-from order directing a forensic evaluation (see Family Ct Act §§ 154-a, 251 [a] …). Indeed, as is the case here, an expectation of finality derives from a stipulation of settlement entered into by those with legal capacity to negotiate … . Accordingly, we find that Family Court lacked subject matter jurisdiction to order a forensic evaluation. Matter of James R. v Jennifer S., 2020 NY Slip Op 06997, Third Dept 11-25-20

JUVENILE DELINQUENCY, ADJOURNMENT IN CONTEMPLATION OF DISMISSAL.

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

The Second Department, reversing Family Court, determined Family Court abused its discretion in denying appellant's request for an adjournment in contemplation of dismissal in this juvenile delinquency proceeding:

The Family Court has broad discretion in determining whether to adjourn a proceeding in contemplation of dismissal … . Although, as it is often stated, a respondent is not entitled to an adjournment in contemplation of dismissal merely because this was his or her "first brush with the law" … , a respondent's criminal

and disciplinary history is nevertheless relevant to a court's discretionary determination of whether to adjourn a proceeding in contemplation of dismissal … . Other relevant factors include, but are not necessarily limited to, a respondent's history of drug or alcohol use … , a respondent's association with gang activity … , a respondent's academic and school attendance record … , the nature of the underlying incident … , a respondent's decision to accept responsibility for his or her actions … , any recommendations made in a probation or mental health report … , the degree to which the respondent's parent or guardian is involved in the respondent's home and academic life … , and the ability of the respondent's parent or guardian to provide adequate supervision … .

Here, the Family Court improvidently exercised its discretion in denying the appellant's application pursuant to Family Court Act § 315.3(1) for an adjournment in contemplation of dismissal. This proceeding constituted the appellant's first contact with the court system, the appellant took responsibility for his actions, and the record demonstrates that he had learned from his mistakes. Matter of Brian M., 2020 NY Slip Op 03785, Second Dept 7-8-20

JUVENILE DELINQUENCY, ADJOURNMENT IN CONTEMPLATION OF DISMISSAL.

FAMILY COURT SHOULD HAVE GRANTED THE APPLICATION FOR AN ADJOURNMENT IN CONTEMPLATION OF DISMISSAL IN THIS JUVENILE DELINQUENCY PROCEEDING (SECOND DEPT).

The Second Department determined Family Court should have granted the application for an adjournment in contemplation of dismissal in this juvenile delinquency proceeding:

" The Family Court has broad discretion in determining whether to adjourn a proceeding in contemplation of dismissal'" … . Factors that are relevant to a court's discretionary determination of whether to adjourn a proceeding in contemplation of dismissal include a respondent's criminal and disciplinary history, history of drug or alcohol use, academic and school attendance record, association with gang activity, acceptance of responsibility for his or her actions, the nature of the underlying

incident, recommendations made in a probation or mental health report, the degree to which the respondent's parent or guardian is involved in the respondent's home and academic life, and the ability of the parent or guardian to provide adequate supervision … .

Here, the 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. Under the circumstances here, including the fact that this proceeding constituted the appellant's first contact with the court system, he took responsibility for his actions and expressed remorse, he voluntarily participated in counseling during the pendency of the proceeding, and he maintained a strong academic and school attendance record, an adjournment in contemplation of dismissal was warranted … . Matter of Maximo M., 2020 NY Slip Op 03428, Second Dept 6-17-20

LEGITIMATED CHILD, DEATH OF FATHER, TRUSTS AND ESTATES.

PLAINTIFF, WHO WAS BORN TWO YEARS BEFORE HIS MOTHER AND FATHER WERE MARRIED, WAS A DISTRIBUTEE OF HIS FATHER'S ESTATE; IT HAS YET TO BE DETERMINED WHETHER DEFENDANT YOUSEF FRAUDULENTLY REPRESENTED HE WAS THE SOLE HEIR WHEN HE TRANSFERRED REAL PROPERTY TO DEFENDANT BASMANOV (FIRST DEPT).

The First Department determined plaintiff demonstrated he was a distributee of his father's estate. Plaintiff was born two years before his parents married and both his father's and mother's names were on plaintiff's birth certificate. The court noted that it has yet to be established whether defendant Yousef fraudulently represented himself as the sole heir of the estate when he transferred real property to defendant Basmanov:

Pursuant to Domestic Relations Law § 24, if a mother and father enter into a civil or religious marriage after the birth of their child, the child is legitimated for all purposes of New York law, even if the marriage is void or voidable (§ 24[1]). Therefore, such child automatically becomes a distributee of both birth parents,

without any need to satisfy one of the paternity tests set forth in Section 4-1.2(a)(2) of the EPTL … .

Plaintiff was born in 1973, nearly two years before his parents subsequently married. At some point, the decedent-father's name was placed on the plaintiff's birth certificate, which, pursuant to Public Health Law § 4135(2) in effect at the time, required "the consent in writing of both the mother and putative father, duly verified, and filed with the record of the birth." Pursuant to Public Health Law § 4103(2), "a certification of birth is prima facie evidence of the facts therein." …

Defendant Basmanov's argument that plaintiff failed to establish fraud necessary to warrant voiding the deeds by which defendant Yosef purported to transfer the decedent's real property to himself, and then to her, is unavailing. Absent proof of fraud, a deed that purports to transfer more than the party owns is valid to the extent of transferring that party's interest … ; however, it has yet to be established whether Yosef committed a fraudulent transfer by representing himself as the sole heir of the decedent's estate in order to effectuate the transfer. Tiwary v Tiwary, 2020 NY Slip Op 07479, First Dept 12-10-20

MAINTENANCE, WAIVER.

SUPPORT MAGISTRATE HAD THE AUTHORITY TO VACATE MAINTENANCE ARREARS; THE FORMER HUSBAND DEMONSTRATED THE FORMER WIFE WAIVED HER RIGHT TO MAINTENANCE PAYMENTS 16 YEARS BEFORE THE PETITION WAS BROUGHT (SECOND DEPT).

The Second Department, reversing Family Court, determined the former husband's (appellant's) objection to the support magistrate's order that appellant pay maintenance arrears should have been granted. The support magistrate had terminated the former wife's (respondent's) right to maintenance payments but held she did not have the authority to vacate the arrears. The Second Department held respondent had waiver her right to maintenance payments years before and appellant was not obligated to pay the arrears:

… [P]ursuant to Domestic Relations Law § 236(B)(9)(b), a prior judgment or order as to maintenance may be modified or annulled after the accrual of such arrears where "the defaulting party shows good cause for failure to make an application for relief from the judgment or order directing payment prior to the accrual of such arrears" … . …

The appellant demonstrated that in June 2001, the respondent waived her right to receive maintenance payments … . "A valid waiver requires no more than the voluntary and intentional abandonment of a known right which, but for the waiver, would have been enforceable'" … . "It may arise by either an express agreement or by such conduct or failure to act as to evince an intent not to claim the purported advantage" … . Here, the evidence adduced at the hearing demonstrated that after the appellant stopped paying maintenance beginning in June 2001 pursuant to the parties' alleged oral agreement, the respondent did not make any written demands or otherwise move to enforce the maintenance provision of the parties' judgment of divorce for a period of more than 16 years. Although a waiver "is not created by negligence, oversight, or thoughtlessness, and cannot be inferred from mere silence" … , the respondent's conduct evinced an intent by her to abandon her right to maintenance payments and supported the appellant's claim that she had orally agreed to terminate his maintenance obligation in June 2001 … . Matter of Makris v Makris, 2020 NY Slip Op 00139, Second Dept 1-8-20

NAME CHANGE FOR CHILD, ADDING MOTHER'S NAME TO FATHER'S.

MOTHER'S APPLICATION TO CHANGE THE CHILD'S NAME BY ADDING MOTHER'S LAST NAME TO FATHER'S LAST NAME (HYPHENATED) WAS PROPERLY GRANTED (THIRD DEPT).

The Third Department determined mother's application to add her last name to the father's last name for the child (hyphenated) was properly granted. Mother and father are separated and mother has sole custody. Having both last names will facilitate dealing with the child's medical care:

Pursuant to Civil Rights Law article 6, an application to change a child's name shall be granted as long as the court is satisfied that the petition is true, there is no reasonable objection to the proposed name change by the opposing party and the child's interests will be substantially promoted by the change (see Civil Rights Law § 63 …). The evidence at the hearing demonstrated that the mother is the primary legal and physical custodian of the child, with the father having parenting time with the child every other weekend for a four-hour time period. The mother testified that the child suffers from a medical condition that requires frequent visits with medical providers and, because she does not presently share her surname with the child, this fact regularly presents confusion and difficultly when dealing not only with the child's medical and insurance providers, but also with the child's school, pharmacy and the various foundations where she has applied for grants pertaining to the child's diagnosis. Moreover, the child recently started kindergarten, is "very curious" and has asked the mother numerous questions regarding his family, indicating a preference for his name to reflect both the mother's and father's family names. To that end, the mother indicated that she is not seeking to eliminate the father's surname, but simply to add her surname to create a hyphenated last name that includes both the mother's and the father's surnames. Matter of Noah ZZ. (Amanda YY.–Ramon ZZ.), 2020 NY Slip Op 05007, Third Dept 9-17-20

NEGLECT, ADEQUATE SHELTER.

THE EVIDENCE DID NOT SUPPORT A FINDING OF NEGLECT FOR FAILURE TO PROVIDE ADEQUATE SHELTER (FIRST DEPT).

The First Department, reversing Family Court, determined the neglect finding based upon an alleged failure to provide adequate shelter was not supported by the evidence:

While the apartment was in a deteriorated condition, there is no evidence that the child, age thirteen, was in danger or imminent danger of impairment due to the condition of the apartment; indeed, the caseworker testified that she observed the child to be healthy and appropriately groomed, the child was at the appropriate grade level, and the child denied any concerns about the father … . The strong inference

drawn by the court against the father for failing to testify is insufficient by itself to provide the necessary link between the conditions in the apartment and any imminent harm to the child … . Matter of Angelica M. (Joe M.), 2020 NY Slip Op 05685, First Dept 10-13-20

NEGLECT, CONDITION OF THE HOME.

EVIDENCE DID NOT SUPPORT A NEGLECT FINDING BASED UPON THE CONDITION OF THE HOME (FIRST DEPT),

The First Department, in affirming neglect findings based upon leaving the children unattended in a car and in the bathtub, determined that the evidence did not support the neglect finding based upon the condition of the home:

The only evidence that respondents failed to maintain the home in a sanitary condition was the caseworker's testimony about her observations during a single visit, which is insufficient to support the finding of neglect on that basis … . Matter of Dream F. (Phillystina R.), 2020 NY Slip Op 05832, First Dept 10-15-20

NEGLECT, CONFERENCE, FAILURE TO APPEAR, DEFAULT ORDER VACATED.

ALTHOUGH MOTHER DID NOT APPEAR AT THE SCHEDULED CONFERENCE AND DID NOT HAVE A MERITORIOUS DEFENSE IN THIS NEGLECT PROCEEDING, SHE WAS NOT AWARE FINDINGS OF FACT WOULD BE MADE IN HER ABSENCE; DEFAULT ORDER VACATED ON DUE PROCESS GROUNDS (THIRD DEPT).

The Third Department, reversing Family Court, determined mother was deprived of her right to due process when findings of fact were made in her absence in this neglect proceeding. Although mother did not appear at a scheduled conference, mother was not aware findings of fact would be made:

A parent has a right "to be present at every stage of" a Family Ct Act article 10 proceeding as a matter of due process, but that right "is not absolute" … . Family Ct Act § 1042 provides that "a court may proceed with a hearing . . . in a parent's absence, so long as the subject child is represented by counsel, and the absent parent may thereafter move to vacate the resulting order and schedule a rehearing" … . Vacatur of that order would ordinarily be warranted if, upon motion, the parent demonstrated "a meritorious defense to the petition, unless . . . [he or she] willfully refused to appear at the hearing" … . If the parent demonstrates that the default itself resulted from a deprivation of his or her "fundamental due process rights," however, the default is a nullity and no showing of a meritorious defense is required … . …

… [A]lthough respondent was arguably on notice of the April 2018 conference, she did not receive notice that a potential fact-finding hearing might be conducted at it so as to satisfy due process … . Indeed, despite the references in the order of fact-finding to an inquest, there is no dispute that Family Court departed from "the proper course" of conducting a hearing in respondent's absence by accepting the allegations in the petition as proven by virtue of respondent's default … . It would offend due process to hold that respondent "default[ed] in attending a hearing that she did not know was going to happen and did not, in fact, happen" … . Thus, notwithstanding the failure of respondent to articulate a meritorious defense, Family Court abused its discretion in denying respondent's motion. Matter of Arra L. (Christine L.), 2020 NY Slip Op 02829, Third Dept 5-14-20

NEGLECT, CUSTODY, NOTICE OF HEARING, DEFAULT ANALYZED UNDER FCA 1042.

DEFAULT IN THIS NEGLECT/CUSTODY PROCEEDING SHOULD HAVE BEEN ANALYZED UNDER FAMILY COURT ACT 1042, NOT CPLR 5015 AND 5511; BECAUSE RESPONDENT WAS NEVER NOTIFIED THAT A FACT-FINDING HEARING, AS OPPOSED TO A CONFERENCE, WAS GOING TO BE HELD THE DEFAULT ORDER SHOULD HAVE BEEN VACATED (THIRD DEPT).

The Third Department, reversing Family Court, determined: (1) the proper analysis of a default in this neglect/custody proceeding is under Family Court Act 1042, not

CPLR 5015 and 5511; (2) respondent was never notified of the fact-finding; and (3) the default order must be vacated:

To begin, although Family Court and the parties assessed whether respondent was entitled to vacatur under "the default mechanism of CPLR 5015 and 5511," the standard set forth by Family Ct Act § 1042 controls in this Family Ct Act article 10 proceeding … .. If a "person legally responsible for the child's care" has been notified of a pending fact-finding hearing and fails to attend … . Family Court is free to conduct the hearing so long as the child is represented by counsel … . Respondent is such a person and, upon her timely motion to vacate the fact-finding order, Family Court was obliged to grant vacatur and reopen the hearing if she showed "a meritorious defense to the petition . . . [unless she] willfully refused to appear at the hearing" … . …

It was an impossibility for respondent to default in attending a hearing that she did not know was going to happen and did not, in fact, happen. Respondent was further unable to challenge details of petitioner's evidence in the absence of a hearing and, the strength of petitioner's proof remaining a mystery, we deem the denials in respondent's affidavit sufficient to set forth a meritorious defense. Matter of Lila JJ. (Danelle KK.), 2020 NY Slip Op 01216, Third Dept 2-20-20

NEGLECT, DERIVATIVE NEGLECT, SUMMARY JUDGMENT NOT SUPPORTED.

DERIVATIVE NEGLECT FINDING STEMMING FROM A MOTION FOR SUMMARY JUDGMENT REVERSED; MOTHER HAD SUCCESSFULLY PARTICIPATED IN MENTAL HEALTH TREATMENT SINCE THE NEGLECT FINDINGS WITH RESPECT TO THE OLDER CHILDREN (SECOND DEPT).

The Second Department, reversing Family Court, determined a derivative neglect finding stemming from a motion for summary judgment should not have been granted. Mother had participated in mental health treatment and had made progress since the prior neglect findings with respect to her older children:

Although there is no express provision for a summary judgment procedure in a Family Court Act article 10 proceeding, summary judgment pursuant to CPLR 3212 may be granted in such a proceeding when there is no triable issue of fact outstanding (see Family Ct Act § 165[a] …). In support of its motion, ACS [Administration for Children's Services] submitted the court's prior orders determining that the mother neglected the two older children … . While there were findings of neglect as to the subject child's two siblings, "there is no per se rule that a finding of neglect of one sibling requires a finding of derivative neglect with respect to the other siblings. The focus of the inquiry . . . is whether the evidence of abuse or neglect of one child indicates a fundamental defect in the parent's understanding of the duties of parenthood" … . …

… ACS failed to establish as a matter of law that, under the circumstances, the neglect of the subject child's siblings merits a finding of derivative neglect as to the subject child … . The medical records submitted by ACS demonstrated that the mother had failed to comply with her mental health treatment in late 2016, which noncompliance was a basis of the prior findings of neglect. However, the records submitted also demonstrated that the mother recommenced treatment in early 2017, immediately after the finding of neglect as to the second child, Akira, and that the mother was thereafter compliant and made positive progress in her mental health treatment for the following year. Accordingly, it cannot be said that ACS established, prima facie, that the mother derivatively neglected the subject child through her failure to resolve the same issues that were the basis for the prior findings of neglect as to the two older children … . Matter of Azayla K. L. (Aleisha L.), 2020 NY Slip Op 05902, Second Dept 10-21-20

NEGLECT, HEARSAY, CORROBORATION.

HEARSAY STATEMENTS OF THE ALLEGED VICTIM WERE NOT CORROBORATED, NEGLECT FINDING REVERSED (FIRST DEPT).

The First Department, reversing the neglect finding, determined the hearsay statements of the alleged victim were not corroborated:

The finding of neglect was not supported by a preponderance of the evidence. "Unsworn out-of-court statements of the victim may be received and, if properly corroborated, will support a finding of abuse or neglect" … . Here, the child's out-of-court statement made during his videotaped interview with an investigator from the the Child Advocacy Center, that respondent bit him on the right shoulder during a January 2017 incident, was not sufficiently corroborated … . Although medical findings confirmed that the child sustained injuries that were consistent with a bite mark, those findings in no way connected those marks to respondent. Further, there is no dispute that the child told respondent that he was going to make false allegations against her to the Administration for Children's Services while the fact-finding hearing was pending, rendering his overall credibility quite impaired. Matter of Jaylin S. (Jasmine E.T.), 2020 NY Slip Op 05606, First Dept 10-8-20

NEGLECT, HEARSAY, CORROBORATION.

THE CHILD'S HEARSAY STATEMENTS CLAIMING HE WAS PUNCHED IN THE STOMACH WERE NOT CORROBORATED AND THEREFORE COULD NOT SUPPORT A FINDING OF NEGLECT BY THE INFLICTION OF EXCESSIVE CORPORAL PUNISHMENT (SECOND DEPT).

The Second Department, reversing (modifying) Family Court, determined the child's hearsay statements claiming Manuel R. punched him in the stomach were not corroborated. Therefore the finding that Manuel R. neglected the child by inflicting excessive corporal punishment:

… [G]enerally a petitioner must present nonhearsay, relevant evidence to reliably corroborate the out-of-court disclosures … . Moreover, "repetition of an accusation by a child does not corroborate the child's prior account of it" … .

Here, where there was no physical evidence of neglect, the child's out-of-court statements that Manuel R. disciplined him by punching him in the stomach were not sufficiently corroborated by nonhearsay, relevant evidence tending to support the reliability of the statements. While the child did say "ow, ow it hurt" when a case worker touched his stomach, this occurred after the caseworker told the child that she did not see bruises on his stomach. Moreover, although the child made a fist to

demonstrate to the caseworker what Manuel R. allegedly did when he punched him, he did this at the same time he made his verbal accusation that Manuel R. punched him. Under these circumstances, the child's reaction to the caseworker's touch and his gesture in making a fist were simply a repetition of his verbal accusation, which did not serve to corroborate his out-of-court statements … . As there was no other evidence tending to corroborate the child's out-of-court statement, the Family Court's finding that Manuel R. inflicted excessive corporal punishment on the child was not supported by a preponderance of the evidence. Matter of Treyvone A. (Manuel R.), 2020 NY Slip Op 07049, Second Dept 11-25-20

NEGLECT, MEDICAL NEGLECT, HEARING REQUIRED.

PETITION ALLEGED MOTHER FAILED TO GIVE ADHD MEDICATION TO THE CHILDREN; THE NEGLECT PETITION SHOULD NOT HAVE BEEN DISMISSED WITHOUT A HEARING; BECAUSE FAMILY COURT ADDRESSED THE MERITS OF THE MOTION TO REARGUE THE MOTION WILL BE DEEMED TO HAVE BEEN GRANTED RENDERING THE ORDER APPEALABLE AS OF RIGHT (THIRD DEPT).

The Third Department, reversing Family Court, determined the neglect proceeding should not have been dismissed without a hearing. The petition alleged mother was not providing ADHD medication to the children and the children were unable to focus in school as a result. The Third Department noted that, although the denial of a motion to reargue is not appealable, here Family Court addressed the merits of the motion to reargue and will be deemed to have granted the motion:

Although, generally, no appeal lies from an order denying a motion to reargue, where "the court actually addresses the merits of the moving party's motion, we will deem the court to have granted reargument and adhered to its prior decision — notwithstanding language in the order indicating that reargument was denied" … . Considering that Family Court scheduled and heard oral argument on the motion to reargue and, thereafter, issued a decision addressing the merits, we deem the court to have granted reargument, such that the December 2018 order adhering to the October 2018 order is appealable as of right … . …

"A parent's unwillingness to follow a recommended course of psychiatric therapy and medication, resulting in the impairment of a child's emotional health[,] may support a finding of neglect. However, what constitutes adequate medical care cannot be judged in a vacuum. The critical factor in this determination is whether the parent[has] provided an acceptable course of medical treatment for [his or her] child in light of all the surrounding circumstances" … . Here, the petition and corresponding affidavit stated, among other things, that respondent failed to properly administer prescribed ADHD medication to the two oldest children and failed to bring them to scheduled doctor appointments, and that those children were struggling in school and were unable to focus because they were not receiving the proper dosage of medication. The petition states that these allegations are supported, in part, by information received from the children and their school. Petitioner further alleged its concern that respondent was either taking the children's medication herself or selling it, along with the reasons for such concern. * * *

Despite the lack of allegations in the petition directly concerning the youngest child, the petition's allegations could support a finding of derivative neglect of that child. Matter of Aydden OO. (Joni PP.), 2020 NY Slip Op 01232, Third Dept 2-20-20

NEGLECT, MEDICAL NEGLECT.

FINDING THAT MOTHER DID NOT MEDICALLY NEGLECT HER CHILDREN LACKED A SOUND AND SUBSTANTIAL BASIS (FOURTH DEPT).

The Fourth Department, reversing Family Court, determined the finding that mother did not medically neglect her children lacked a sound and substantial basis:

A neglected child is defined, in relevant part, as a child less than 18 years of age "whose physical, mental or emotional condition has been impaired or is in imminent danger of becoming impaired as a result of the failure of his [or her] parent . . . to exercise a minimum degree of care . . . in supplying the child with adequate . . . medical . . . care, though financially able to do so" … . "The statute thus imposes two requirements for a finding of neglect, which must be established by a

preponderance of the evidence . . . First, there must be proof of actual (or imminent danger of) physical, emotional or mental impairment to the child . . . Second, any impairment, actual or imminent, must be a consequence of the parent's failure to exercise a minimum degree of parental care . . . This is an objective test that asks whether a reasonable and prudent parent [would] have so acted, or failed to act, under the circumstances" … .

A parent's failure to provide medical care as required by [Family Court Act § 1012 (f) (i) (A)] may be interpreted to include psychiatric medical care where it is necessary to prevent the impairment of the child's emotional condition' " … . Here, upon our review of the record, we conclude that DSS established a prima facie case of medical neglect by presenting evidence that the mother failed to follow mental health treatment recommendations upon the daughter's discharges from psychiatric hospitalizations for suicidal and homicidal ideation and that the mother failed to rebut DSS's prima facie case … .

We further agree with the AFC that the evidence of neglect with respect to the daughter " demonstrates such an impaired level of . . . judgment as to create a substantial risk of harm for any child in [the mother's] care,' " thus warranting a finding of derivative neglect with respect to the younger children … . Matter of Olivia W. (Courtney W.), 2020 NY Slip Op 03296, Fourth Dept 6-12-20

NEGLECT.

CHILD WAS ASLEEP DURING THE INCIDENT INVOLVING FATHER, NEGLECT FINDING REVERSED (FIRST DEPT).

The First Department, reversing Family Court, determined the evidence did not support finding father had neglected the child. The child was asleep during the incident:

The Family Court's finding that the father neglected the subject child lacks a sound and substantial basis in the record because a preponderance of the evidence does not demonstrate that the child's physical, mental or emotional condition was impaired or in danger of becoming impaired, or that the actual or threatened harm to the child

was a consequence of the father's failure to exercise a minimal degree of care in providing her with proper supervision or guardianship during the February 14, 2016 incident … Although the mother's and the father's fact-finding testimony established that the child was in the home when the incident occurred, petitioner failed to establish a prima facie case of neglect because their testimony also established that the child was sleeping in another room in the apartment and was unaware of what occurred, which testimony was supported by the testimony of the responding police officer … . Matter of K. S. (Dyllin S.), 2020 NY Slip Op 00979, First Dept 2-11-20

NEGLECT.

EVIDENCE OF DOMESTIC VIOLENCE AND MARIJUANA USE WAS NOT SUFFICIENT TO FIND THAT FATHER NEGLECTED THE CHILD (SECOND DEPT).

The Second Department, reversing Family Court, determined the evidence did not support the neglect finding against father based upon domestic violence and marijuana use:

… " [A] finding of neglect is proper where a preponderance of the evidence establishes that the child's physical, mental, or emotional condition was impaired or was in danger of becoming impaired by the parent's commission of an act, or acts, of domestic violence in the child's presence'"… . However, "exposing a child to domestic violence is not presumptively neglectful. Not every child exposed to domestic violence is at risk of impairment" … . Here, we agree with the father's contention that, with respect to that allegation, the preponderance of the evidence did not establish that he neglected the child … .

The father contends, and ACS [Administration of Children's Services] concedes, that the evidence of the father's use of marijuana was insufficient to establish that the child was neglected. We agree. The evidence failed to demonstrate that the father's marijuana use caused impairment, or an imminent danger of impairment, to the physical, mental, or emotional well-being of the child … . Matter of Simone C.P. (Jeffry F.P.), 2020 NY Slip Op 02270, Second Dept 4-9-20

NEGLECT.

EVIDENCE SUPPORTED DERIVATIVE NEGLECT FINDING (SECOND DEPT).

The Second Department determined the evidence supported Family Court's derivative neglect finding:

… [T]he evidence adduced at the fact-finding hearing established that the mother's verbal abuse of Hannah due to an untreated mental illness demonstrated such an impaired level of parental judgment as to create a substantial risk of harm to Samuel. Hannah testified that the mother threw things at her and instructed her brothers, including Samuel, to hit her when the mother became frustrated with her. According to Hannah, after these proceedings were commenced, the mother told Hannah that Hannah would be placed in a mental institution and raped in the petitioner's custody, told Hannah that the mother would pretend Hannah was dead and burn Hannah's clothes, and threatened to kill Hannah once the case was over. The mother's conduct caused Hannah to fear the mother and her brothers. This evidence sufficiently supported the Family Court's conclusion that the mother derivatively neglected Samuel, as it demonstrated that the mother had such an impaired level of parental judgment as to create a substantial risk of harm to the well-being of Samuel … . Matter of Samuel A. R. (Soya R.), 2020 NY Slip Op 00144, Second Dept 1-8-20

NEGLECT.

THE EVIDENCE DID NOT SUPPORT THE NEGLECT FINDING (SECOND DEPT).

The Second Department, reversing Family Court, determined the finding of neglect was not supported:

To establish neglect, a petitioner must demonstrate 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 . . . to exercise a minimum degree of care in providing the child with proper supervision or guardianship' . 'Actual or imminent danger of impairment is a prerequisite to a finding of neglect [which] ensures that the Family Court, in deciding whether to authorize state intervention, will focus on serious harm or potential harm to… the child, not just on what might be deemed undesirable parental behavior' … .

… The evidence adduced at the fact-finding hearing demonstrated that the mother and the child have a difficult relationship caused, in significant part, by the mother's disapproval of the child's behavior and the child's unwillingness to abide by her mother's rules, and the fact that the child had disciplinary problems at home and at school. Contrary to the court's determination, there was insufficient evidence to prove that the mother ever struck the child at the relevant time. While the petition alleged that the mother, during an argument with the child … locked the child in a storage room, the child testified that she herself ran into the storage room, locked the door, and was not physically hurt. This argument arose when the mother told the child that she could not go out that night. At that time, when the neglect is alleged to have occurred, the child had been residing with the mother for only one day, having lived in foster care for approximately two years. Moreover, although the petition alleged that the mother was required to make alternate living arrangements for the child since the child could no longer reside with the maternal grandmother and refused to reside with the mother, the mother's desire to have the child reside with her does not support a finding of neglect. Finally, the evidence adduced at the fact-finding hearing of the mother's insults and name-calling, while certainly counterproductive and inappropriate, does not rise to the level of establishing a failure to provide the child with proper supervision or guardianship or demonstrate a resulting impairment or imminent danger of impairment of the child's physical, mental, or emotional condition … . Matter of Alexandra R.-M. (Sonia R.), 2020 NY Slip Op 00280, Second Dept 1-17-20

OBJECTIONS TO MAGISTRATE'S ORDER, SERVICE AT LAST KNOWN ADDRESS.

ALTHOUGH MOTHER WAS GENERALLY AWARE FATHER HAD MOVED TO DELAWARE, FATHER DID NOT SPECIFY AN AGENT FOR SERVICE AS REQUIRED BY THE FAMILY COURT ACT; THEREFORE SERVICE OF MOTHER'S OBJECTIONS TO THE SUPPORT MAGISTRATE'S ORDER AT FATHER'S LAST KNOWN ADDRESS WAS PROPER (SECOND DEPT).

The Second Department, reversing Family Court, determined mother's objections to the Support Magistrate's order should not have been rejected on the ground father was not properly served. The papers were served at father's prior address in Brooklyn. Although mother was aware father may live in Delaware from representation made to the court, father did not specify an agent for service as required by Family Court Act. Therefore service at father's last known address was proper:

"Family Court Act § 439(e) provides, in pertinent part, that [a] party filing objections shall serve a copy of such objections upon the opposing party,' and that [p]roof of service upon the opposing party shall be filed with the [Family Court] at the time of filing of objections and any rebuttal'" … . Here, the mother served her objections upon the father at an address in Brooklyn, which was the same address she listed for the father in her petition. The court rejected the proof of service because, inter alia, the court file reflected a Delaware address for the father. While the mother was generally aware that the father represented to the court that his address was in Delaware, there was no evidence in the record that the address was ever disclosed to the mother. Moreover, following the mailing of the original summons to the father's Brooklyn address, he filed an Address Confidentiality Affidavit. In his Address Confidentiality Affidavit, the father failed to specify an agent for service, and there was no evidence that the mother ever received notice of an agent for service for the father as required by Family Court Act § 154-b(2)(c). Under these circumstances, the mother had insufficient notice of the father's purported new address in Delaware and lacked notice of an agent for service for the father. Therefore, service upon the father at the address last known to the mother was proper (see CPLR 2103[b][2]

…). Matter of Deyanira P. v Rodolfo P.-B., 2020 NY Slip Op 03918, Second Dept 7-15-20

OBJECTIONS TO MAGISTRATE'S ORDER, TIME FOR FILING.

ABSENT PROOF OF SERVICE OF THE SUPPORT MAGISTRATE'S ORDER ON FATHER OR FATHER'S COUNSEL, THE TIME FOR FILING OBJECTIONS TO THE ORDER NEVER BEGAN RUNNING (SECOND DEPT).

The Second Department, reversing Family Court, determined the time for filing objections to the order of the Support Magistrate never started to run because there was no evidence the order was served or mailed, notwithstanding father's possession of the order:

Pursuant to Family Court Act § 439(e), objections to an order of a Support Magistrate must be filed within 30 days after the date on which the order is provided to the objecting party in court or by personal service, or within 35 days after the date in which the order is mailed to the objecting party … . When a party is represented by counsel, the 35-day time requirement does not begin to run until the final order is mailed to counsel … . Here, the father and the father's prior counsel indicated that neither of them received the Support Magistrate's order by either personal service or mail. In addition, there is no evidence in the record demonstrating that the Support Magistrate's order was mailed or personally served on the father's counsel. Since there is no evidence in the record indicating that the Support Magistrate's order was personally served or mailed to the father's counsel … , the time in which the father was required to file his objections never began to run … . Contrary to the Family Court's determination, the father's actual possession of the Support Magistrate's order, which prior counsel indicated was obtained from the Family Court record room, is not dispositive, as the time limitations of Family Court Act § 439(e) do not begin to run until service is effectuated in accordance therewith … . Hughes v Lugo, 2020 NY Slip Op 04308, Second Dept 7-29-20

ORDER VS DECISION, DECISION CONTROLS, NEGLECT.

WHERE THERE IS A DISCREPANCY THE ORDER MUST BE CONFORMED WITH THE DECISION (FOURTH DEPT).

The Fourth Department noted a discrepancy between the decision and the order. Therefore the order was conformed to the decision:

… [W]e note that, in its bench decision, Family Court determined that the child ,,, was derivatively neglected. Inasmuch as there is a conflict between the decision and the order in appeal No. 1, that order must be conformed to the decision (… see generally CPLR 5019 [a]). We therefore modify the order … by vacating that part of the order determining that the child was derivatively abused and substituting therefor a determination that the child was derivatively neglected. Matter of Aaren F. (Amber S.), 2020 NY Slip Op 01739, Fourth Dept 3-13-20

PATERNITY, EQUITABLE ESTOPPEL, GENETIC TESTING.

ALTHOUGH THE CHILD WAS 17 AND HAD A LONG STANDING PARENT-CHILD RELATIONSHIP WITH MOTHER'S HUSBAND, THE DOCTRINE OF EQUITABLE ESTOPPEL SHOULD NOT HAVE BEEN APPLIED TO DISMISS MOTHER'S PETITION FOR GENETIC MARKER TESTING TO DETERMINE PATERNITY; THE CHILD WAS AWARE FROM A YOUNG AGE THAT THE PUTATIVE FATHER WAS THE CHILD'S BIOLOGICAL FATHER AND THERE WAS NO SHOWING THE PATERNITY PETITION WAS NOT IN THE CHILD'S BEST INTERESTS (SECOND DEPT).

The Second Department, reversing Family Court, determined the doctrine of equitable estoppel should not have been applied to dismiss mother's petition for a genetic marker test to determined paternity. The petition was brought when the child was 17 and the child was aware at a young age that the putative father was in fact the child's biological father. The child had developed a parent-child relationship with mother's husband, who had known the child since the child was two. The

equitable estoppel doctrine is applied solely in the child's best interests which were not shown to be detrimentally affected by the paternity petition:

As the party moving for dismissal of the petition, the putative father failed to establish that the child would suffer irreparable loss of status, destruction of his family image, or other harm to his physical or emotional well-being if a genetic marker test was ordered … . Here, the record reflects that the child was told by his mother and the husband at a young age that the putative father was his biological father. "Equitable estoppel is not used to deny the existence of a relationship, but rather to protect one" … . Absent any indication that the child's relationship with the husband needed protection from a determination as to whether the putative father was the biological father, equitable estoppel was not available to the putative father as a remedy … . Thus, under the circumstances, any lack in diligence by the mother in pursuing her earlier petitions was not a basis to estop her from seeking to establish the putative father's paternity … . Matter of Denise R.-D. v Julio R. P., 2020 NY Slip Op 00145, Second Dept 1-8-20

PATERNITY, EQUITABLE ESTOPPEL.

THE EVIDENCE DID NOT SUPPORT THE EXISTENCE OF A FATHER-CHILD RELATIONSHIP WITH MOTHER'S HUSBAND OR PETITIONER'S ACQUIESCENCE IN THE DEVELOPMENT OF SUCH A RELATIONSHIP; THE BIOLOGICAL FATHER'S PETITION FOR A DECLARATION OF PATERNITY SHOULD NOT HAVE BEEN DISMISSED PURSUANT TO THE DOCTRINE OF EQUITABLE ESTOPPEL (SECOND DEPT).

The Second Department, reversing Family Court, determined the doctrine of equitable estoppel should not have been invoked to dismiss the petition for a declaration petitioner is the father of a child born in 2016. Mother did not deny petitioner was the father but claimed the child had developed a father-child relationship with her husband, Joseph T. The Second Department held that the evidence did not demonstrate a father-child relationship with Joseph T and did not demonstrate petitioner acquiesced in the creation of a father-child relationship with Joseph T:

The doctrine of equitable estoppel may "preclude a man who claims to be a child's biological father from asserting his paternity when he acquiesced in the establishment of a strong parent-child bond between the child and another man" … . " The doctrine in this way protects the status interests of a child in an already recognized and operative parent-child relationship'" … , and has been applied "[i]n situations where an individual has assumed the role of a father and where the petitioner putative father has neglected to assume such a role" … . …

We agree with the petitioner that the respondents failed to demonstrate the existence of an operative parent-child relationship between the child and Joseph T. The only evidence of such a relationship came from the child's foster mother, with whom he has lived since he was one year old. The foster mother testified that the child called Joseph T. "daddy" during weekly supervised visits, and that they were affectionate with each other at the visits … . … Joseph T. never appeared in court on the petition and did not testify at the hearing. Further, we disagree with the Family Court that the petitioner acquiesced in the establishment of a relationship between the child and Joseph T. The petitioner testified at the hearing that, until the child was removed from the mother's care, he did not know she married to Joseph T. Matter of Luis V. v Laisha P. T., 2020 NY Slip Op 03235, Second Dept 6-10-20

PATERNITY, JURISDICTION OVER NONRESIDENT.

FAMILY COURT CAN EXERCISE JURISDICTION OVER A NONRESIDENT PUTATIVE FATHER IN A PATERNITY ACTION AS LONG AS THE FACTS HAVE A CONNECTION WITH NEW YORK STATE; THE PETITION SHOULD NOT HAVE BEEN DISMISSED WITH PREJUDICE (FOURTH DEPT).

The Fourth Department determined the paternity petition should not have been dismissed with prejudice because there are circumstances where the New York Family Court can obtain jurisdiction over an out-of-state respondent in the paternity action:

In a paternity proceeding, personal jurisdiction over a nonresident putative father may be established pursuant to Family Court Act § 580-201. Petitioner, however,

admittedly failed to allege in her petition that respondent engaged in sexual intercourse with the mother in New York State at the time of conception, or that he had any other relevant ties to New York State, and no other grounds for jurisdiction apply (see Family Ct Act § 580-201 [6], [8]). Under the circumstances of this case, we conclude that the court should have granted the motion on the ground that petitioner failed to state a cause of action predicated upon respondent's sexual intercourse with petitioner in New York State … . Inasmuch as such a dismissal is not on the merits, however, we further conclude that the petition should be dismissed without prejudice … . Matter of Joyce M.M. v Robert J.G., 2020 NY Slip Op 05616, Fourth Dept 10-9-20

POSTNUPTIAL AGREEMENTS, STATUTE OF LIMITATIONS FOR ENFORCEMENT.

THE ACTION TO ENFORCE THE POSTNUPTIAL AGREEMENT WAS GOVERNED BY THE THREE-YEAR STATUTE OF LIMITATIONS IN THE DOMESTIC RELATIONS LAW, NOT THE SIX-YEAR CONTRACT STATUTE OF LIMITATIONS IN CPLR 213; THEREFORE THE ACTION WAS TIME-BARRED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the statute of limitations with respect to the enforcement of a postnuptial agreement is that provided for in Domestic Relations Law 250, not the six-year statute of limitations for contract actions generally:

… [T]he six-year statute of limitations that pertains to breach of contract causes of action (see CPLR 213[2]) is not applicable. Rather, the applicable statute of limitations is provided for in Domestic Relations Law § 250. Pursuant to Domestic Relations Law § 250, the statute of limitations for claims arising from prenuptial and postnuptial agreements is three years and that period is tolled, as relevant here, until process has been served in a matrimonial action. The language of the statute makes it broadly applicable to claims arising from prenuptial and postnuptial agreements, such that it applies equally where a party seeks to invalidate the agreement and where a party seeks to enforce it … .

Here, the defendant did not assert his claim to enforce the postnuptial agreement until more than 4½ years after he was served with process in the matrimonial action. Accordingly, the defendant's claim is untimely, and should have been rejected. Washiradusit v Athonvarangkul, 2020 NY Slip Op 03562, Second Dept 6-24-20

PRENUPTIAL AGREEMENT MUST BE MUTUALLY REAFFIRMED.

THE DEFENDANT'S SIGNATURE ON THE PRENUPTIAL AGREEMENT WAS NOT ACKNOWLEDGED UNTIL RIGHT BEFORE THE DIVORCE PROCEEDINGS, SEVEN YEARS AFTER PLAINTIFF'S SIGNATURE ON THE AGREEMENT WAS ACKNOWLEDGED; IN THIS CIRCUMSTANCE, THE PRENUPTIAL AGREEMENT MUST BE MUTUALLY REAFFIRMED TO BE VALID (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, over a two-justice dissent, determined the prenuptial agreement was not valid and enforceable. The agreement was not acknowledged in front of a notary in 2011 by the defendant. Plaintiff had signed and acknowledged the agreement in 2011. Seven years later, right before the divorce proceedings, defendant had his signature acknowledged and he filed the agreement:

… [W]e conclude that, when an acknowledgment is missing from a nuptial agreement, an acknowledgment and a reaffirmation by the parties is required to cure the defect. To hold otherwise would permit a spouse to act unilaterally to cure the lack of his or her acknowledgment at some later date, and would thereby permit that spouse to choose, based on circumstances that may have changed in ways unanticipated by the other spouse at the time of the initial signing of the agreement, whether to acknowledge the agreement and make it enforceable or to leave it unacknowledged and defective. When the parties mutually sign and acknowledge the agreement, it is clear that they are mutually binding themselves to the weighty decisions that they deliberated on. Thus, in order for the acknowledgment to have true significance and purpose, it must be done contemporaneously with the parties' signatures or, if the acknowledgment occurs at a later date, the agreement must be

mutually reaffirmed by the parties … . Anderson v Anderson, 2020 NY Slip Op 04640, Fourth Dept 8-20-20

SEPARATION AGREEMENT, UNCONSCIONABILITY.

PLAINTIFF FAILED TO DEMONSTRATE THE SEPARATION AGREEMENT WAS UNCONSCIONABLE AS A MATTER OF LAW; PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the plaintiff failed to demonstrate the separation agreement was unconscionable as a matter of law and plaintiff's motion for summary judgment, therefore, should not have been granted. The court outlined the analytical criteria for unconscionability in this context:

"A separation agreement or stipulation of settlement which is fair on its face will be enforced according to its terms unless there is proof of fraud, duress, overreaching, or … . However, because of the fiduciary relationship existing between spouses, a marital agreement should be closely scrutinized and may be set aside upon a showing that it is unconscionable or the result of fraud or where it is shown to be manifestly unjust because of the other spouse's overreaching … . "In general, an unconscionable contract has been defined as one which is so grossly unreasonable as to be unenforc[ea]ble because of an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party" … . "This definition reveals two major elements which have been labeled by commentators, procedural and substantive unconscionability. The procedural element of unconscionability concerns the contract formation process and the alleged lack of meaningful choice; the substantive element looks to the content of the contract, per se" … . A reviewing court examining a challenge to a separation agreement "will view the agreement in its entirety and under the totality of the circumstances" … . Eichholz v Panzer-Eichholz, 2020 NY Slip Op 06500, Second Dept 11-12-20

SETTLEMENT AGREEMENT, DEATH OF HUSBAND, CONSTRUCTIVE TRUST, TRUSTS AND ESTATES.

THE CAUSE OF ACTION SEEKING THE IMPOSITION OF A CONSTRUCTIVE TRUST TO PREVENT UNJUST ENRICHMENT SHOULD NOT HAVE BEEN DISMISSED; PLAINTIFF WIFE ENTERED A SETTLEMENT AGREEMENT REQUIRING PAYMENTS BY HER EX-HUSBAND; AFTER HER EX-HUSBAND'S DEATH HIS CHILDREN ALLEGEDLY EMPTIED THE ESTATE OF ASSETS, THEREBY PREVENTING THE FULFILLMENT OF THE TERMS OF THE SETTLEMENT AGREEMENT (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the cause of action alleging the existence of a constructive trust to prevent unjust enrichment should not have been dismissed. Plaintiff and her deceased ex-husband entered a settlement agreement in which plaintiff would be entitled to certain payments until 2020 and 2023. Plaintiff's ex-husband died in 2017 and the complaint alleged that all of the ex-husband's assets had been removed from the estate by the husband's children making it impossible for the terms of the settlement to be fulfilled:

The purpose of a constructive trust is to prevent unjust enrichment … . Accordingly, " the constructive trust doctrine is given broad scope to respond to all human implications of a transaction in order to give expression to the conscience of equity and to satisfy the demands of justice'" … . " A constructive trust is an equitable remedy, and may be imposed when property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest'" … .

Moreover, an agreement between spouses, such as the agreement and addendum here, involve a fiduciary relationship requiring the utmost good faith … . Since the agreement and addendum provide that, if necessary, the plaintiff could use the assets of Iannazzo's [the ex-husband's] estate to satisfy his obligations to her, and, thereafter, all of Iannazzo's assets were transferred to the Trust before his death, his estate can provide no relief to the plaintiff and the obligations she is owed pursuant to the agreement and addendum will not be met. The plaintiff therefore adequately states a cause of action that the defendants would be unjustly enriched if the Trust is allowed to retain the portion of the assets now owned by the Trust that would satisfy

the unmet obligations of Iannazzo and his estate pursuant to the agreement … . Derosa v Estate of Iannazzo, 2020 NY Slip Op 04917, Second Dept 9-16-20

SETTLEMENT AGREEMENT, DISTANCE LIMIT FOR MOVES.

WHETHER MOTHER MOVED MORE THAN 40 MILES WAS AN ISSUE IN THIS MODIFICATION OF CUSTODY ACTION; FAMILY COURT TOOK JUDICIAL NOTICE THAT THE MOVE WAS 39 MILES; THE DISSENT ARGUED FAMILY COURT DID NOT DISCLOSE THE BASIS OF THE JUDICIAL NOTICE WHICH PRECLUDED A CHALLENGE TO THE FINDING (THIRD DEPT).

he Third Department determined Family Court properly found that mother had not moved beyond the 40-mile limit imposed by the settlement agreement. The Family Court judge took judicial notice of the distance involved in the move which was determined to be 39 miles. The dissent argued Family Court erred in not specifying the basis for the judicial notice, thereby making it impossible to challenge:

From the dissent:

Although it is well settled that "'a court may take judicial notice of facts which are capable of immediate and accurate determination by resort to easily accessible sources of undisputable accuracy'" … , judicial notice of a fact is improper when it is "from a hearsay source or from unidentifiable or nonindisputable sources outside the record or at a time subsequent to the close of testimony" … . Fundamental fairness thus dictates that a court, before it takes judicial notice of a fact, provide the parties with the basis for its notice and "afford the parties the opportunity to be heard as to the propriety of taking judicial notice in the particular instance" … . Otherwise, the determination of whether such fact is or is not "of common knowledge or determinable by resort to sources of indisputable accuracy" cannot be properly tested or reviewed … .

… .Family Court never disclosed the basis for its 39-mile calculation, and it announced that it was taking judicial notice of that "fact" after testimony had concluded and only in the context of its written decision. As such, the parties never

had an opportunity to be heard on this issue or dispute the basis for such judicially noticed finding. Nor does the record reflect that Family Court had a factual basis for its conclusion that the relocation provision of the agreement — which the court itself recognized as ambiguous — required that the 40-mile radius be measured between the outermost borders of Deposit and Clarks Summit, rather than from the parties' respective residences or some other location, particularly since the language of the agreement requires the mother's residence for the children, and not the boundary line of Clarks Summit, to be within a 40-mile radius from an undetermined location in Deposit. Indeed, the testimony of both parties contradicts the court's interpretation … . Matter of Lonny C v Elizabeth C., 2020 NY Slip Op 04620, Third Dept 8-20-20

SPECIAL IMMIGRANT JUVENILE STATUS.

FAMILY COURT SHOULD HAVE MADE FINDINGS WHICH WOULD ALLOW THE CHILD TO PETITION FOR SPECIAL IMMIGRANT JUVENILE STATUS (SIJS) (FIRST DEPT).

The First Department, reversing Family Court, determined the court should have made findings which would allow the child to petition for Special Immigrant Juvenile Status (SIJS):

The evidence shows that the subject child was unmarried and under the age of 21 at the time of the special findings hearing and order (see generally 8 USC § 1101[a][27][J]; 8 CFR 204.11[c] …). The Family Court's appointment of a guardian rendered the child dependent on a juvenile court … .

The evidence also established that reunification with the child's parents was not viable due to neglect or abandonment. The child testified that, with no prior warning, his father left him in the United States with his uncle (petitioner), and that his parents later told him that they could not support him and did not want him back. The child further stated, and petitioner corroborated, that he had only occasional contact with his parents, and received no gifts or support from them, since coming here. This was sufficient to "evince[] an intent to forego . . . parental rights and obligations" or a

failure to exercise a minimum degree of care to supply the child with adequate food, clothing, shelter, education, or supervision … .

In determining whether reunification was viable, the Family Court should not have refused to consider evidence of circumstances which occurred after the child's 18th, but before his 21st, birthday … .

The evidence also demonstrated that it is not in the best interests of the child to return to Thailand, where his parents reside, or to be sent to live in Bangladesh, where he has citizenship but has never resided. The child presented evidence that his parents would not accept him if he returned to Thailand, that his Thai visa was on the verge of expiring and he had no way to renew it, and that he had no other place to live or way to support himself in Thailand or Bangladesh … . He also presented evidence that he was doing well in petitioner's care … . Matter of Khan v Shahida Z., 2020 NY Slip Op 03480, First Dept 6-18-20

SPECIAL IMMIGRANT JUVENILE STATUS.

FAMILY COURT SHOULD HAVE MADE FINDINGS ENABLING THE CHILD TO PETITION FOR SPECIAL IMMIGRANT JUVENILE STATUS (SIJS) (FIRST DEPT).

The First Department, reversing Family Court, determined Family Court should have made findings enabling the child to petition for special immigrant juvenile status (SIJS):

The evidence establishes that the child was unmarried and under the age of 21 at the time of the special findings hearing and order (see 8 CFR 204.11[c]). The Family Court's appointment of a guardian (petitioner) rendered the child dependent on a juvenile court … .

The evidence that the child had had no contact with his parents, and received no support from them, since at least September 2014 established that reunification with the parents was not viable due to neglect or abandonment …. The parents' consent

to the appointment of a guardian and waiver of service also demonstrate an intent to relinquish their parental rights.

In determining whether reunification was viable, the Family Court should not have refused to consider evidence of circumstances that occurred after the child's 18th, but before his 21st, birthday … .

The record demonstrates that it is not in the best interests of the child to return to Albania … . The evidence shows that the child suffered political persecution in Albania that his parents were unable to prevent … , that he had had no recent contact with his parents and was not sure if they would accept him if he returned … , and that he was doing well in petitioner's care … . Matter of Lavdie H. v Saimira V., 2020 NY Slip Op 03177, First Dept 6-4-20

SPECIAL IMMIGRANT JUVENILE STATUS.

THE FACT THAT PATERNITY HAD NOT BEEN ESTABLISHED DID NOT PRECLUDE MOTHER'S GUARDIANSHIP PETITION OR FINDINGS TO ALLOW THE CHILD TO PETITION FOR SPECIAL IMMIGRANT JUVENILE STATUS (SIJS) (SECOND DEPT).

The Second Department, reversing Family Court, determined the petition to have the child's mother appointed guardian and to make findings necessary for the child to petition for special immigrant juvenile status (SIJS) should have been granted:

The Family Court should not have dismissed the guardianship petition on the ground that paternity had not been established. A natural parent may be appointed guardian of his or her own child (see Family Ct Act § 661 [a] …), and the mere fact that paternity has not been established for the putative father does not preclude the guardianship petition or the issuance of an order making specific findings enabling the subject child to petition for SIJS … . …

Here, the subject child is under the age of 21 and unmarried, and since we have found that the mother should have been appointed as the subject child's guardian, a finding also should have been made that the child is dependent on a juvenile court within the meaning of 8 USC § 1101(a)(27)(J)(i) …. Further, based upon our independent

factual review, the record supports a finding that reunification of the subject child with his father is not a viable option due to parental abandonment …. Lastly, the record supports a finding that it would not be in the best interests of the subject child to return to Guatemala … . Matter of Mardin A. M.-I. (Reyna E. M.-I.–Mardin H.), 2020 NY Slip Op 05754, Second Dept 10-14-20

STIPULATION OF SETTLEMENT, CHILD SUPPORT, CHILD SUPPORT STANDARDS ACT.

THE CHILD SUPPORT PROVISIONS OF THE STIPULATION OF SETTLEMENT IN THE DIVORCE ACTION VIOLATED THE CHILD SUPPORT STANDARDS ACT AND MUST BE VACATED; THE VACATUR SHOULD HAVE EXTENDED BACK TO THE DATE OF THE STIPULATION, NOT MERELY TO THE DATE OF THE RELATED MOTION (SECOND DEPT).

The Second Department, reversing (modifying) Supreme Court in this action on the child support provisions of a stipulation of settlement in a divorce action, determined the child support provisions violated the Child Support Standards Act and the required vacatur should extend back to the date of the stipulation:

The Child Support Standards Act (Domestic Relations Law § 240[1-b][h]; hereinafter CSSA) mandates vacatur of original child support stipulations when they fail to comply with CSSA guidelines. Here … the Supreme Court found that the parties' failure to strictly comply with the CSSA with regard to the deviation from the statutory support obligations vitiated the child support provision of the stipulation of settlement with regard to apportionment of unreimbursed medical costs. … [T]he court improperly determined that the reimbursement of the medical costs and child care expenses was retroactive only to the filing date of the motion, relying on Luisi v Luisi (6 AD3d 398). However, in Luisi, this Court held that it was improper to award child support arrears retroactive to the date of a stipulation of settlement because the party seeking such recalculation only did so by motion in the matrimonial action rather than by plenary action … . Here, the defendant did properly commence a plenary action to vacate those provisions of the stipulation of settlement which pertained to the calculation of the medical costs and child care

expenses and, upon vacatur, to recalculate the amounts owed. … Thus, the court should have granted those branches of the defendant's motion which sought a recalculation of the arrears owed retroactive to the date of the stipulation of settlement … . Martelloni v Martelloni, 2020 NY Slip Op 05197, Second Dept 9-30-20

STIPULATION OF SETTLEMENT, CUSTODY MODIFICATION, HEARINGS, INADMISSIBLE EVIDENCE.

THE CUSTODY ARRANGEMENTS SET FORTH IN A SETTLEMENT AGREEMENT SHOULD NOT HAVE BEEN MODIFIED IN THE ABSENCE OF A HEARING AND FAMILY COURT SHOULD NOT HAVE RELIED ON INADMISSIBLE EVIDENCE UNTESTED BY THE PARTIES (SECOND DEPT).

The Second Department, reversing Family Court, determined the custody arrangements set forth in the settlement agreement should not have been modified in the absence of a hearing and the modification should not have been based upon inadmissible evidence not tested by either party:

… [T]he Supreme Court should not have granted, without a hearing, that branch of the defendant's motion which was to modify the terms of the parties' stipulation of settlement. Custody determinations should generally be made only after a full and plenary hearing … . While the general right to a hearing in custody and visitation cases is not absolute, where "facts material to the best interest analysis, and the circumstances surrounding such facts, remain in dispute," a hearing is required … . Here, the record shows that there were disputed factual issues regarding the child's best interests, such that a hearing on the defendant's petition was necessary … .

In addition, decisions regarding child custody and parental access should be based on admissible evidence … . Here, in making its determination, the Supreme Court improperly relied solely on statements and conclusions of witnesses whose opinions and credibility were untested by either party … . Palazzola v Palazzola, 2020 NY Slip Op 06801, Second Dept 11-18-20

STIPULATION OF SETTLEMENT, INTERPRETATION REQUIRES HEARING.

THE MEANING OF 'GROSS EARNED INCOME' IN THE STIPULATION OF SETTLEMENT AFFECTED THE CALCULATION OF CHILD SUPPORT; THE TERM WAS AMBIGUOUS REQUIRING A HEARING TO DETERMINE THE INTENT OF THE PARTIES (SECOND DEPT).

The Second Department, reversing Family Court, determined the settlement agreement was ambiguous. The meaning of the term "gross earned income" in the agreement affected the child support calculation. The court should have held a hearing to ascertain the intent of the parties. Instead, the court deferred to the definition of "income" in the Child Support Standards Act (CSSA):

"A stipulation of settlement entered into by parties to a divorce proceeding constitutes a contract between them subject to the principles of contract interpretation" … . "Where the intention of the parties is clearly and unambiguously set forth, effect must be given to the intent as indicated by the language used" … . "A court may not write into a contract conditions the parties did not insert or, under the guise of construction, add or excise terms, and it may not construe the language in such a way as would distort the apparent meaning" … . "Whether a writing is ambiguous is a matter of law for the court, and the proper inquiry is whether the agreement on its face is reasonably susceptible of more than one interpretation" … . In making this determination, the court also should examine the entire contract and consider the relation of the parties and the circumstances under which the contract was executed … . Where a contract is ambiguous, "the court may consider the construction placed on the contract by the parties to help ascertain the meaning" … . "The role of the court is to determine the intent and purpose of the stipulation based on the examination of the record as a whole" … .

Here, the term "gross earned income," in the context of the parties' stipulation, is ambiguous … . However, instead of deferring to the CSSA's definition of "income," the Support Magistrate should have held a hearing to determine the parties' intent in including the word "earned" … . Matter of Abramson v Hasson, 2020 NY Slip Op 03418, Second Dept 6-17-20

STIPULATION OF SETTLEMENT, ORAL STIPULATION NOT ENFORCEABLE.

THE ORAL STIPULATION OF SETTLEMENT IN THIS DIVORCE ACTION IS INVALID AND UNENFORCEABLE (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, over a dissent, determined the oral stipulation of settlement in this divorce action is invalid and unenforceable. The dissent argued defendant wife was not aggrieved because the parties contentions were resolved by the stipulation which was incorporated into the judgment of divorce:

… [T]he parties placed on the record an oral stipulation of settlement that, inter alia, provided for the distribution of the marital property. Although the oral stipulation contemplated the signing of a postnuptial agreement, defendant wife refused to sign such an agreement. Nevertheless, Supreme Court issued a judgment that acknowledged that the parties had placed on the record in open court an oral stipulation resolving all disputed issues, and that provided, inter alia, that the oral stipulation was incorporated but not merged into the judgment. …

We agree with defendant that the oral stipulation rendered in open court did not satisfy the requirements of Domestic Relations Law § 236 (B) (3), and it is therefore invalid and unenforceable. "In matrimonial actions . . . an open court stipulation is unenforceable absent a writing that complies with the requirements for marital settlement agreements" … . "More particularly, to be valid and enforceable, marital settlement agreements must be in writing, subscribed by the parties, and acknowledged or proven in the manner required to entitle a deed to be recorded' … . McGovern v McGovern, 2020 NY Slip Op 04635, Fourth Dept 8-20-20

STIPULATION OF SETTLEMENT, UNCONSCIONABILITY.

CAUSE OF ACTION ALLEGING THE STIPULATION OF SETTLEMENT IN THIS DIVORCE ACTION WAS UNCONSCIONABLE SHOULD HAVE BEEN DISMISSED, CRITERIA EXPLAINED (SECOND DEPT).

The Second Department, reversing (modifying) Supreme Court, determined the cause of action alleging the stipulation of settlement in this divorce action was unconscionable should have been dismissed:

… [W]e agree with the defendant that the Supreme Court should have granted that branch of her cross motion which was pursuant to CPLR 3211(a) to dismiss the second cause of action, seeking to set aside the stipulation on the ground of unconscionability. "'An unconscionable bargain is one which no person in his or her senses and not under delusion would make on the one hand, and 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'" … . "An agreement, however, is not unconscionable 'merely because, in retrospect, some of its provisions were improvident or one-sided'" … . Here, the terms of the stipulation, while perhaps improvident or one-sided in favor of the defendant, were not so unfair as to shock the conscience and confound the judgment of any person of common sense. Heinemann v Heinemann, 2020 NY Slip Op 08044, Second Dept 12-30-20

TEMPORARY REMOVAL, RISK CAUSED BY SIBLING PREVENTED RETURN.

THE PARENT'S INABILITY TO CONTROL THE CHILD'S BROTHER PRECLUDED THE RETURN OF THE CHILD TO THE PARENT'S CUSTODY AFTER TEMPORARY REMOVAL (SECOND DEPT).

The Second Department, reversing Family Court, determined the record did not support the return of the child to the parent's custody after temporary removal. The Second Department found that the parent's difficulty controlling the child's brother, who requires constant supervision, put the child at risk:

"An application pursuant to Family Court Act § 1028(a) for the return of a child who has been temporarily removed shall be granted unless the court finds that the return presents an imminent risk to the child's life or health'" … . "In a proceeding for removal of a child, the Family Court must weigh, in the factual setting before it, whether the imminent risk to the child can be mitigated by reasonable efforts to avoid removal'" … . "Ultimately, the Family Court must balance that risk against the harm removal might bring, and it must determine factually which course is in the child's best interests" … . On appeal, this Court must assess whether the record provides a sound and substantial basis to support the Family Court's determination … .

Here, the Family Court's determination granting the parents' application pursuant to Family Court Act § 1028 for the return of the child to their custody lacks a sound and substantial basis in the record … . The evidence at the hearing demonstrates that the child's sibling, Michael, has special needs that require him to be under constant supervision, and that on a prior occasion the parents' inability to control Michael resulted in serious physical injuries to one of the child's siblings. Notwithstanding the parents' willingness to comply with court-ordered services, the parents and Michael had not yet completed those services at the time of the hearing. In our view, the parents' inability to adequately control Michael would present an imminent risk to the child's life or health if the child were returned to the parents. Given the circumstances of the family's living situation at the time of the hearing, this risk could not be mitigated by the conditions imposed by the court. Matter of Nicholas O. (Jenny F.), 2020 NY Slip Op 03663, Second Dept 7-1-20

TEMPORARY REMOVAL.

RETURN OF THE CHILDREN TO MOTHER AFTER A TEMPORARY REMOVAL WAS NOT SUPPORTED BY A SOUND AND SUBSTANTIAL BASIS (SECOND DEPT).

The Second Department, reversing Family Court, determined the return of children to mother after a temporary removal was not supported by a sound and substantial basis:

"An application pursuant to Family Court Act § 1028 to return a child who has been temporarily removed shall' be granted unless the Family Court finds that "the return presents an imminent risk to the child's life or health"'" … . The court's determination will not be disturbed if it is supported by a sound and substantial basis in the record … . In making its determination, the court " must weigh, in the factual setting before it, whether the imminent risk to the child can be mitigated by reasonable efforts to avoid removal'" … .The court " must balance that risk against the harm removal might bring, and it must determine factually which course is in the child's best interests'" … . "Evidence that the children who are the subject of the proceeding were previously harmed while in the parent's care is not required where it is shown that the parent demonstrated such an impaired level of parental judgment with respect to one child so as to create a substantial risk of harm to any child in that parent's care" … . The child services agency bears the burden of establishing that the subject child would be at imminent risk and therefore should remain in its custody … . …

The evidence at the hearing demonstrated that, after one of the subject children reported to the mother that her older brother had been sexually abusing her since she was 10 years old, the mother did not address the sexual abuse and did not provide increased supervision for the subject children. Further, the petitioner demonstrated that the mother left one of the subject children in the older brother's care, for at least a period of time, while she gave birth to the third subject child, in violation of an order dated March 23, 2018. Under the circumstances, we cannot agree that the return of two of the subject children to the mother's custody, notwithstanding the conditions that were imposed, would not present an imminent risk to the children's life or health … . Matter of Carter R. (Camesha B.), 2020 NY Slip Op 03118, Second Dept 6-3-20

TERMINATION OF PARENTAL RIGHTS, ABANDONMENT.

FATHER WAS NOT ENTITLED TO SUMMARY JUDGMENT TERMINATING HIS PARENTAL RIGHTS ON THE GROUND HIS 18-YEAR-OLD CHILD HAD ABANDONED HIM (THIRD DEPT).

The Third Department, reversing Family Court, determined father was not entitled to summary judgment on his petition to terminate his parental rights on the ground that the 18-year-old had abandoned him:

… [T]he father did not establish his entitlement, as a matter of law, to termination of his child support obligation on the ground of abandonment. Although the father's submissions detailed his efforts to establish a relationship with the child and the child's repeated rebuffs of those efforts, the father's proof failed to demonstrate as a matter of law that the child's refusal to have contact with him was totally unjustified, particularly given the father's prolonged absence from the child's life and the child's developmental disability and other diagnoses. Such factual issues warranted a full evidentiary hearing and should not have been summarily resolved by Family Court … . Although Family Court had knowledge of prior proceedings between the parties, the justification issue had never been squarely before Family Court and required the presentation of evidence, including potential expert testimony, concerning the impact of the child's developmental disability and other diagnoses on the child's refusal to have contact with the father. Matter of Thomas GG. v Bonnie Jean HH., 2020 NY Slip Op 05988, Third Dept 10-22-20

TERMINATION OF PARENTAL RIGHTS, TRIAL DISCHARGE.

THE EVIDENCE DID NOT SUPPORT THE TERMINATION OF MOTHER'S PARENTAL RIGHTS; PETITIONER MADE NO EFFORT TO HELP MOTHER MAKE THE TRIAL DISCHARGE WORK (SECOND DEPT).

The Second Department, reversing Family Court, determined the evidence did not support the termination of mother's parental rights. During the trial discharge of the child to mother, the petitioner made no effort to place in a school closer to mother

and mother allowed the child to stay at the foster home on weeknights to attend school:

The evidence at the fact-finding hearing established that in May 2016, the mother had adequate housing for the child, that in June 2016, she had completed her service plan and was having unsupervised parental access with the child, and that in July 2016, she was having overnight and weekend parental access. In November 2016, the Family Court directed that the petitioner implement a trial discharge to the mother, and a trial discharge commenced on December 23, 2016. Although at that time the mother resided in Manhattan and the child was attending school in Brooklyn, the petitioner did not provide any assistance with regard to transferring the child to a school closer to the mother in Manhattan, did not provide any assistance with the child's transportation to and from his school in Brooklyn, and did not provide other appropriate services to the family. The trial discharge failed in April 2017. According to the petitioner's witness, the trial discharge failed after the petitioner became aware that the mother had not taken the child into her full-time custody. According to the mother, the child spent weeknights with the foster mother in Brooklyn, because of the long commute between the mother's apartment in Manhattan and the child's school in Brooklyn. After the trial discharge failed in April 2017, the mother consistently attended her scheduled supervised parental access two hours per week until the petition was filed on August 7, 2017.

Under the circumstances presented, the petitioner failed to establish by clear and convincing evidence that, during the relevant period of time, the mother failed to maintain contact with or plan for the future of the child, and further, that it made diligent efforts to encourage and strengthen the parental relationship (see Social Services Law § 384-b[7] …). Matter of Tai-Gi K. (Nadine B.), 2020 NY Slip Op 00586, Second Dept 1-29-20

TESTIMONY BY TELEPHONE, JUDGES, OUT-OF-STATE PARTY, JURISDICTION NOT CHALLENGED.

FATHER, WHO WAS INCARCERATED IN PENNSYLVANIA, INFORMED FAMILY COURT HE WISHED TO APPEAR BY TELEPHONE IN THE CUSTODY MATTER; FAMILY COURT DENIED THE REQUEST STATING THE COURT DID NOT HAVE JURISDICTION OVER FATHER; THE 3RD DEPARTMENT HELD FATHER, WHO HAD NOT CHALLENGED THE COURT'S JURISDICTION, SHOULD HAVE BEEN ALLOWED TO APPEAR BY PHONE (THIRD DEPT).

The Third Department, reversing Family Court, determined that father, who was incarcerated in Pennsylvania, should have been allowed to appear in the custody proceeding by telephone. Father had informed the court of his wish to appear and had not challenged the court's jurisdiction and informed Family Court he wished to appear by telephone. Family Court denied father's request stating that the court did not have jurisdiction over father:

"The right to be heard is fundamental to our system of justice" … . Further, "[p]arents have an equally fundamental interest in the liberty, care and control of their children" … . "[E]ven an incarcerated parent has a right to be heard on matters concerning [his or her] child, where there is neither a willful refusal to appear nor a waiver of appearance" … . Here, the father had notice of the proceeding, did not challenge Family Court's jurisdiction and the court could have permitted him to testify telephonically … . Because the record demonstrates that the father was not given an opportunity to participate in the proceedings, we must reverse and remit for a new hearing … . Matter of Starasia E. v Leonora E., 2020 NY Slip Op 00334, Third Dept 1-16-20

TESTIMONY BY TELEPHONE, MUST BE SWORN.

FAMILY COURT ALLOWED MOTHER TO TESTIFY BY TELEPHONE WITHOUT WARNING HER A NOTARY SHOULD BE PRESENT SO SHE COULD BE SWORN AND THEN, SUA SPONTE, REJECTED MOTHER'S TESTIMONY BECAUSE IT WAS NOT SWORN; NEW HEARING ORDERED (THIRD DEPT).

The Third Department, reversing Family Court in this child support violation proceeding, determined that mother's testimony by telephone should not have been rejected, sua sponte, because it was unsworn. Family Court allowed mother to testify and mother, who was facing incarceration for the child-support violation, had not been warned to have a notary present so her testimony could be sworn:

In noting the lack of a notary present with the mother to swear her in, Family Court correctly identified a critical issue about to unfold at the hearing, but then took no timely corrective action to address the issue, permitted the unsworn questioning to occur and then, in its written decision, found fault with the very unsworn testimony methodology that it had permitted to occur at the hearing. The correct course of action would have been for the court to explain up front that, if the mother wished to testify, she would have to do so under oath and then administer the oath itself if the mother had not made other suitable arrangements. Given that the mother was facing a potential period of incarceration of up to six months in the event that Family Court determined that her failure to pay child support was willful (see Family Ct. Act § 454 [3] [a]), the mother's testimony was essential to the court's determination as to whether she had had the ability to pay or willfully disobeyed the prior support order. Thus, having permitted the mother to give unsworn testimony telephonically, it was error for Family Court to thereafter sua sponte rule, nearly 1½ months after the hearing, that it would not credit the mother's testimony given that it was not sworn. Matter of Burnett v Andrews-Dyke, 2020 NY Slip Op 03838, Third Dept 7-9-20

TRIAL DISCHARGE, ABUSE.

ALTHOUGH THE PARENTS HAD BEEN FOUND TO HAVE ABUSED THE CHILDREN, THEY HAVE DEMONSTRATED THEY ARE LOVING AND CARING PARENTS; IN LIGHT OF THE CHILDREN'S EMOTIONAL PROBLEMS ASSOCIATED WITH FOSTER CARE, THE MOTION FOR A TRIAL DISCHARGE TO THE PARENTS SHOULD HAVE BEEN GRANTED (FIRST DEPT).

The First Department, reversing Family Court, determined the motion for a trial discharge of the children to the parents, who had been found to have abused the children, should have been granted:

Family Court's denial of respondents' motions pursuant to Family Ct Act § 1061 for a trial discharge of the children Ashlynn and Yeovanny to their care, a position vigorously supported by the foster care agency and the attorney for the children, does not have a sound and substantial basis in the record … . At the time of the motions, these children had recently been placed in their fourth foster home, and the agency was already investigating a fifth placement. Meanwhile, respondents had complied with all services, including full mental health evaluations ordered by the court at disposition, regularly attended unsupervised visitation, and had received uniformly positive reports from those who observed them interact with the children that they were loving and caring parents whose parenting skills were continually improving.

Under these circumstances, although respondents continued to maintain that Ian and Yeovanny's injuries were accidental, "their acceptance of ultimate responsibility for [the children's] injuries [was] demonstrated by their conduct" … . In view of the parents' demonstrated ability to care for the children, ACS [Administration for Children's Services] failed to show that it would be in Ashlynn and Yeovanny's best interest for continued foster placement … especially when weighed against the emotional harm on children when they are removed from the home … . Such emotional harm was amply documented here and disturbingly downplayed by both petitioner and the court. The record shows that Ashlynn suffered from severe anxiety, nightmares, and other mental health issues that her therapist and agency caseworker attributed to being separated from respondents and shuttled through a succession of foster care placements. At the hearing on the motions, the agency

caseworker submitted evidence that Ashlynn had to be taken to a hospital emergency room for night terrors shortly after she began living in her fourth foster home. Based on the foregoing, respondents showed "good cause" under Family Ct Act § 1061 for a trial discharge. Matter of Ashlynn R. (Maria R.-Yeovany R.), 2020 NY Slip Op 07726, First Dept 12-22-20

TRIAL DISCHARGE, DELAY DENIED DUE PROCESS.

FATHER WAS DENIED DUE PROCESS WHEN THE COURT TOOK SIX MONTHS TO HOLD A POST-DISPOSITIONAL HEARING AFTER A FAILED TRIAL DISCHARGE OF THE CHILDREN TO FATHER; THE CHILDREN WERE FINALLY RETURNED TO FATHER AND THE APPEAL WAS CONSIDERED AS AN EXCEPTION TO THE MOOTNESS DOCTRINE (FIRST DEPT).

The First Department, in a full-fledged opinion by Justice Singh, determined that father was entitled to an expedited post-dispositional hearing after the children were removed from the father's custody based upon a failed trial discharge. The children were eventually returned to father, but the hearing took six months and the children were not returned to father until eight months after the decision was issued. The First Department ruled on the appeal as an exception to the mootness doctrine, finding that this situation was likely to recur. The court held that father was entitled to an "expedited hearing" after the children were removed under due process principles:

We find that a parent's private interest in having custody of his or her children, the children's private interest in residing with their parent, and the undisputed harm to these interests are factors that merit equal consideration. On this record, ACS [Administration for Children's Services] fails to establish that the lengthy delay was related to its interest in protecting the children. Rather, the hearing was prolonged over six months because of the court's and attorneys' scheduling conflicts. There is no indication that the completion of the hearing was caused by difficult legal issues, or by the need to obtain elusive evidence, or by some other factor related to an accurate assessment of the best interest of the children … .

Even though this is a post-dispositional matter, the father is entitled to the strict due process safeguards afforded in neglect proceedings. "The fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State" … . This rationale equally applies to the primacy of a parent's fundamental liberty interest, and the importance of procedural due process in protecting that interest, particularly when a parent and child are physically separated … . Accordingly, we find that a parent is entitled to a prompt hearing on the agency's determination to remove the children from his or her physical custody through a failed trial discharge. Matter of F.W. (Monroe W.), 2020 NY Slip Op 02385, First Dept 4-23-20

TRI-PARENT ARRANGEMENT, CUSTODY, VISITATION.

THERE IS NO LEGAL SUPPORT FOR A 'TRI-PARENT' ARRANGEMENT WHERE A FORMER SAME-SEX PARTNER OF MOTHER, MOTHER AND FATHER SHARE VISITATION AND CUSTODY OF THE CHILD (FOURTH DEPT).

The Fourth Department, in a full-fledged opinion by Justice Centra, over a two-justice concurrence and a dissent, determined petitioner, the former same-sex partner of mother, did not have standing to seek custody and visitation of the child, despite mother's support of the petition. The petitioner moved out of mother;s residence in 2010. Mother thereafter conceived a child with father. At first father wanted nothing to do with the child, but he has visited the child since 2014. Petitioner participated in the birth and naming of the child and assumed the role of a parent, but the romantic relationship with mother ended in 2012. Father opposed petitioner's 2017 petition for custody and visitation. Mother did not want to terminate father's rights. Family Court granted father's motion to dismiss the petition. The Fourth Department affirmed finding no legal support for a "tri-parent" custody and visitation arrangement:

The wording of Domestic Relations Law § 70 (a) is clear and straightforward. It states that "either" parent may seek custody or visitation (id.). It is a well-settled principle of statutory construction that "[w]ords of ordinary import used in a statute

are to be given their usual and commonly understood meaning" … . The common dictionary definition of "either" when used as an adjective has two senses, i.e., "being the one and the other of two" and "being the one or the other of two" … . In addition, when the Court of Appeals stated in Brooke S.B. that section 70 does not define the critical term "parent," it added the following in a footnote: "We note that by the use of the term either,' the plain language of Domestic Relations Law § 70 clearly limits a child to two parents, and no more than two, at any given time" (Brooke S.B., 28 NY3d at 18 n 3). In our view, the clear wording of section 70 (a), which was expressly recognized by the Court of Appeals, precludes any relief to petitioner here because there are already two parents: the mother and the father. Under section 70 (a), there simply can be no more. We are therefore in agreement with the Third Department's recent decision determining that to allow three parents to "simultaneously have standing to seek custody . . . does not comport with the holding in Matter of Brooke S.B." (Matter of Shanna O. v James P., 176 AD3d 1334, 1335 [3d Dept 2019]). Matter of Tomeka N.H. v Jesus R., 2020 NY Slip Op 02015, Fourth Dept 3-20-20

Similar issue and result in Matter of Wlock v King, 2020 NY Slip Op 02019, Fourth Dept 3-20-20

VACCINATION, OPPOSITION TO, MEDICAL DECISION-MAKING.

MOTHER, WHO OPPOSES VACCINATING THE CHILD, SHOULD NOT HAVE BEEN AWARDED MEDICAL DECISION-MAKING AUTHORITY (SECOND DEPT).

The Second Department, reversing (modifying) Family Court, determined mother, who opposes vaccination of the child, should not have been awarded medical decision-making authority:

Here, the child, by his attorney … , asserts that the mother should not have medical decision-making authority over him. The mother opposes vaccinating the child. However, at the hearing, the father testified that he would innoculate the child for diphtheria, tetanus, and pertussis, and measles, mumps, and rubella, expressed concern that the child could become infected and young and elderly members of his

family were at risk due to the child's lack of immunization against "highly contagious preventable diseases," and further noted that his younger child had received a "full set" of vaccinations. The forensic evaluator recommended that the father should be awarded medical decision-making authority due to his position on vaccinations which was safer for the child, a position which was entitled to some weight … . Under the circumstances, the determination of the Family Court to award the mother medical decision-making authority did not have a sound an substantial basis in the record, and the father should have been awarded medical decision-making authority … . Matter of Ednie v Haniquet, 2020 NY Slip Op 04305, Second Dept 7-29-20

VISITATION, CONDITIONED UPON COUNSELING.

FAMILY COURT DID NOT HAVE THE AUTHORITY TO CONDITION VISITATION UPON FATHER'S PARTICIPATION IN MENTAL HEALTH COUNSELING; THEREFORE FATHER'S PETITION TO MODIFY CUSTODY AND VISITATION SHOULD NOT HAVE BEEN DISMISSED ON THE GROUND THAT ORDER HAD BEEN VIOLATED (FOURTH DEPT).

The Fourth Department, reversing Family Court, determined the motion to dismiss father's petition to modify custody and visitation shoud not have been granted. The motion to dismiss argued father had not complied with the court's order conditioning visitation on participation in mental health counseling. The court did not have the authority to issue that order:

… [A]lthough a court may include a directive to obtain counseling as a component of a custody or visitation order, the court does not have the authority to order such counseling as a prerequisite to custody or visitation" … . Family Court therefore "lacked the authority to condition any future application for modification of [the father's] visitation on [his] participation in mental health counseling" … . Matter of Lane v Rawleigh, 2020 NY Slip Op 06926, Fourth Dept 11-20-20

VISITATION, GRANDMOTHER, STANDING.

MOTHER HAD FLED TO ARGENTINA WITH THE CHILD WHILE CUSTODY PROCEEDINGS WERE PENDING; FAMILY COURT SHOULD NOT HAVE DENIED THE MATERNAL GRANDMOTHER'S PETITION SEEKING VISITATION ON THE GROUND SHE DID NOT HAVE STANDING; MATTER REMITTED FOR A BEST INTERESTS HEARING (SECOND DEPT).

The Second Department, reversing Family Court, determined the court erred in finding the maternal grandmother did not have standing to seek visitation and remitted the matter for a best interests hearing. Mother had fled to Argentina with the child when custody proceedings were pending:

"When a grandparent seeks visitation pursuant to Domestic Relations Law § 72(1), the court must make a two-part inquiry" … . The court must first determine if the grandparent has standing, based on death or equitable circumstances, and if it determines that the grandparent has established standing, it must then determine whether visitation is in the best interests of the child (see Domestic Relations Law § 72[1] …).

"Standing [based upon equitable circumstances] should be conferred by the court, in its discretion, only after it has examined all the relevant facts" … . "[A]n essential part of the inquiry is the nature and extent of the grandparent-grandchild relationship" … . "It is not sufficient that the grandparents allege love and affection for their grandchild" … . "They must establish a sufficient existing relationship with their grandchild, or in cases where that has been frustrated by the parents, a sufficient effort to establish one, so that the court perceives it as one deserving the court's intervention" … .

Here, the Family Court's determination that the grandmother lacked standing to seek visitation was not supported by a sound and substantial basis in the record … . The evidence demonstrated that the grandmother developed a relationship with the child early on in his life and thereafter made repeated efforts to continue that relationship … . Matter of Noguera v Busto, 2020 NY Slip Op 07385, Second Dept 12-9-20

VISITATION, GRANDMOTHER, STANDING.

THE MATERNAL GRANDMOTHER HAD STANDING TO PETITION FOR VISITATION AFTER MOTHER'S DEATH; FAMILY COURT SHOULD NOT HAVE DENIED THE PETITION WITHOUT HOLDING A "BEST INTERESTS" HEARING (SECOND DEPT).

The Second Department, reversing Family Court, determined the maternal grandparent had standing to petition for visitation after mother died. Because the grandparent had standing, Family Court should have held a "best interests" hearing rather than precluding the presentation of evidence and granting father's petition to deny the petition:

… [I]t is undisputed that the maternal grandparents have standing based upon the death of the child's mother. Since the maternal grandparents have standing, the Family Court should have proceeded to conduct a best interests determination based upon admissible evidence … . Instead, the maternal grandparents were not permitted to present any evidence, no testimony was taken from any of the parties, and no in camera interview with the child was conducted. We disagree with the court's determination to grant the father's application, in effect, to deny the petition and dismiss the proceeding without first conducting a hearing … . Matter of Jafer v Marasa, 2020 NY Slip Op 06789, Second Dept 11-18-20

VISITATION, GRANDPARENTS, TRIAL REQUIRED.

THE ORDER WAS NOT ENTERED ON CONSENT AND THEREFORE WAS APPEALABLE; GRANDPARENTS' PETITIONS FOR VISITATION SHOULD NOT HAVE BEEN GRANTED ABSENT A FULL TRIAL (FIRST DEPT).

The First Department, after noting the order was not entered on consent and was therefore appealable, determined the grandparents should not have been awarded visitation absent a full trial:

In the absence of consent, Family Court should not have awarded the paternal grandparents visitation without conducting a full trial. The decision was based only on the grandmother's partial testimony. The separately petitioning grandfather did not testify. The mother was not present due to a medical procedure she was undergoing in North Carolina. Even if the court was justified in drawing a negative inference from her failure to give testimony … , the court failed to afford the attorney for the child (AFC) an opportunity to ascertain the seven-year-old child's position … . Although the Family Court appropriately appointed an AFC, he did not let her do her job. The child's position in this case was particularly important because of the mother's representations that the child did not want to see the grandparents so soon following her father's death and would be traumatized by such visitation. In addition, each of the grandparents brought separate petitions and each was separately represented in this matter. Although there is some indication that the grandparents are separated, because of the truncated record, there is insufficient information to support the court's having jointly awarded jointly awarded them visitation with the child. Without a full hearing, the record is insufficient to determine whether visitation with the paternal grandparents is in the child's best interests … . If after a full hearing upon remand the Family Court determines that grandparental visitation is in the child's best interest, it should also clarify the award of visitation rights vis-a-vis each grandparent, given that they filed separate petitions and were not jointly represented by counsel, and thus in fact may be separated. Matter of Donna F.T., 2020 NY Slip Op 03469, First Dept 6-18-20

VISITATION/CONTACT, FORUM NON CONVENIENS.

NEW YORK SHOULD NOT HAVE BEEN RULED AN INCONVENIENT FORUM FOR THIS VISITATION/CONTACT ENFORCEMENT PROCEEDING, CRITERIA EXPLAINED (THIRD DEPT).

The Third Department, reversing Family Court, determined Family Court should not have ruled that New York was an inconvenient forum for a visitation/contact enforcement petition where mother is in New York and father is in Arizona with the child:

As Family Court acknowledged, it had exclusive continuing jurisdiction over the matter pursuant to the Uniform Child Custody Jurisdiction and Enforcement Act … . However, "[a] court of this state which has jurisdiction under this article . . . may decline to exercise its jurisdiction at any time if it determines that it is an inconvenient forum under the circumstances and that a court of another state is a more appropriate forum" … .

An inconvenient forum determination "depends on the specific issues to be decided in the pending litigation" … . This is an enforcement petition, and the sole issue concerns the conduct of the parents vis-À-vis the current order. The vast amount of testimony as to whether the father violated the order, which is central to the issue in this proceeding, will come from the mother, who is located in New York, and any witnesses that she may call. Any testimony from the father can be presented by telephone, audiovisual means or other electronic means. Moreover, Family Court has presided over numerous proceedings between the parties related to this child … .That court is far more familiar with the case than the Arizona court and is in a better position to interpret the meaning of its own order … .

Additionally, the mother submitted an affidavit evidencing that she will not be able to travel to or retain counsel in Arizona, yet she has legal representation in New York. Family Court acknowledged her indigency and that it was unable to conclude whether Arizona could provide indigent legal representation to her. Matter of Sadie HH. v Darrin II., 2020 NY Slip Op 01219, Third Dept 2-20-20

VISITATION/CONTACT, HEARING REQUIRED, INCARCERATION IS A CHANGE IN CIRMCUMSTANCES.

FATHER'S INCARCERATION CONSTITUTED A CHANGE IN CIRCUMSTANCES RE FATHER'S VISITATION/CONTACT PETITIONS; HEARING REQUIRED TO DETERMINE BEST INTERESTS OF THE CHILD; VISITATION PETITIONS NEED NOT BE VERIFIED (THIRD DEPT).

The Third Department, reversing Family Court, determined: (1) father's incarceration constituted a change in circumstances; (2) father's petition for

visitation and contact triggered the need for a hearing to determine the best interests of the child; and (3) verification of a visitation petition is not required by CPLR 3020 or Family Ct Act article 6:

… [W]e find that the father demonstrated a change in circumstances arising from his incarceration … .

We note that "[v]isitation with a noncustodial parent, even one who is incarcerated, is presumed to be in the best interests of the child[]" . Further, "as a general matter, custody determinations … be rendered only after a full and plenary hearing" … . This guideline applies to requests for visitation and contact, as presented here … . Accordingly, in the absence of sufficient information allowing a comprehensive review of the child's best interests, Family Court erred in dismissing the petitions without a hearing … . Finally, it was not necessary for Family Court to dismiss the petitions because they were unsworn, given that verification of a visitation petition is not required by either CPLR 3020 or Family Ct Act article 6 … . Matter of Shawn MM. v Jasmine LL., 2020 NY Slip Op 01223, Third Dept 2-20-20