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An Organized Compilation of the Summaries of Selected Family Law Decisions Released by Our New York State Appellate Courts and Posted on the New York Appellate Digest Website April 1, 2021 – June 30, 2021. 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. Right Click on the Citations to Keep Your Place in the Quarterly.

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ADOPTION, JUDICIAL SURRENDER.

A CONDITIONAL JUDICIAL SURRENDER OF A CHILD FOR ADOPTION MUST BE REVOKED WHERE THE DESIGNATED ADOPTIVE PARENT DECLINES TO ADOPT AND THE BIRTH PARENT PROMPTLY APPLIES FOR REVOCATION OF THE JUDICIAL SURRENDER (FIRST DEPT).

The First Department, in a full-fledged opinion by Justice Oing, reversing Family Court, determined the conditional judicial surrender of a child for adoption must be revoked where the designated adopting parent declines to adopt the child and the birth parent promptly applies for revocation. The child, now 16 years old, had been in foster care for nine years. Although the First Department revoked the judicial surrender, the court remanded the matter for a quick hearing on the petition to terminate mother's parental rights:

This appeal requires us to resolve an issue not previously addressed by this Court. When the person designated in a conditional judicial surrender as the adopting parent declines to adopt the child must the surrender be revoked upon the birth parent's application? The Family Court was unwilling to vacate the surrender given the undisputed toll on the child's well-being as a result of spending virtually her entire life in foster care. Instead, the court held a best interests hearing and determined that the mother's parental rights remain terminated, and converted her conditional judicial surrender to an unconditional one, which permitted the child to remain free for adoption. This issue pits the basic principle that a parent has a "fundamental liberty interest . . . in the care, custody and management" of his or her child … against this state's statutory framework governing conditional judicial surrenders … . … We conclude that the order of the Family Court should be reversed because the designated person to adopt is a fundamental condition precedent to a surrender such that the person's declination mandates its revocation upon the birth parent's prompt application. * * *

Order, Family Court, … reversed, on the law, … the petition denied and dismissed, and the mother's application granted and the matter remanded for an expeditious

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APPEALS, INAADEQUATE RECORD, PARENTAL ACCESS.

FAMILY COURT, UPON REMITTAL AFTER A PRIOR REVERSAL ON APPEAL, DID NOT MAKE A SUFFICIENT RECORD FOR REVIEW OF ITS ORDER RE: FATHER'S PARENTAL ACCESS (SECOND DEPT).

The Second Department, reversing Family Court, determined Family Court, upon remittal after a prior reversal, did not create a sufficient record to allow review of its order re: father's parental access schedule:

"In determining custody and [parental access] issues, the most important factor to be considered is the best interests of the child" … . "Generally, [parental access] should be determined after a full evidentiary hearing to determine the best interests of the child" … .

"A trial court must state in its decision 'the facts it deems essential' to its determination" … . "Effective appellate review, especially in proceedings involving child custody determinations, 'requires that appropriate factual findings be made by the trial court—the court best able to measure the credibility of the witnesses'" … . Under the circumstances of this case, the record is not sufficient for this Court to conduct an intelligent review of the evidence.

Furthermore, the children are of such an age and maturity that information regarding their preferences is necessary to create a sufficient record to determine their best interests … . Matter of Georgiou-Ely v Ely, 021 NY Slip Op 02796, Second Dept 5-5-21

ATTORNEYS, CUSTODY.

GRANDMOTHER SHOULD HAVE BEEN NOTIFIED OF HER RIGHT TO COUNSEL IN THIS CUSTODY CASE; MATTER SENT BACK TO FAMILY COURT TO DETERMINE WHETHER GRANDMOTHER WAS ELIGIBLE FOR ASSIGNED COUNSEL (THIRD DEPT).

The Third Department determined grandmother should have been notified of her right to counsel in this custody case. But the question remains whether grandmother would have qualified (financially) for assigned counsel. The matter was sent back to Family Court to rule on grandmother's eligibility for assigned counsel:

We find merit to the grandmother's argument that she was potentially eligible for the assignment of counsel at the March 2017 appearance and that Family Court erred in failing to advise her of that right. The purpose of providing counsel to certain persons involved in Family Court proceedings is to provide protection against "infringements of fundamental interests and rights" (Family Ct Act § 261). The grandmother was listed as a respondent in the mother's modification petition brought under Family Ct Act article 6, part 3 … , which sought sole legal and primary physical custody of the child. As of the initial appearance on that petition in March 2017, the grandmother jointly shared "secondary legal custody" with the mother. Accordingly, the mother's request for sole legal custody of the child, if granted, had the potential to alter the grandmother's custodial rights. We are mindful that the mother subsequently withdrew her request for custody and instead advocated for the child's placement with the grandmother. However, she did not do so until the fact-finding hearing, nearly four months after the March 2017 appearance. Family Ct Act § 262 (a) requires the court to advise an eligible person of the right to counsel "[w]hen such person first appears in court" … . As the grandmother was potentially eligible for assigned counsel under Family Ct Act § 262 (a), upon a showing of the required financial circumstances, the court was obligated to advise her of that right at the March 2017 appearance … . Matter of Renee S. v Heather U., 2021 NY Slip Op 03635, Third Dept 6-10-21

CHILD ABUSE.

FAMILY COURT'S DETERMINATION FATHER DID NOT SEXUALLY ABUSE HIS CHILD WAS NOT SUPPORTED BY THE RECORD; THE CHILD'S HEARSAY STATEMENTS WERE CORROBORATED, AND FAMILY COURT'S DECISION TO CREDIT THE TESTIMONY OF FATHER'S EXPERT OVER PETITIONER'S EXPERT WAS NOT SUPPORTED BY THE RECORD (SECOND DEPT).

The Second Department, reversing Family Court, determined the allegations father sexually abused his child, Zamir, were proved by a preponderance of the evidence. The hearsay allegations of the child were corroborated by another child and case workers. Father's expert, relied upon by Family Court, offered speculative testimony about alleged flaws in the approach taken by petitioner's expert, but acknowledged he had not reviewed the petitioner's expert's testimony:

… [W]e find that the petitioner established by a preponderance of the evidence that the father neglected Zamir by sexually abusing him. The Family Court's finding that there was no evidence presented of "age-inappropriate sexual knowledge" by Zamir is not supported by the record, since the then five-year-old child made an "up down" motion with his hands during the interviews with the petitioner's expert to demonstrate how he was made to touch the father's penis … . Further, the court's finding that there was no evidence presented that the child displayed any "psychological or behavioral characteristics" indicative of having been sexually abused is not supported by the record. The petitioner's expert testified that Zamir was "engaging" when talking about anything other than the sexual abuse, but used "less words per sentence," without maintaining eye contact, and became "squirmy" when discussing the sexual abuse, and that "[i]t was very easy to see that he was not comfortable discussing th[at] topic." In addition, the court's speculation that Zamir fabricated the claims of sexual abuse because he was angry at the father for other matters is not supported by the record. Matter of Zamir F. (Ricardo B.), 2021 NY Slip Op 02391, Second Dept 4-21-21

CHILD SUPPORT, JURISDICTION.

NEW YORK DID NOT HAVE JURISDICTION OVER THE FLORIDA CHILD SUPPORT ORDER, EVEN THOUGH FATHER'S CHILD SUPPORT OBLIGATION HAD TERMINATED BY THE TERMS OF THE ORDER (SECOND DEPT).

The Second Department, reversing Family Court, determined Florida, which issued the child support order and where father resides, continued to have jurisdiction over the child support order, even though the child support obligation had terminated. Therefore the New York child support order was not a "de novo" order. Rather, it was a modification of the Florida order over which New York did not have jurisdiction:

After relocating to New York, the daughter applied for and began receiving public assistance in Nassau County. In July 2019, the Nassau County Department of Social Services (hereinafter DSS) filed the instant petition for support on behalf of the daughter. At a hearing on the petition before a support magistrate, the father moved to dismiss the petition for lack of subject matter jurisdiction pursuant to the Uniform Interstate Family Support Act (hereinafter UIFSA), arguing that Florida retained exclusive jurisdiction over his child support obligation to the daughter, and that under Florida law, his obligation to support the daughter ceased when she turned 18. The Support Magistrate denied the motion, finding that the subject application was not seeking to modify the father's existing child support obligation in Florida, but, instead, was a de novo application for support. …

"Under the [Full Faith and Credit for Child Support Orders Act] and UIFSA, the state issuing a child support order retains continuing, exclusive jurisdiction over its child support orders so long as an individual contestant continues to reside in the issuing state" (… cf. Family Ct Act § 580-205). "Accordingly, a state may modify the issuing state's order of child support only when the issuing state has lost continuing, exclusive jurisdiction" … . …

Since the father still resides in Florida, that state has continuing, exclusive jurisdiction of the child support order, despite the termination of his obligations under that order, and New York does not have subject matter jurisdiction to modify

that order … . Matter of Nassau County Dept. of Social Servs. v Ablog, 2021 NY Slip Op 03035, Second Dept 5-12-21

CHILD SUPPORT, CONTEMPT, SUPREME COURT, ATTORNEYS.

ALTHOUGH THE CHILD-SUPPORT CONTEMPT PROCEEDING WAS IN SUPREME COURT, NOT FAMILY COURT, PLAINTIFF HAD A RIGHT TO COUNSEL UNDER THE JUDICIARY LAW; PLAINTIFF'S COUNSEL WAS INEFFECTIVE BECAUSE NO MEDICAL EVIDENCE WAS PRESENTED TO SUPPORT PLAINTIFF'S TESTIMONY HE WAS UNABLE TO WORK (SECOND DEPT).

The Second Department, after noting plaintiff was entitled to counsel under Judiciary Law 35 (8) in this child-support contempt proceeding in Supreme Court, determined plaintiff's counsel was ineffective. Plaintiff testified he could not meet his child-support obligations because of medical problems, but counsel did not present any medical evidence:

The plaintiff was denied effective assistance of counsel in connection with that branch of the defendant's cross motion which was to hold him in contempt for wilful violation of the 2013 order. Under Judiciary Law § 35(8), a person has the right to the assistance of counsel in any matter before the Supreme Court, under circumstances whereby, if such proceeding was pending in the Family Court, such court would be required, by section 262 of the Family Court Act, to appoint counsel, such as the matter here in which the defendant sought to hold the plaintiff in contempt for wilful violation of the 2013 [child-support] order and sought his incarceration (see Judiciary Law § 35[8]; Family Ct Act § 262). The standard for effective assistance of counsel in such cases is whether, viewed in its totality, there was meaningful representation … . Here, the plaintiff's attorney failed to present any medical evidence, whether in the form of admissible medical records or testimony of medical witnesses, to support the plaintiff's defense that his failure to pay child support in accordance with the 2013 order was not wilful, but rather due to his medical condition which rendered him unable to work. Winter v Winter, 2021 NY Slip Op 03865, Second Dept 6-16-21

CUSTODY, EVIDENCE, APPEALS, ATTORNEY-FOR-THE-CHILD.

THE ATTORNEY FOR THE CHILD, IN A BRIEF TO THE APPELLATE COURT, ALERTED THE COURT TO NEW INFORMATION RELEVANT TO THE CUSTODY RULING BY FAMILY COURT; THE MATTER WAS REMITTED FOR A REOPENED HEARING (SECOND DEPT).

The Second Department sent the matter back to Family Court for a reopened custody hearing after the attorney for the child alerted the court to new relevant information:

… [T]he attorney for the child, in the brief submitted to this Court on the child's behalf, has brought to this Court's attention certain alleged new developments including that shortly after the child began living with the father, the child reported that the father told her that the mother was evil, and the child stated that she no longer wanted to see the mother at all. "As the Court of Appeals has recognized, changed circumstances may have particular significance in child custody matters and may render the record on appeal insufficient to review whether a child custody determination is still in the best interests of the children" … . In light of the alleged new developments brought to this Court's attention by the attorney for the child, the record is no longer sufficient to determine which arrangement is in the best interests of the child … .

… [W]e remit the matter to the Family Court … for a reopened hearing at which the alleged new facts shall be considered, and a new custody determination thereafter. In so doing, we express no opinion as to the appropriate determination. Matter of Magana v Delph, 2021 NY Slip Op 03589, Second Dept 6-9-21

CUSTODY, IMPOSITION OF CONDITIONS.

FATHER'S ABILITY TO BRING FUTURE PETITIONS FOR CUSTODY SHOULD NOT HAVE BEEN CONDITIONED UPON HIS UNDERGOING TREATMENT OR COUNSELING (SECOND DEPT).

The Second Department, reversing Family Court, determined father's ability to bring future custody petitions should not have been condition upon father's undergoing counseling or treatment:

A court deciding a custody proceeding may "direct a party to submit to counseling or treatment as a component of a [parental access] or custody order" … . "A court may not, however, order that a parent undergo counseling or treatment as a condition of future [parental access] or reapplication for [parental access] rights" … . Here, the Family Court erred in conditioning the filing of any future petitions by the father to modify parental access upon his successful completion of an anger management class and a negative drug test, and we modify the order so as to eliminate that condition. Matter of Hardy v Hardy. 2021 NY Slip Op 03320. Second Dept 5-26-21

CUSTODY, JUDGES.

FAMILY COURT SHOULD HAVE CONDUCTED A HEARING IN THIS CUSTODY/PARENTAL ACCESS PROCEEDING AND SHOULD HAVE MADE FINDINGS OF FACT AS REQUIRED BY CPLR 4213 (SECOND DEPT).

The Second Department, reversing Family Court, determined a hearing should have been held in this custody/parental access proceeding. The court noted Family Court failed to set forth findings of fact as required by CPLR 4213 (b):

Parental access determinations should "[g]enerally be made only after a full and plenary hearing and inquiry" … . "While the general right to a hearing in [parental access] 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

finding of the children's best interests such that a hearing on the father's parental access was required … . … [W]e note that the decision issued by the Supreme Court failed to comply with CPLR 4213(b) in that it did not set forth findings of fact … . Matter of Vazquez v Bahr, 2021 NY Slip Op 02397, Second Dept 4-21-21

CUSTODY, JURISDICTION.

FAMILY COURT SHOULD NOT HAVE FOUND NEW YORK DID NOT HAVE JURISDICTION OVER THIS CUSTODY DISPUTE WITHOUT HOLDING A HEARING PURSUANT TO THE UNIFORM CHILD CUSTODY JURISDICTION AND ENFORCEMENT ACT TO DETERMINE WHETHER NEW YORK OR YEMEN WAS THE CHILDREN'S HOME STATE (SECOND DEPT).

The Second Department, reversing Family Court, determined Family Court should not have found New York did not have jurisdiction over this custody dispute without holding a hearing pursuant to the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA). The issue is whether New York or Yemen was the children's home state:

Pursuant to Domestic Relations Law § 70, "[w]here a minor child is residing within this state, either parent may apply to the supreme court for a writ of habeas corpus to have such minor child brought before such court; and on the return thereof, the court, on due consideration, may award . . . custody of such child to either parent." Here, since the children reside outside of this State, reference must necessarily be made to the Uniform Child Custody Jurisdiction and Enforcement Act (Domestic Relations Law art 5-A; hereinafter UCCJEA), which provides, inter alia, that "a court of this state has jurisdiction to make an initial child custody determination only if: (a) this state is the home state of the child on the date of the commencement of the proceeding, or was the home state of the child within six months before the commencement of the proceeding and the child is absent from this state but a parent or person acting as a parent continues to live in this state" (Domestic Relations Law § 76[1][a] …). The UCCJEA defines "home state" as "the state in which a child lived with a parent . . . for at least six consecutive months immediately before the commencement of a child custody proceeding" (Domestic Relations Law § 75-a[7]).

Here, the Family Court was required to hold a hearing as to the issue of whether New York or Yemen was the children's home state, as there are disputed issues of fact regarding the circumstances under which the parties moved with the children from New York to Yemen … . Matter of Kassim v Al-Maliki, 2021 NY Slip Op 02800, Second Dept 5-5-21

CUSTODY, PLACEMENT WITH SIBLINGS.

FAMILY COURT PROPERLY CONSIDERED THE BEST INTERESTS OF THE TWO CHILDREN IN ITS PLACEMENT DECISION; STRONG TWO-JUSTICE DISSENT (SECOND DEPT).

The Second Department, over an extensive two-justice dissent, determined Family Court properly considered the best interests of two children in deciding where the children should be place. The dissent disagreed. The decision is too detailed and fact-specific to fairly summarize here:

At its essence, this appeal presents a circumstance where everyone involved—the foster mother, the godmother, the attorney for the child, ACS, and the Family Court—agreed that the child and his half-sibling should be kept together. The court found that both the godmother's home and the foster mother's home were entirely suitable, but in choosing between the two, properly noted that the half-sibling's father did not consent to the half-sibling being placed anywhere except with the godmother. The court's consideration of that fact did not mean that the child's best interests were not globally considered, but was instead a relevant and necessary fact that the court needed to take into account in determining how to best promote the child's best interests and the obvious benefit to him of keeping the two half-siblings together as each other's sole living, known, biological relatives. It was not error for the court to do so, and in fact, the court would have been derelict in its duties had it failed to do so. Matter of Adonnis M. (Kenyetta M.), 2021 NY Slip Op 03322, Second Dept 5-26-21

CUSTODY.

FATHER'S PETITION FOR A MODIFICATION OF CUSTODY OR INCREASED PARENTAL ACCESS SHOULD NOT HAVE BEEN DENIED WITHOUT AN IN CAMERA INTERVIEW OF THE CHILD (SECOND DEPT).

The Second Department, reversing Family Court, determined father's petition for joint custody or an expansion of parental access should not have been denied without an in camera interview of the child:

A modification of a court-ordered custody arrangement must be based upon a showing of a change in circumstances such that the modification is required to protect the best interests of the child … . A child's changing needs as he or she grows older can sufficiently constitute a change in circumstances … .

Here, in light of the evidence presented by the father and assertions of the attorney for the child, the Family Court should not have determined the father's petition without conducting an in camera interview with the child. "[W]hile the express wishes of children are not controlling, 'they are entitled to great weight, particularly where their age and maturity would make their input particularly meaningful'" … . Matter of Coleman v Lymus, 2021 NY Slip Op 02389, Second Dept 4-21-21

CUSTODY.

THE USUAL STRICT CRITERIA FOR VACATING A DEFAULT ORDER ARE RELAXED IN CHILD CUSTODY PROCEEDINGS; MOTHER'S MOTION TO VACATE THE DEFAULT ORDER AWARDING CUSTODY TO FATHER SHOULD HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Family Court, determined mother's motion to vacate the default order granting custody to father should have been granted. The usual strict criteria for a default order are relaxed in child custody matters:

The determination of whether to relieve a party of an order entered upon his or her default is a matter left to the sound discretion of the Family Court … . "A party seeking to vacate an order entered upon his or her default is required to demonstrate a reasonable excuse for the default and the existence of a potentially meritorious cause of action or defense" … . However, "the law favors resolution on the merits in child custody proceedings," and thus the "general rule with respect to opening defaults in civil actions is not to be rigorously applied to cases involving child custody" … . Matter of Williams v Worthington, 2021 NY Slip Op 03040, Second Dept 5-12-21

CUSTODY, DEFAULT ORDER.

FATHER'S EXCUSE FOR NOT APPEARING (HE OVERSLEPT) WAS REASONABLE UNDER THE CIRCUMSTANCES AND FATHER DEMONSTRATED A MERITORIOUS DEFENSE TO THE GRANDPARENTS' PETITION FOR CUSTODY OF THE CHILD; DEFAULT CUSTODY ORDER VACATED AND MATTER REMITTED FOR A HEARING (THIRD DEPT).

The Third Department, reversing Supreme Court, determined father's motion to vacate the order granting, without a hearing, custody of the child to the grandparents should have been granted. The Third Department found that father's failure to appear was excusable (he overslept) and father had a meritorious defense to the grandparents' application for custody:

Although oversleeping may not ordinarily constitute a reasonable excuse, we find such excuse to be reasonable under the particular circumstances of this case … . …

… [B]efore Family Court may award custody to a nonparent, it must have first made a finding of extraordinary circumstances and then determined that such award is in the child's best interests … . …

… .Family Court failed to conduct an evidentiary hearing and make the requisite extraordinary circumstances and best interests findings prior to awarding the grandparents permanent custody of the child. … Family Court's failures in this

regard, together with the father's superior claim to custody of the child, constitute a meritorious defense … . Matter of Melissa F. v Raymond E., 2021 NY Slip Op 02026, Third Dept 4-1-21

DIVORCE, CHILD SUPPORT.

IN A COMPLEX MARITAL-PROPERTY, MAINTENANCE AND CHILD-SUPPORT ANALYSIS TOO DETAILED AND COMPREHENSIVE TO SUMMARIZE HERE, THE COURT NOTED THAT, ABSENT A VOLUNTARY AGREEMENT, A PARENT MAY NOT BE DIRECTED TO SUPPORT A CHILD AFTER THE AGE OF 21 (SECOND DEPT).

The Second Department, in an extensive marital-property, maintenance and child-support decision too detailed and comprehensive to fairly summarize here, noted that a parent is not obligated to support a child over the age of 21:

The defendant … contends that the Supreme Court improperly directed him to pay basic child-support and add-on expenses for the child after she reaches the age of 21. A parent has no legal obligation to provide for or contribute to the support of a child over the age of 21 … . "In the absence of a voluntary agreement, a parent may not be directed to pay support or to contribute to the college education of a child who has attained the age of 21 years, and has no obligation to continue the support of a child after the child reaches the age of 21 years" … . Here, there was no voluntary agreement, and accordingly, the court should not have directed the defendant to pay basic child support and add-on expenses for the child after she reaches the age of 21. Sinnott v Sinnott, 2021 NY Slip Op 03073, Second Dept 5-12-21

DIVORCE, CHILD SUPPORT.

SUPREME COURT DID NOT CONDUCT A HEARING OR FOLLOW THE CHILD SUPPORT STANDARDS ACT FORMULA FOR CHILD SUPPORT CALCULATIONS; IN ADDITION THE COURT DID NOT CONSIDER THE STRONG PUBLIC POLICY AGAINST RESTITUTION OR RECOUPMENT OF CHIILD SUPPORT ALREADY PAID; MATTER REMITTED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the court did not conduct a hearing, did not follow the child support formula of the Child Support Standards Act (CSSA) and did not consider the public policy against recoupment or restitution of child support already paid. The matter was remitted for a hearing and a new determination:

… [T]he Supreme Court did not calculate the basic child support obligation for the children, which is done by (1) determining the combined parental income and (2) multiplying the amount of combined parental income up to the statutory cap by the appropriate child support percentage (see Domestic Relations Law § 240[1-b][c]). The court did not determine the combined parental income or identify the applicable statutory cap. It further failed to determine each parent's pro rata share of the basic child support obligation based on his or her income in proportion to the combined parental income … . Rather, the court incorrectly determined the amount of child support owed to the custodial parent based solely on the noncustodial parent's income multiplied by the appropriate child support percentage, which the court determined to be 25% of the plaintiff's income. However, the appropriate basic child support figure for the parties' two children was 25% of the combined parental income, as prorated between the parties in accordance with the statute (see Domestic Relations Law § 240[1-b][b][3][ii]). … [T]here is no indication that the court considered "[t]he financial resources of the custodial and non-custodial parent" or whether "the gross income of one parent is substantially less than the other parent's gross income" … . Park v Park, 2021 NY Slip Op 02536, Second Dept 4-28-21

DIVORCE, MAINTENANCE.

THE JUDGE'S MAINTENANCE AWARD MAY NOT HAVE BEEN PROPERLY BASED UPON THE FACTORS ENUMERATED IN DOMESTIC RELATIONS LAW 236; MATTER REMITTED (FOURTH DEPT).

The Fourth Department, vacating the maintenance award and remitting for recalculation, determined Supreme Court did not set forth the factors for the maintenance calculation as required by Domestic Relations Law 236:

Defendant husband appeals from a judgment of divorce that, inter alia, directed him to pay plaintiff wife $750 a week in maintenance for a period of 17 years. On appeal, he contends that Supreme Court erred in awarding maintenance for a period of time in excess of the recommendation set forth in the advisory schedule in Domestic Relations Law § 236 (B) (6) (f) (1) without adequately demonstrating its reliance on the relevant statutory factors enumerated in section 236 (B) (6) (e) (see § 236 [B] [6] [f] [2]). We agree and further conclude that the court erred in awarding plaintiff maintenance without sufficiently setting forth the relevant factors enumerated in section 236 (B) (6) (e) that it relied on in reaching its determination. Although the court need not specifically cite the factors enumerated in that section, its analysis must show that it at least considered the relevant factors in making its determination … . The determination must also "reflect[] an appropriate balancing of [the wife's] needs and [the husband's] ability to pay" … .

… [T]he court stated that it awarded plaintiff $750 per week—an amount deviating from the statutory guidelines—for a duration in excess of the statutory guidelines based on the length of the marriage, the parties' disproportionate earning capacities, and defendant's tax debt. However, although the statutory guidelines use the length of the marriage to calculate the duration of the maintenance award … , the length of the parties' marriage is not a factor enumerated in section 236 (B) (6) (e). Further, the court did not state what factors it considered, in addition to actual earnings, in determining the parties' earning capacities … . Moreover, the court did not determine whether defendant's substantial tax debt would impede his ability to pay plaintiff's maintenance award … . Thus, the court failed to show that it considered any of the factors enumerated in section 236 (B) (6) (e) (1) in making its

determination of both the amount and duration of the maintenance award. Gutierrez v Gutierrez, 2021 NY Slip Op 02662, Fourth Dept 4-30-21

DIVORCE, MARITAL PROPERTY.

THE PARTIES MARRIED IN 1974, STARTED DIVORCE PROCEEDINGS IN 1991, DISCONTINUED THE DIVORCE AND BEGAN LIVING TOGETHER AGAIN IN 1998, CONTINUED LIVING TOGETHER UNTIL THE INSTANT DIVORCE IN 2015; SUPREME COURT ERRED IN FINDING THE ECONOMIC PARTNERSHIP ENDED IN 1991; MATTER REMITTED FOR RECALCULATION OF THE MARITAL PROPERTY AND COUNSEL FEES (SECOND DEPT).

The Second Department, remitting the matter for recalculation of equitable distribution of marital assets and counsel fees, determined Supreme Court erred in finding that the parties ceased to be an economic partnership when they separated and divorce proceedings were commenced in 1991. The parties were married in 1974. The divorce was discontinued in 1998 when defendant moved back into the marital residence. The couple lived together until the instant separation and divorce proceedings in 2015:

… [T]he parties resided together in the marital residence from 1998 until the commencement of the subject action in 2015, and for most of that time, shared the marital residence with the children. During that time, the parties visited relatives and attended social functions together, went on vacations together, and periodically engaged in sexual relations. Although the parties maintained separate bank accounts and credit cards, the parties filed joint tax returns and shared many of the family's expenses, including the children's college tuition and home renovations. Moreover, the parties named each other as executors and beneficiaries in their wills. Thus, the evidence demonstrates that the parties functioned as an "economic partnership" after the discontinuance of the prior divorce action, and the Supreme Court improperly found that the parties "ceased functioning as an economic partnership" and "lived separate financial lives" starting in 1991 … . …

… [T]here was no written agreement to keep the parties' finances separate (cf. Domestic Relations Law § 236[B][1][d][4]). "Marital partners may agree that property they acquire during the marriage will be divided in a particular manner, but that agreement must be in writing" … , or "be part of an oral stipulation placed upon the record in open court and acknowledged in writing to be free from fraud, undue influence and duress" … . Here, the alleged oral agreement between the parties does not constitute such an agreement. Thus, the distribution of marital property "must be based upon the equitable consideration and application of . . . enumerated factors" … , and the court is required to "set forth the factors it considered and the reasons for its decision" … . Potvin v Potvin, 2021 NY Slip Op 02429, Second Dept 4-21-21

DIVORCE, PRENUPTIAL AGREEMENTS.

PLAINTIFF IN THIS DIVORCE ACTION WAS ENTITLED TO A NEW HEARING ON WHETHER THE PRENUPTIAL AGREEMENT SHOULD BE SET ASIDE; THE COURT NOTED THAT A CONTRACT WHICH MAY NOT BE UNCONSCIONABLE WHEN ENTERED MAY BECOME UNCONSCIONABLE WHEN FINAL JUDGMENT IS ENTERED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiff was entitled to a new hearing on whether the prenuptial agreement was unconscionable. In the agreement, each party waived maintenance, equitable distribution and attorney's fees. At the time the agreement was entered plaintiff was making $75 to $80,000 per year. At the time of the divorce plaintiff alleged she had no assets and needed public assistance:

"An agreement between spouses or prospective spouses 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 unfair to one spouse because of overreaching on the part of the other spouse"… . "An agreement that might not have been unconscionable when entered into may become unconscionable at the time a final judgment would be entered" … .

Here, the plaintiff submitted evidence with her motion papers in support of her argument that the prenuptial agreement should be set aside as a matter of public policy since, at the time of her motion, she was unemployed, had become reliant on public assistance for herself and her children, and had no financial resources … . Despite the plaintiff having raised this argument, the Supreme Court failed to address the plaintiff's contention that the enforcement of the agreement would result in the risk of her becoming a public charge … . Mahadeo v Mahadeo, 2021 NY Slip Op 02285, Second Dept 4-14-21

DIVORCE, PRENUPTIAL AGREEMENTS.

THE CHILDREN DO NOT HAVE STANDING TO PARTICIPATE IN LITIGATION REGARDING THEIR PARENTS' PRENUPTIAL AGREEMENT; THEREFORE THE ATTORNEY FOR THE CHILD DID NOT HAVE THE AUTHORITY TO MAKE A MOTION CONCERNING THE PRENUPTIAL AGREEMENT (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the children did not have standing to participate in the litigation of financial matters of their parents' divorce, including the litigation concerning whether the prenuptial agreement should be set aside. Therefore the attorney for the child (AFC) did not have the authority to make a motion regarding the prenuptial agreement:

Although children have certain rights with respect to issues of child support, custody, and visitation in matrimonial actions … , children do not have a right to participate in the litigation of financial matters of their parents' divorce relating to maintenance and/or equitable distribution.

Moreover, while "children's attorneys are expected to participate fully in proceedings in which they are appointed" … , such participation is limited to matters in which the children are the "subject of the proceeding" (Family Court Act § 249; see Judiciary Law § 35[7]). Given that children are not bound by agreements entered into by their parents , they are not the "subject" of proceedings to determine the validity of their parents' prenuptial agreement related to maintenance and equitable

distribution (Family Court Act § 249). Mahadeo v Mahadeo, 2021 NY Slip Op 02286, Second Dept 4-14-21

DIVORCE, RELIGIOUS DIVORCE, RABBINICAL TRIBUNAL.

THE ARBITRATORS' AWARD IN THIS RELIGIOUS DIVORCE PROCEEDING WAS NOT INVALID BECAUSE THE ARBRITRATORS DID NOT STATE THE REASONS FOR THE AWARD, AND THE AWARD WAS NOT INDEFINITE AND NONFINAL; SUPREME COURT SHOULD NOT HAVE VACATED THE AWARD (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the arbitration award should not have been vacated. The award, issued by a rabbinical tribunal in a religious divorce proceeding, required the respondent to arrange for the religious divorce (a Get) and required petitioner to accept the religious divorce. A lump sum award and maintenance of $10,000 per month was to be held in escrow until the Get is accepted. Supreme Court held the award was indefinite or nonfinal and the arbitrators failed to state the reasons for the award:

Contrary to the conclusion of the Supreme Court, the arbitrators were not required to give reasons for their arbitration award … . Further, the arbitration award did not leave the parties unable to determine their rights and obligations, resolved the controversy before the arbitrators, and did not create a new controversy; therefore, the arbitration award was not indefinite or nonfinal for purposes of CPLR 7511 … . The respondent's obligation to pay maintenance continued because he failed to arrange for issuance of a Get and termination of the marriage—not because the terms of the arbitration award were not definite. Matter of Rokeach v Salamon, 2021 NY Slip Op 02393, Second Dept 4-21-21

DIVORCE, SEPARATE PROPERTY.

HUSBAND'S PROCEEDS FROM THE SALE OF STOCK DID NOT LOSE THEIR SEPARATE-PROPERTY CHARACTER WHEN THEY WERE BRIEFLY PLACED IN THE PARTIES' JOINT BANK ACCOUNT BEFORE BEING USED FOR THE DOWNPAYMENT FOR THE MARITAL RESIDENCE (FOURTH DEPT).

The Fourth Department, reversing (modifying) Supreme Court, determined funds from the husband's sale of stock were his separate property, even though the funds were briefly placed in a joint account before using them for the down payment on the marital residence:

… [D]efendant offered uncontroverted testimony, supported by documentary evidence, that he placed funds acquired from the sale of stocks he had purchased prior to the marriage into the parties' joint bank account because it was his only checking account and he could not access the funds directly from the platform from which he sold the stock … . The funds remained in the account for only a matter of weeks before defendant withdrew a majority of them to pay a portion of the down payment for the marital home … . Thus, defendant established that the account was used "only as a conduit" for the sale of his stock … . The funds therefore maintained their character as separate property, and defendant is entitled to a credit for his portion of the down payment … . LaPoint v Claypoole, 2021 NY Slip Op 03947, Fourth Dept 6-17-21

FAMILY OFFENSES, PRIMA FACIE CASE.

IN DETERMINING WHETHER A PRIMA FACIE CASE HAS BEEN MADE OUT IN A FAMILY OFFENSE PROCEEDING, CREDIBILITY IS IRRELEVANT (SECOND DEPT).

The Second Department, reversing Family Court, determined the motion to dismiss the family offense petition for failure to make out a prima facie case should not have been granted, noting that the credibility of the evidence is not a factor to be considered at that stage:

In a family offense proceeding, the petitioner has the burden of establishing that the charged conduct was committed as alleged in the petition by a fair preponderance of the evidence (see Family Ct Act § 832 …). "'In determining a motion to dismiss for failure to establish a prima facie case, the evidence must be accepted as true and given the benefit of every reasonable inference which may be drawn therefrom . . . The question of credibility is irrelevant, and should not be considered'"). Here, the Family Court failed to properly apply this standard. Viewing the petitioner's evidence in the light most favorable to her, and accepting the evidence as true, it established a prima facie case … . Matter of Prince v Ford, 2021 NY Slip Op 03591, Second Dept 6-9-21

IMMIGRATION LAW, SPECIAL IMMIGRANT JUVENILE STATUS.

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

The Second Department, reversing Family Court, determined the court should have made findings which would allow the subject child to apply for special immigrant juvenile states (SIJS);

The Family Court erred in failing to make the specific finding that reunification with the father is not viable due to abandonment. Based upon our independent factual review, the record supports the requisite finding that reunification with the child's father is not viable due to parental abandonment … . The record demonstrates that even though the child's father knew where he lived, the father never visited him. The child has never met his father, his father has never supported him and has never sent gifts or cards, and his father's whereabouts are unknown.

Moreover, the record supports a finding that it would not be in the best interests of the child to be returned to Nicaragua, his previous country of nationality and last habitual residence, as there is no one to care for him or protect him in that country … . The record reflects that it would not be in the child's best interests to return to Nicaragua as he would be separated from his mother who has consistently cared for and supported him. In Nicaragua, there is no one who can care for him or support

him; as previously set forth, his father has abandoned him. The child's maternal grandparents, with whom he lived after his mother left Nicaragua, are elderly and began to struggle to care for him and protect him. Moreover, the child faces harm from gang violence in Nicaragua, having been threatened by gang members and been kidnapped by them once for approximately eight days. Matter of Rosa M. M.-G. v Dimas A., 2021 NY Slip Op 03033, Second Dept 5-12-21

IMMIGRATION LAW, SPECIAL JUVENILE IMMIGRANT STATUS.

FAMILY COURT SHOULD HAVE APPOINTED PETITIONER GUARDIAN OF THE CHILD AND SHOULD HAVE MADE THE FINDINGS NECESSARY TO ALLOW THE CHILD TO PETITION FOR SPECIAL IMMIGRANT JUVENILE STATUS (SECOND DEPT).

The Second Department, reversing Family Court, determined petitioner should have been appointed guardian of the child and Family Court should have made the findings necessary for the child to petition for Special Immigrant Juvenile Status (SIJS):

Upon our independent factual review of the record, we find that the subject child's best interests would be served by the appointment of the petitioner as his guardian … . …

… [T]he subject child is under the age of 21 and unmarried, and since we have appointed the petitioner as the subject child's guardian, the subject 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 reflects that it would not be in the subject child's best interests to be returned to El Salvador, his previous country of nationality or country of last habitual residence … . Matter of Jose E. S. G., 2021 NY Slip Op 02294, Second Dept 4-14-21

NEGLECT.

MOTHER'S REFUSING TO SIGN MEDICAL CONSENT FORMS FOR PSYCHIATRIC TREATMENT OF HER CHILD DID NOT CONSTITUTE NEGLECT (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the Administration for Children's Services (ACS) did not demonstrate mother had neglected the child by refusing to sign medical consent forms which resulted in the child being discharged from the psychiatric care at the Richmond University Medical Center (RUMC):

ACS failed to establish by a preponderance of the evidence that the mother neglected the child. ACS did not establish that the mother's failure to sign the admissions paperwork for the child's stay at RUMC, or her failure to consent to the child being given a drug known as Risperdal, impaired, or caused imminent risk of impairment of, the child's physical, mental, or emotional condition. Contrary to the allegation in the petition, the child's medical records showed that she was discharged from RUMC because her condition had stabilized and she did not appear to be a threat to herself or others. Moreover, the mother agreed with the recommendation that the child receive follow-up outpatient care, and at the time that the child was discharged, the mother had two such appointments scheduled. As to the mother's failure to consent to the child being given Risperdal, the medical records showed that, despite not being given this medication, the child's condition stabilized during her hospitalization such that she was able to be released safely for outpatient treatment. ACS presented no evidence that outpatient treatment without the use of Risperdal was not "an acceptable course of treatment in light of all of the surrounding circumstances" … . Matter of Nabil H. A. (Vinda F.), 2021 NY Slip Op 04129, Second Dept 6-30-21

NEGLECT.

THE EVIDENCE THAT THE PATERNAL UNCLE STRUCK THE CHILD ON THE ARM AFTER SHE MADE FUN OF AN ADULT IN THE HOUSEHOLD WAS NOT SUFFICIENT TO SUPPORT THE NEGLECT AND DERIVATIVE NEGLECT FINDINGS (SECOND DEPT).

The Second Department, reversing Family Court, determined the evidence the child's paternal uncle struck the child on the arm after the child had made fun of another adult in the household did not support a neglect and derivative neglect finding. (The paternal uncle denied striking the child):

While those legally responsible for the care of children "have a right to use reasonable physical force against a child in order to maintain discipline or to promote the child's welfare" … , the use of excessive corporal punishment constitutes neglect … . The petitioner has the burden of proving neglect by a preponderance of the evidence … . Although a single incident of excessive corporal punishment may suffice to support a finding of neglect in a given case, there are instances where the record will not support such a finding, even where the use of physical force was inappropriate … . Under the circumstances presented here, we agree with the paternal uncle and the attorneys for the respective children that the Family Court erroneously found that ACS [Administration for Children's Services] established by a preponderance of the evidence that the paternal uncle neglected Myiasha by inflicting excessive corporal punishment upon her. ACS failed to establish that the paternal uncle's action in inappropriately striking the child rose to the level of neglect, or that he intended to hurt Myiasha, or exhibited a pattern of excessive corporal punishment … . Moreover, there was insufficient evidence that Myiasha suffered the requisite impairment of her physical, mental, or emotional well-being to support a finding of neglect … . Matter of Myiasha K. D. (Marcus R.), 2021 NY Slip Op 02290, Second Dept 4-14-21

ORDERS OF PROTECTION, FIRST AMENDMENT.

THE HARASSMENT-RELATED SPEECH PROHIBITIONS IN THE ORDER OF PROTECTION DID NOT VIOLATE THE FIRST AMENDMENT BUT THE PROVISION PROHIBITING RESPONDENT FROM DISCSUSSING THE PETITIONER OR THE FAMILY OFFENSE PROCEEDING WAS STRUCK FROM THE ORDER OF PROTECTION AS UNNECESSARY (FIRST DEPT).

The First Department affirmed the finding respondent committed the family offense of harassment by sending email about petitioner's personal matters to 53 people. Although the harassment prohibitions in the order of protection did not violate the Firs Amendment, the provision in the order of protection which prohibited respondent from discussing the petitioner or the proceedings was struck as unnecessary:

Respondent contends that the provision of the order prohibiting him from discussing petitioner or the case with anyone familiar with petitioner violated his First Amendment right to freedom of speech. To be sure, respondent's repeatedly sending petitioner emails articulating his unwanted opinions about her, her mother and their family dynamic or making petitioner aware of the emails he sent to several third parties broadcasting those opinions by blind-copying her on those messages is not protected by the First Amendment, because those repeated and unwanted communications serve no legitimate purpose … . However, because the harassment is adequately addressed by the provision that respondent stay away from petitioner and not contact her, we delete the prohibition against his discussing petitioner or the proceeding … . Matter of Sophia M. v James M., 2021 NY Slip Op 03992, First Dept 6-22-21

ORDERS OF PROTECTION, MANDAMUS.

PETITIONER WAS ENTITLED TO A HEARING ON A TEMPORARY ORDER OF PROTECTION (TOP) WHICH BARRED HER FROM HER OWN APARTMENT WHERE HER CHILDREN LIVED; THE APPEAL WAS HEARD AS AN EXCEPTION TO THE MOOTNESS DOCTRINE (FIRST DEPT).

The First Department, in a full-fledged opinion by Justice Webber, reversing Criminal Court, determined the mandamus action against a Criminal Court judge seeking a hearing on a temporary order of protection (TOP) should have been granted. The First Department found that the matter qualified as an exception to the mootness doctrine and heard the appeal despite the dismissal of the underlying criminal action. Petitioner was charged with assaulting a man with whom she lived in her apartment. The TOP barred her from her own apartment where her children resided:

We find that the Criminal Court's initial failure to hold an evidentiary hearing in accordance with petitioner's due process rights after being informed that petitioner might suffer the deprivation of a significant liberty or property interest upon issuance of the TOP falls within the exception to the mootness doctrine: "(1)[there is] a likelihood of repetition, either between the parties or among other members of the public; (2) [it involves] a phenomenon typically evading review; and (3) [there is] a showing of significant or important questions not previously passed on, i.e., substantial and novel issues" … . Matter of Crawford v Ally, 2021 NY Slip Op 04082, First Dept 6-24-21

PATERNITY, GENETIC MARKER TEST.

THE EVIDENCE DID NOT DEMONSTRATE THE DEVELOPMENT OF A PARENT-CHILD RELATIONSHIP BETWEEN RAYMOND F AND THE CHILD; THEREFORE RAYMOND F'S REQUEST FOR A GENETIC MARKER TEST SHOULD NOT HAVE BEEN DENIED (THIRD DEPT).

The Third Department, reversing Family Court, determined Raymond F's request for a genetic marker test should not have been denied. The evidence did not demonstrate a parent-child relationship such that Raymond F should be equitably estopped from denying paternity:

The application of the doctrine of equitable estoppel does not involve the equities between adult participants to the paternity proceedings … . "Rather, in the context of a paternity proceeding, it is the child's justifiable reliance on a representation of paternity that is considered and, therefore, the doctrine of equitable estoppel will be applied only where its use furthers the best interests of the subject child" … . …

The trial testimony established that the mother and Trini G., the mother's boyfriend with whom she and her children lived for nine years (from the time the child was two to three months old), "co-parented" all of the children by contributing financially to their care and feeding, bathing and playing with them. Trini G. referred to the child as "stepson" and the child called him "daddy." The record established that Reymond F. had no contact with the child since birth, except during sporadic visits between Reymond F. and his two older children. Reymond F. testified that he did not do "anything" with the child during these visits, was not called "dad" and did not call the child "son." He further testified that he never called the child on the phone, never gave him gifts and never checked on his educational or medical issues. The mother testified that, while she did not encourage the child to have a relationship with Reymond F., the child knew that Reymond F. was his biological father. Matter of Montgomery County Dept. of Social Servs. v Trini G., 2021 NY Slip Op 03489, Third Dept 6-3-21

PLACEMENT AGENCY, LIABILITY FOR CHILD'S INJURY?

INFANT PLAINTIFF, H.M., WAS INJURED BY HOT WATER IN THE SHOWER; THE PROPERTY OWNER WHO REPLACED THE WATER HEATER MAY BE LIABLE; THE FOSTER-CARE SERVICE WHICH PLACED H.M. IN THE HOME, HOWEVER, COULD NOT HAVE FORESEEN THE INCIDENT (FIRST DEPT).

The First Department, reversing (modifying) Supreme Court, determined there was a question of fact whether the property owner could be liable for injury to a child, H.M. caused by hot water in the shower. The defendant placement service (Leake) had placed H,M. in the foster care of defendant Butler who lived in a home owned by Alicea. Butler had turned on the shower and was picking up H.M.'s clothes when H.M. climbed into the tub. There was a question of fact whether the property owner, Alicea, was liable because of conflicting expert evidence about the danger posed by the temperature of the water. However, the incident was not foreseeable from the perspective of the placement agency (Leake). Therefore, Leake's motion for summary judgment should have been granted:

… [T]here is an issue of fact as to whether [Alicea] created the dangerous hot water temperature when he replaced the home's hot water heater prior to the accident. …

Leake demonstrated prima facie entitlement to summary judgment dismissing the negligent supervision claim against it because it established that it did not have "sufficiently specific knowledge or notice of the dangerous conduct which caused injury," and "[t]he scalding hot bath water was an intervening act or event that is divorced from and not the foreseeable risk associated with. . .defendant's alleged negligence" … . The excessively hot water was not the foreseeable risk associated with Leake's alleged negligence in placing more than five children in the home, and the momentary inattention of Butler was not an act that should have been foreseeable by Leake in the exercise of reasonable care … . H.M. v City of New York, 2021 NY Slip Op 03376, First Dept 5-27-21

TERMINATION OF PARENTAL RIGHTS, DEFAULT ORDER, ATTORNEYS.

FATHER'S MOTION TO VACATE THE DEFAULT ORDER TERMINATING HIS PARENTAL RIGHTS SHOULD HAVE BEEN GRANTED; FATHER ATTEMPTED TO ATTEND THE HEARING, BUT WAS LATE; FATHER WAS ENTITLED TO COUNSEL BUT NONE HAD BEEN ASSIGNED; AND THERE WAS EVIDENCE HE DID NOT ABANDON THE CHILD (SECOND DEPT).

The Second Department, reversing Family Court, determined father's motion to vacate the default order terminating his parental rights should have been granted. Father had appeared on the day of the hearing but it had concluded. In addition father was entitled to counsel and there was evidence father had not abandoned the child:

A parent seeking to vacate an order entered upon their default in a termination of parental rights proceeding must establish a reasonable excuse for the default and a potentially meritorious defense to the relief sought in the petition (see CPLR 5015[a][1] …).

Here, the father presented a reasonable excuse for his failure to timely appear at the May 28, 2019 fact-finding hearing. The father did in fact appear in court on the hearing date, but the proceedings had already concluded. This was the father's first appearance in the proceeding, and there is no indication that the father was notified by the Family Court or counsel of the hearing … . Indeed, the father was unrepresented by counsel at that time, and claims that he was not offered assigned counsel on May 28, 2019. The father had a right to the assistance of counsel in this proceeding, in which he faced a potential termination of his parental rights … . Parental rights may not be curtailed without a meaningful opportunity to be heard, which includes the assistance of counsel … .

… Social Services Law § 384-b(5)(a) provides that "a child is 'abandoned' by his parent if such parent evinces an intent to forego his or her parental rights and obligations as manifested by his or her failure to visit the child and communicate with the child or agency, although able to do so and not prevented or discouraged

from doing so by the agency." Abandonment must be proven by clear and convincing evidence … . Termination of parental rights is authorized by Social Services Law § 384-b(4)(b) when the parent abandoned the child for a period of six months immediately prior to the date of the filing of the petition. Here, the father's allegations regarding his attempts to contact the agency and visit with the child potentially extend into the relevant six-month period prior to the October 2018 petition. Matter of Jonathan N., Jr. (Jonathan N., Sr.), 2021 NY Slip Op 03034, Second Dept 5-12-21

TERMINATION OF PARENTAL RIGHTS, SUSPENDED JUDGMENT.

RATHER THAN TERMINATING MOTHER'S PARENTAL RIGHTS, FAMILY COURT SHOULD HAVE SUSPENDED JUDGMENT TO GIVE MOTHER A CHANCE TO PREPARE FOR REUNIFICATION WITH HER CHILD (SECOND DEPT).

The Second Department, reversing Family Court, determined the termination of mother's parental rights was not demonstrated to be in the child's best interests. Judgment should have been suspended so mother could prepare for reunification with the child:

At the dispositional stage of a proceeding to terminate parental rights, the Family Court must make its determination based solely on the best interests of the child (see Family Ct Act § 631). Depending on the best interests of the child, the court has to either dismiss the petition, suspend judgment for up to one year, or terminate parental rights (see Family Ct Act §§ 631, 633[b]; Social Services Law § 384-b[8][f]). A dispositional order suspending judgment provides a brief grace period to give a parent found to have permanently neglected a child a second chance to prepare for reunification with the child (see Family Ct Act § 633 …). …

… [I]t is undisputed that the mother engaged in regular phone conversations with the child at least once a week; that, since March 2019, following a difficult pregnancy with her younger child which impeded her ability to travel from her apartment in upper Manhattan to the agency in Jamaica, Queens, where visitation occurred, she had been regularly visiting the child; that the child continued to refer

to the mother as her mother and her foster parent as her auntie; and that there is a strong bond between the mother and the child and between the child and the mother's younger child, who resided with the mother. In addition, the mother had completed a drug treatment program and was drug free, attended a parenting class with intentions to attend additional classes, underwent a mental health evaluation, and was receiving therapy and preventive services. Further, following the child's placement in foster care, the mother, who, at the time that she gave birth to the child, was 20 years old and living in a group home, having entered foster care herself at the age of 17, obtained an associate's degree and secured an apartment. Moreover, in a related derivative neglect proceeding filed with respect to the mother's younger child, the mother was granted a suspended judgment which expired in July 2020. Matter of Grace G. (Gloria G.), 2021 NY Slip Op 02795, Second Dept 5-5-21

VISITATION, COSTS OF SUPERVISED VISITATION.

FAMILY COURT SHOULD NOT HAVE ORDERED THE PARTIES TO EQUALLY SHARE THE COSTS OF FATHER'S SUPERVISED VISITATION WITHOUT EVALUATING THE PARTIES' FINANCES (SECOND DEPT).

The Second Department determined Family Court properly found father had committed the family offense of harassment and properly ordered therapeutic supervised parental access for father. However, Family Court should not have order the parties to equally share the expense of supervised parental access without evaluating the parties' ability to pay:

The Family Court should not have directed the parties to equally share the costs of the father's supervised parental access, without evaluating the parties' "economic realities," including the father's ability to pay and the actual cost of each visit … . Accordingly, we remit the matter to the Family Court, Orange Country, for a hearing to resolve those issues, and a determination thereafter regarding the parties' respective shares of the costs for the father's supervised therapeutic parental access. Matter of Livesey v Gulick, 2021 NY Slip Op 03321, Second Dept 5-26-21