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ABUSE, NEGLECT, SUMMARY JUDGMENT.

FATHER ACKNOWLEDGED IMPREGNATING THE OLDEST CHILD; SUMMARY JUDGMENT ON THE ABUSE AND NEGLECT ALLEGATIONS AGAINST FATHER WAS PROPER; HOWEVER THERE WERE QUESTIONS OF FACT ABOUT WHEN MOTHER LEARNED OF THE PREGNANCY AND WHETHER SHE KNEW WHO THE FATHER WAS; SUMMARY JUDGMENT ON THE ABUSE AND NEGLECT ALLEGATIONS AGAINST MOTHER SHOULD NOT HAVE BEEN GRANTED (THIRD DEPT).

The Third Department, reversing (modifying) Family Court, determined summary judgment on the abuse and neglect allegations against father was properly granted, but summary judgment on the abuse and neglect allegations against mother should not have been granted. Father acknowledged he impregnated the oldest child (who was eleven at the time of the birth). But there were questions of fact about whether mother knew who the father was and whether she know the child was pregnant and therefore in need of medical care:

Although it is a drastic procedural device rarely used in Family Court proceedings, Family Court may grant summary judgment in an abuse and neglect proceeding if no triable issue of fact exists … . On a motion for summary judgment, the moving party bears the burden of establishing its prima facie entitlement to judgment as a matter of law … . If this burden is met, the burden shifts to the party opposing the motion to demonstrate the existence of a material issue of fact … . In resolving a motion for summary judgment, the evidence must be viewed in the light most favorable to the nonmoving party … .

* * * Viewing the evidence in the light most favorable to the mother and according her the benefit of every favorable inference, we cannot conclude as a matter of law that the mother knew or should have known of the father's sexual abuse and impregnation of the oldest child or that the mother fostered or allowed the children to live in a sexually charged household.

* * * Although the mother provided some testimony as to when she learned of the pregnancy,[FN9] her testimony changed during the course of the lengthy hearing and a determination as to which, if any, of her accounts was credible is inappropriate

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ABUSE, NEGLECT.

THE 2ND DEPARTMENT, MAKING ITS OWN CREDIBILITY ASSESSMENTS, DETERMINED THE EVIDENCE SUFFICIENTLY DEMONSTRATED ABUSE; A FINDING OF NEGLECT BASED UPON EXCESSIVE CORPORAL PUNISHMENT WAS NOT SUPPORTED (SECOND DEPT).

The Second Department, reversing Family Court, making its own credibility assessments, determined there was sufficient evidence Amir abused Shyla. In addition, the Second Department determined the evidence did not demonstrate that mother neglected Amir by inflicting excessive corporal punishment:

Shyla described in detail at the fact-finding hearing the incidents of abuse by Bryan, which testimony sufficiently corroborated her out-of-court descriptions of the abuse … . Inconsistencies in Shyla's testimony as to peripheral details, such as timing and the presence of other individuals in the home at the time of the abuse, did not detract from Shyla's consistent and credible description of the core conduct constituting the abuse, particularly considering the child's age at the time of these events … . Further, Shyla's previous, out-of-court recantation of her allegations was sufficiently explained by the indirect threats she received from her own family members … . …

While the use of excessive corporal punishment constitutes neglect, "[p]arents have a right to use reasonable physical force against a child in order to maintain discipline or to promote the child's welfare" … . Here, ACS [Administration for Children's Services] offered evidence of a single instance in which the mother hit Amir's arm with a belt to discipline him after he was caught shoplifting, and failed to sufficiently demonstrate that marks observed on Amir were the result of being hit with the belt by the mother. Under the circumstances, ACS failed to establish that the mother's conduct rose to the level of neglect or that she exhibited a pattern of inflicting excessive corporal punishment on Amir … . Matter of Tarahji N. (Bryan N.–Divequa C.), 2021 NY Slip Op 05125, Second Dept 9-29-21

ANNULMENT, FRAUD.

HUSBAND DID NOT DEMONSTRATE HIS WIFE FRAUDULENTLY INDUCED HIM TO MARRY HER TO OBTAIN UNITED STATES CITIZENSHIP; THE MARRIAGE SHOULD NOT HAVE BEEN ANNULLED (THIRD DEPT).

The Third Department, reversing Supreme Court, determined the husband did not demonstrate he was fraudulently induced to marry his wife. Husband argued his wife, who was from the Philippines, induced him to marry her in order to become a United States citizen. Supreme Court annulled the marriage. The Third Department held the husband did not meet his burden of proof:

Where the consent of either spouse to a marriage was obtained by fraud, the marriage is voidable by way of an annulment action (see Domestic Relations Law §§ 7 [4]; 140 [e] …). To obtain an annulment, the plaintiff spouse must prove that the defendant spouse knowingly made a material false representation to the plaintiff spouse with the intent of inducing the plaintiff spouse's consent to marriage, that the misrepresentation was of such a nature as to deceive an ordinarily prudent person, that the plaintiff spouse justifiably relied on the misrepresentation in consenting to marriage and that, once aware of the false representation, cohabitation ceased … . …

The husband's case of fraud in the inducement was premised upon his claim that the wife induced him to marry through false representations of love and affection for the sole purpose of obtaining an immigration benefit. The husband, however, failed to prove that claim at trial, as his proof fell far short of demonstrating a fraudulent premarital intent on the part of the wife. The husband's proof primarily consisted of testimony establishing premarital and marital discord between the parties. Although the husband sought to attribute that discord to a fraudulent premarital intent, he ultimately failed to demonstrate "that the marital break was due to any cause other than the general discontent and incompatibility of the parties" … . Indeed, the husband's own proof demonstrated that, during their marital spats, the wife indicated her desire to leave the marriage and return to her family and friends in the Philippines. The fact that she remained in the United States after the parties ceased cohabitating is insufficient to demonstrate that, prior to the marriage, the wife had

the intent to induce the husband to marry with the sole objective of obtaining an immigration benefit. In determining otherwise, Supreme Court erred by not holding the husband to his burden of proof, relying too heavily upon the wife's belated filing of a family offense petition in another county and taking a negative inference against the wife for purportedly exploring relief under the Violence Against Women Act. Travis A. v Vilma B., 2021 NY Slip Op 04996, Third Dept 9-16-21

APPEALS, ATTORNEYS, DIVORCE.

A FRIVOLOUS APPEAL IN THIS DIVORCE PROCEEDING WARRANTED SANCTIONS AGAINST APPELLANT'S ATTORNEY (FOURTH DEPT).

The Fourth Department, determined sanctions against plaintiff's attorney for bringing a frivolous appeal were in order in this divorce proceeding:

… [W]e consider defendant's request for costs, attorney's fees, and sanctions pursuant to 22 NYCRR 130-1.1. We grant defendant's request in part and award costs in the form of reimbursement by plaintiff's attorney, Angelo T. Calleri, for actual expenses reasonably incurred and reasonable attorney's fees resulting from the frivolous conduct of Calleri in prosecuting this appeal … and we remit the matter to Supreme Court to determine such amount … . "[C]onduct is frivolous if: (1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law; (2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or (3) it asserts material factual statements that are false" … . We conclude that Calleri's appellate brief is replete with arguments that qualify as frivolous under the first paragraph of subdivision (c). Indeed, plaintiff's frivolous request that we impose sanctions against defendant by itself qualifies as frivolous conduct … . Marshall v Marshall, 2021 NY Slip Op 05194, Fourth Dept 10-1-21

ATTORNEYS, RIGHT TO COUNSEL, DIVORCE.

SUPREME COURT SHOULD HAVE CONDUCTED AN INQUIRY TO ENSURE DEFENDANT INTELLIGENTLY WAIVED HIS RIGHT TO COUNSEL AFTER HIS ATTORNEY WAS PERMITTED TO WITHDRAW; NEW TRIAL ORDERED (SECOND DEPT).

The Second Department, reversing Supreme Court in this divorce action, determined the court did not make sure defendant intelligently waived his right to counsel after his attorney was permitted to withdraw:

A divorce litigant has a statutory right to counsel for the custody portion of the litigation (see Family Ct Act § 262[a][iii], [v]; Judiciary Law § 35[8]). Here, the defendant's attorney was permitted to withdraw during the trial, and the defendant proceeded pro se. However, the Supreme Court did not determine whether the defendant was unequivocally, voluntarily, and intelligently waiving his right to counsel … and failed to inquire whether the defendant understood the risks and disadvantages of appearing pro se. … [W]e … remit the matter … for a new trial … . At that time, the court should conduct a more detailed inquiry to determine whether the defendant is eligible for assigned counsel. Brandel v Brandel, 2021 NY Slip Op 05116, Second Dept 9-29-21

ATTORNEYS, RIGHT TO COUNSEL, TERMINATION OF PARENTAL RIGHTS.

MOTHER'S ATTORNEY SHOULD NOT HAVE BEEN ALLOWED TO WITHDRAW WITHOUT NOTICE TO MOTHER WHO DID NOT ATTEND THE TERMINATION-OF-PARENTAL-RIGHTS HEARING; THE DEFAULT ORDER TERMINATING MOTHER'S PARENTAL RIGHTS WAS THEREFORE IMPROPER AND APPEAL IS NOT PRECLUDED (FOURTH DEPT).

The Fourth Department, reversing Family Court, determined the default order terminating mother's parental rights was improper because mother's attorney was

allowed to withdraw without notice to mother. Because the default order was improper, mother's appeal is not precluded (default orders are not appealable):

In this proceeding pursuant to Social Services Law § 384-b,respondent mother contends that Family Court erred in allowing the mother's attorney to withdraw as counsel and in proceeding with the hearing in the mother's absence. We agree. " 'An attorney may withdraw as counsel of record only upon a showing of good and sufficient cause and upon reasonable notice to the client . . . [, and a] purported withdrawal without proof that reasonable notice was given is ineffective' " … . Because there is no indication in the record that the mother's attorney informed her that he was seeking to withdraw as counsel, the court should not have relieved him as counsel … . Although, generally, no appeal lies from an order entered on default (see CPLR 5511 …), here, the absence of evidence that the mother was put on notice of her attorney's motion to withdraw renders the finding of default improper, and thus the mother's appeal is not precluded … . We therefore reverse the order and remit the matter to Family Court for the assignment of new counsel and a new hearing … . Matter of Calvin L.W. (Dominique H.), 2021 NY Slip Op 04470, Fourth Dept 7-15-21

CHILD SUPPORT, CSSA, STIPULATION OF SETTLEMENT.

THE APPLICABILITY OF THE CHILD SUPPORT STANDARDS ACT (CSSA) WAS NOT ADEQUATELY WAIVED IN THE STIPULATION OF SETTLEMENT; THE CHILD SUPPORT PROVISIONS OF THE STIPULATION SHOULD HAVE BEEN VACATED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the child support provisions of the stipulation of settlement should have been vacated because the applicability of Child Support Standards Act (CSSA) was not waived:

Parties to a separation agreement are free to "opt out" of the provisions of the Child Support Standards Act (Domestic Relations Law § 240[1-b] [hereinafter the CSSA]) "so long as their decision is made knowingly"… . To ensure that waivers of the statutory provisions of the CSSA are truly knowingly made, Domestic Relations Law § 240(1-b)(h) requires that stipulations of settlement include provisions: "(1) stating that the parties have been advised of the provisions of the CSSA; (2) stating

that the basic child support provisions of the CSSA would presumptively result in the determination of the correct amount of child support to be awarded; (3) stating what the amount of basic child support would have been if calculated pursuant to the CSSA, if the parties' stipulation or agreement deviates from the basic child support obligation; and (4) setting forth the parties' reason or reasons for deviating from the CSSA calculation, if they have chosen to deviate" … . "The policy reasons underlying the requirement that waivers must be knowingly made are so strong that agreements that do not comply with the strictures of the CSSA are invalid and unenforceable, at least to the extent of the child support provisions set forth therein" … .

Here, the child support provisions in the parties' stipulation of settlement did not include any of the foregoing recitals, including a calculation of basic child support pursuant to the CSSA. Haik v Haik, 2021 NY Slip Op 04599, Second Dept 8-4-21

CHILD SUPPORT, CSSA.

PETITIONER'S OBJECTION TO THE SUPPORT MAGISTRATE'S ORDER SHOULD NOT HAVE BEEN DENIED; THE CSSA APPLIES EVEN WHEN THE CHILD RECEIVES PUBLIC ASSISTANCE; DOWNWARD DEVIATION FROM THE PRESUMPTIVE SUPPORT LEVEL IMPROPERLY APPLIED THE PROPORTIONAL OFFSET METHOD (FOURTH DEPT).

The Fourth Department, reversing Family Court, determined petitioner's objections to the Support Magistrate's order should not have been denied:

It is well settled that "the CSSA [Child Support Standards Act] must be applied to all child support orders, regardless of a child's receipt of public assistance" … . Here, the Support Magistrate purported to reduce the father's obligation pursuant to Family Court Act § 413 (1) (f) (10) because the father made additional expenditures to maintain his house to permit the child to stay there during the time that he stayed with the father. Such a reduction for extended visitation is permitted by section 413 (1) (f) (9), however, and that subdivision of the statute applies only where "the child is not on public assistance" … . Furthermore, we have previously stated that a determination to grant a downward deviation from the presumptive support

obligation on the ground that the noncustodial parent incurred expenses while the child was in his or her care " 'was merely another way of [improperly] applying the proportional offset method' " … , and the proportional offset method of calculating child support has been explicitly rejected by the Court of Appeals … . Matter of Livingston County Dept. of Social Servs. v Hyde, 2021 NY Slip Op 04316, Fourth Dept 7-9-21

CHILD SUPPORT, CSSA.

THE PARENTS' INCOME WAS NOT PROPERLY CALCULATED FOR CHILD-SUPPORT PURPOSES (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the parents' income was not properly calculated for child-support purposes:

The Child Support Standards Act (hereinafter CSSA) "sets forth a formula for calculating child support by applying a designated statutory percentage, based upon the number of children to be supported, to combined parental income up to the statutory cap that is in effect at the time of the judgment … . …

A calculation of "the basic child support obligation for the children, . . . 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" … . "[A] court has broad discretion to impute income when determining the amount of child support, and is not bound by the parties' representations of their finances"… . The court may impute income to a party "based on the [party's] employment history, future earning capacity, educational background" … , "resources available to the party, including 'money, goods, or services provided by relatives and friends'" … , or "when it is shown that the marital lifestyle was such that, under the circumstances, there [is] a basis for the court to conclude that the [party's] actual income and financial resources were greater than what he or she reported on his or her tax return[ ]" … .

Here, the Supreme Court improperly determined the parties' income by averaging their reported earnings over the preceding four years … . Furthermore, under the circumstances of this case, where the plaintiff is employed by his family and his tax

returns show substantial downward fluctuations in income, the court should have conducted an analysis as to whether to impute income to the plaintiff. Koutsouras v Mitsos-Koutsouras, 2021 NY Slip Op 05328, Second Dept 10-7-21

CUSTODY, PSYCHOLOGICAL EVALUATIONS.

FAMILY COURT'S FAILURE TO CONSIDER THE PSYCHOLOGICAL EVALUATIONS OF THE PARENTS BEFORE AWARDING SOLE CUSTODY TO FATHER REQUIRED REMITTAL (FOURTH DEPT).

The Fourth Department, reversing Family Court, determined the psychological evaluations should have been made before awarding sole custody of the child to father:

The mother's mental and emotional health was the central issue contested in this proceeding, and we conclude that the court abused its discretion in making its determination and awarding the father sole custody of the child without first considering the results of the psychological evaluations that it ordered … . Although a psychological expert testified at the fact-finding hearing on behalf of the father, that expert interviewed the parties and the subject child to assess whether the child had been sexually abused, and therefore he did not provide much information on the mother's emotional functioning, the impact her mental health issues had on [*2]her ability to parent the child, or the fitness of either parent. Thus, on this record, we cannot say that there was sufficient evidence for the court to resolve the custody dispute without considering the court-ordered psychological examinations of the parents … . Matter of Pontillo v Johnson-Kosiorek, 2021 NY Slip Op 04455, Fourth Dept 7-16-21

DEBTOR-CRDITOR, DIVORCE, STIPULATION OF DIVORCE, MARITAL PROPERTY.

THE STIPULATION OF DIVORCE DIVESTED THE HUSBAND OF HIS RIGHTS IN THE MARITAL PROPERTY; THEREFORE THE HUSBAND'S JUDGMENT CREDITOR COULD NOT REACH THE PROPERTY EVEN THOUGH THE HUSBAND'S NAME REMAINED ON THE DEED (FIRST DEPT).

The First Department, reversing Supreme Court, determined the stipulation of divorce awarding the marital property to the wife, Tiozzo, controlled such that the property could not be reached by the husband's, Dangin's, judgment creditor, Lenz. Lenz unsuccessfully argued the property was fair game because Dangin's name remained on the deed:

The stipulation of divorce thus divested Dangin of his rights in the subject property. Under CPLR article 52 a judgment creditor may only seek to enforce its money judgment against a judgment debtor's property. "Property" under CPLR 5201(b), whether realty or personalty, is defined broadly as an interest that is present or future, vested or contingent … . However, the determining factor as to whether a judgment debtor's interest can constitute property vulnerable to a judgment creditor is whether it "could be assigned or transferred" (CPLR 5201[b]). In the stipulation of divorce Dangin gave up any right to assign or transfer to a third party an interest in the subject property. The subject property is therefore beyon.d the reach of Lenz … . Tiozzo v Dangin, 2021 NY Slip Op 04739, First Dept 8-19-21

DIVORCE, MAINTENANCE, BUSINESS VALUATION.

IN THIS DIVORCE ACTION SUPREME COURT ABUSED ITS DISCRETION IN IMPUTING TOO MUCH INCOME TO AND AWARDING TOO LITTLE MAINTENANCE TO PLAINTIFF WIFE; IN ADDITION DEFENDANT SHOULD NOT HAVE BEEN AWARDED 50% OF THE VALUE OF PLAINTIFF'S BUSINESS AND THE COURT SHOULD NOT HAVE ORDERED A POSTTRIAL VALUATION OF THE BUSINESS (SECOND DEPT).

The Second Department, reversing Supreme Court in this divorce action, determined the imputation of income to plaintiff, the amount of maintenance awarded to plaintiff were not supported by the evidence. In addition the award of 50% of plaintiff's business to defendant and the ordering of a posttrial valuation of the business were deemed improper:

… [T]he Supreme Court improvidently exercised its discretion by imputing an annual income of $80,000 to the plaintiff when calculating her maintenance award. During this 28-year marriage, notwithstanding her college degree and various certifications, the plaintiff, who was 55 years old at the time of trial, had been a stay at home mother and homemaker for almost 10 years and had never earned more than $19 per hour from employment upon returning to work outside the home, while the defendant was the primary wage earner for the family and earned a substantial income. Moreover, the plaintiff's business was not a financial success. …

"In cases such as this one, commenced prior to January 23, 2016 …, factors to be considered are, among others, the standard of living of the parties, the income and property of the parties, the distribution of property, the duration of the marriage, the health of the parties, the present and future earning capacity of the parties, the ability of the party seeking maintenance to become self-supporting, the reduced or lost earning capacity of the party seeking maintenance, and the presence of children of the marriage in the respective homes of the parties" … . Weiss v Nelson, 2021 NY Slip Op 04573, Second Dept 7-28-21

DOMESTIC RELATIONS ORDERS (DRO'S), AMENDMENT OF.

THE DOCTRINE OF LACHES DID NOT APPLY TO DEFENDANT'S MOTION TO AMEND THE DRO TO SPECIFY PLAINTIFF WAS NOT ENTITLED TO A SHARE OF DEFENDANT'S DISABILITY RETIREMENT BENEFITS; THE TWO-JUSTICE DISSENT WOULD HAVE APPLIED THE LACHES DOCTRINE (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, over a two-justice dissent, determined the doctrine of laches did not apply and defendant could recoup a lump sum disability retirement payment made to plaintiff. Plaintiff and defendant were divorced and a stipulation provided plaintiff would receive her marital share of defendant's retirement benefits under the New York State and Local Retirement System (NYSLRS). A Domestic Relations Order (DRO) was filed in 2010. In 2011 the NYSLRS approved the DRO with respect to ordinary retirement but was silent on disability retirement. In 2019 the NYSLRS approved defendant's 2016 disability retirement application and a retroactive lump sum payment was made to defendant and plaintiff. In 2019 defendant moved to amend the DRO to specify plaintiff was not entitled to the disability retirement benefits. Supreme Court denied the motion applying the doctrine of laches. The dissent apparently agreed the laches doctrine was properly applied:

"Laches is defined as such neglect or omission to assert a right as, taken in conjunction with the lapse of time, more or less great, and other circumstances causing prejudice to an adverse party, operates as a bar in a court of equity . . . The essential element of this equitable defense is delay prejudicial to the opposing party" … . "The mere lapse of time, without a showing of prejudice, will not sustain a defense of laches" … .

Here, the court found that defendant should have sought to amend the DRO in 2011, after receiving the letter from NYSLRS. But at that time, defendant was not eligible for and had not applied for a disability retirement. When his disability retirement application was approved in February 2019 and defendant became aware that plaintiff's distribution would accordingly increase, he promptly moved to amend the DRO. Moreover, even if there was a delay here, plaintiff utterly failed to make a showing of prejudice … . Taberski v Taberski, 2021 NY Slip Op 04804, Fourth Dept 8-26-21

HEALTH DECISIONS FOR THE CHILD, INOCULATIONS, SEPARATION AGREEMENTS.

THE SEPARATION AGREEMENT PROVIDED THAT THE PARTIES "SHALL" CONSULT EACH OTHER ON HEALTH DECISIONS FOR THE CHILD BUT FATHER HAD THE CHILD INOCULATED WITHOUT CONSULTING MOTHER; BECAUSE THE PARTIES AGREED THE CHILD WOULD ATTEND PUBLIC SCHOOL, AND INOCULATION IS REQUIRED BY THE PUBLIC HEALTH LAW, MOTHER DID NOT DEMONSTRATE SHE WAS PREJUDICED BY THE BREACH OF THE SEPARATION AGREEMENT; THEREFORE MOTHER'S MOTION TO HOLD HUSBAND IN CONTEMPT WAS PROPERLY DENIED (SECOND DEPT).

The Second Department determined Supreme Court properly denied defendant-mother's motion to hold plaintiff-father in contempt for having the child inoculated for common childhood diseases. The separation agreement required that the parties consult each other on health decisions for the child. Father did not consult with mother before having the child inoculated. The separation agreement did not unequivocally prohibit plaintiff from having the child inoculated and the parties agreed the child would attend public school, for which inoculation is required. Therefore defendant was unable to demonstrate a violation of the separation agreement which prejudiced her:

The separation agreement provided that "[t]he parties shall continue to cooperate and consult with one another to arrive at decisions which they believe are in the best interest of the [c]hild with respect to health." Despite this language, on two occasions, the plaintiff, without first consulting with the defendant, took the child, who had not received any vaccinations since the age of two, to get vaccinated.

However, the parties' separation agreement did not unequivocally prohibit the plaintiff from having the child inoculated. Moreover, in light of the parties' express intention to maintain the child's enrollment in public education, and New York State's then newly enacted public school vaccine mandate requiring such inoculations in order for the child to continue to attend public school (see Public Health Law § 2164; C.F. v New York City Dept. of Health & Mental Hygiene, 191

AD3d 52, 70), the defendant cannot demonstrate that she was prejudiced by the failure of the plaintiff to consult with her prior to having the child inoculated. Heffer v Krebs, 2021 NY Slip Op 04542, Second Dept 7-29-21

JUDGES, DELEGATION OF AUTHORITY, PARENTAL ACCESS.

FAMILY COURT SHOULD NOT HAVE DELEGATED TO FATHER ITS AUTHORITY TO SUPERVISE MOTHER'S PARENTING TIME AND TELEPHONE AND ELECTRONIC CONTACT WITH THE CHILDREN (THIRD DEPT).

The Third Department determined Family Court should not have delegated to father its authority to supervise mother's parenting time and telephone and electronic contact:

Family Court improperly delegated its authority over the mother's supervised parenting time and telephone and electronic contact with the children to the father. "Unless [parenting time] is inimical to the children's welfare, the court is required to structure a schedule which results in frequent and regular access by the noncustodial parent. In so doing, the court cannot delegate its authority to determine [parenting time] to either a parent or a child" … . Family Court ordered that the mother's supervised parenting time "shall be arranged as to time, place, circumstances and supervisor as determined by the [f]ather" and that the mother shall have telephone, Facetime and/or other similar contact with the children "as permitted by the [f]ather."

Although the father has sole custody of the children and, in such capacity, has discretion in the selection of an appropriate supervisor, Family Court failed to provide parameters with respect to the frequency of the supervised parenting time to which the mother is entitled and … failed to consider the logistical concerns in ensuring that she has frequent and regular access to the children … . Matter of Jessica HH. v Sean HH., 2021 NY Slip Op 04165, Third Dept 7-1-21

JUDGES, DELEGATION OF AUTHORITY, PARENTAL ACCESS.

THE JUDGE SHOULD NOT HAVE DELEGATED THE AUTHORITY TO DETERMINE FATHER'S PARENTAL ACCESS TO THE PETITIONER, THE DECEASED MOTHER'S COUSIN, IN THIS GUARDIANSHIP CASE (SECOND DEPT).

The Second Department, reversing (modifying) Family Court, noted that a judge cannot delegate the authority to determine father's parental access, here the mother's cousin petitioned to become the child's guardian:

… "[A] court may not delegate its authority to determine parental access to either a parent or a child" … . In this case, the Family Court improperly delegated the determination of the father's parental access to the petitioner. Accordingly, we remit the matter to the Family Court, Suffolk County, to expeditiously establish an appropriate schedule for the father's parental access in accordance with the best interests of the child … . Matter of Madelyn E. P. (Christine L.-B.–Kevin O.), 2021 NY Slip Op 04228, Second Dept 7-7-21

JUVENILE DELINQUENCY, MIRANDA.

THE JUVENILE DELINQUENCY ADJUDICATION WAS AFFIRMED; TWO DISSENTERS ARGUED THE PROOF THE JUVENILE KNOWINGLY, VOLUNTARILY AND INTELLIGENTLY WAIVED HIS MIRANDA RIGHTS WAS INSUFFICIENT (SECOND DEPT).

Although the Second Department affirmed the juvenile delinquency adjudication, two dissenters argued the presentment agency did not prove the juvenile was capable of knowingly, voluntarily and intelligently waiving his Miranda rights. The juvenile's expert provided evidence of the juvenile's limited intellectual functioning:

From the dissent:

The expert's uncontradicted opinion was that the appellant had "fundamental problems" in understanding and comprehending Miranda rights. Specifically, the appellant believed that he had to waive his right to remain silent in order to find out what the detectives were questioning him about. The appellant did not understand what it meant for a statement to be "used against him." Further, he did not understand the role of an attorney in the context of an interrogation.

Given the appellant's young age, low IQ scores, and limited intellectual functioning, there are serious doubts about the appellant's ability to knowingly and intelligently waive his Miranda rights under the circumstances … . Notably, the Presentment Agency did not introduce any expert testimony contradicting the conclusions reached by the appellant's expert forensic psychologist … . The conclusions of the appellant's expert were confirmed by the appellant's educational records showing that he had been selected for an individualized education plan (hereinafter IEP) and had consistently been evaluated as having intellectual disabilities, including a low IQ with reading, listening, and comprehension difficulties. Matter of Tyler L., 2021 NY Slip Op 04713, Second Dept 8-18-21

NEGLECT, HEARSAY.

FAMILY COURT RELIED ON HEARSAY (WHAT MOTHER TOLD THE CASEWORKER) IN THIS NEGLECT PROCEEDING AGAINST FATHER, NEGLECT FINDINGS REVERSED (THIRD DEPT).

The Third Department, reversing Family Court, determined the court improperly relied upon hearsay to make neglect findings and the evidence was otherwise insufficient. Mother's neglect petitions were disposed of after she admitted neglect. The instant proceeding concerned the neglect petitions against father (the respondent) to which mother was not a party. The caseworker testified about what mother had told her:

… [P]etitioner's caseworker testified as to what the mother had told her based upon their conversations. In this regard, the caseworker stated that the mother told her

that, while the middle and youngest children were with her, she had been drinking heavily, that the mother believed that she may have assaulted one of the children and that, after respondent took the children for a while, he came back to her with some vodka, which she drank. As respondent and the attorney for the children correctly argue, Family Court improperly relied on this hearsay testimony — i.e., what the mother told the caseworker — in reaching its determination … , and the error in doing so was not harmless … . Matter of Aiden J. (Armando K.), 2021 NY Slip Op 04637, Third Dept 8-5-21

NEGLECT.

THE EVIDENCE OF ALTERCATIONS IN THE PRESENCE OF THE CHILDREN AND ALCOHOL CONSUMPTION DID NOT SUPPORT THE NEGLECT FINDINGS (THIRD DEPT).

The Third Department, reversing Family Court, determined the neglect findings were not supported by the record:

With respect to the April 2018 incident, petitioner did not sufficiently demonstrate the presence of the children during the altercation that occurred. Given that “a finding of imminent danger is contingent on the child[ren] being present,” the evidence relating to that incident was not relevant and was insufficient to support a finding of neglect … .With respect to the January 2019 incident, it is undisputed that all of the children except the oldest child were asleep during the altercation; as such, the evidence presented could not support a finding of neglect as to the younger children. As to the oldest child, it is true that “a single act of domestic violence may be sufficient to establish neglect if the child is present for such violence and is visibly upset and frightened by it” … . However, the proof at the fact-finding hearing failed in this regard because it was not established that the oldest child was visibly upset or frightened. Thus, petitioner failed to demonstrate that the oldest child was in imminent risk of emotional or physical impairment … . Moreover, the oldest child’s out-of-court statements that the father gave her two to three shots of alcohol were not corroborated by the other evidence presented by petitioner, and the mere “repetition of an accusation by a child does not corroborate that child’s prior account” … . To the contrary, even petitioner’s witnesses conceded that such a level of alcohol consumption was not supported by their observations of the oldest child’s

demeanor and her .01 blood alcohol content. With respect to the allegations of alcohol abuse while caring for the children, "[t]here was insufficient evidence that [respondents] 'misused alcoholic beverages to the extent that [they] lost self-control of [their] actions,' or that the physical, mental, or emotional condition of the children had been impaired or was in imminent danger of becoming impaired" … . Matter of Josiah P. (Peggy P.), 2021 NY Slip Op 04936, Third Dept 9-2-21

REFEREES.

THE REFEREE DID NOT HAVE THE AUTHORITY TO PRECLUDE DEFENDANT FROM PRESENTING EVIDENCE AS AN APPARENT SANCTION FOR DEFENDANT'S FAILURE TO APPEAR; THE REFEREE'S REPORT SHOULD NOT HAVE BEEN CONFIRMED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the referee's report in this matrimonial matter should not have been confirmed because the referee exceeded her authority by ruling the defendant could not present any evidence, an apparent sanction for defendant's failure to appear:

"A referee derives his or her authority from an order of reference by the court, and the scope of the authority is defined by the order of reference" (… see CPLR 4311). "A referee who attempts to determine matters not referred to him or her by the order of reference acts beyond and in excess of his or her jurisdiction" … . Where, as here, the parties did not consent to the determination of any issues by the referee, and the order of reference directed the referee to hear and report (see CPLR 4317 [a]), "the referee had the power only to hear and report his [or her] findings"… .

Here, the Referee exceeded her authority to hear and report her findings based upon the evidence presented at trial by making a determination to preclude the defendant from presenting a case … . Pursuant to CPLR 4201, a referee assigned to hear and report "shall have the power to issue subpoenas, to administer oaths and to direct the parties to engage in and permit such disclosure proceedings as will expedite the disposition of the issues." However, neither CPLR 4201 nor any other provision confers the authority on a referee assigned to hear and report to impose a penalty on

a party for failing to appear, such as precluding that party from presenting any evidence. Pulver v Pulver, 2021 NY Slip Op 04727, Second Dept 8-18-21

RELOCATION, ABUSE.

MOTHER VIOLATED A COURT ORDER BY RELOCATING TO ARIZONA WITH THE CHILD; HOWEVER, HER ALLEGATIONS OF DOMESTIC ABUSE BY FATHER WERE CREDIBLE AND WARRANTED GRANTING HER CROSS PETITION TO RELOCATE (FOURTH DEPT).

The Fourth Department, in a full-fledged opinion by Justice Troutman, determined mother's cross petition to relocate with the child was properly granted, despite mother's violation of a court order prohibiting her from permanently leaving Monroe County with the child without father's consent, or without a court order allowing relocation. Mother testified that father was abusive and she feared for her life at times. Father denied all allegation of abuse. Family Court found mother's testimony credible and did not credit father's testimony:

Courts place considerable weight on the effect of domestic violence on the child … , particularly when a continuing pattern of domestic violence perpetrated by the child's father compels the mother to relocate out of legitimate fear for her own safety … , or where the father minimized the past incidents of domestic violence … . Indeed, where domestic violence is alleged in a petition for custody, "the court must consider the effect of such domestic violence upon the best interests of the child" … .

… [T]he court appropriately considered the fact that the mother unilaterally removed the child from the jurisdiction, determining that the mother "did not relocate to separate the father from the child, but instead acted in good faith to escape the threat of domestic violence" … . Although the court did not countenance the mother's decision to relocate without permission, "it was the father's [violent] conduct that prompted [her] move to [Arizona] in the first instance and triggered the resulting disruption of his relationship with his daughter" … . Furthermore, although the court did not expressly engage in the analysis required under Tropea (87 NY2d at 740-741), according deference to the court's factual findings and credibility assessments … we conclude that "there is a sound and substantial basis in the record supporting

the court’s determination that ‘relocation would enhance the child[‘s life] economically, emotionally, and educationally, and that the child[‘s] relationship with the father could be preserved through a liberal parental access schedule including, but not limited to, frequent communication and extended summer and holiday visits’ ” … . Matter of Edwards v Ferris, 2021 NY Slip Op 04306, Fourth Dept 7-9-21

RELOCATION.

ALTHOUGH IT WAS A VERY CLOSE CASE, THE EVIDENCE DID NOT SUPPORT A CHANGE IN CUSTODY SUCH THAT THE COUPLE’S SON, WHO HAS BEEN DIAGNOSED WITH AUTISM, WOULD RELOCATE WITH FATHER TO MASSACHUSETTS, DESPITE FATHER’S BEING MORE FINANCIALLY SECURE THAN MOTHER; FAMILY COURT DID NOT GIVE PROPER WEIGHT TO THE SON’S WISHES (THIRD DEPT).

The Third Department, reversing Family Court, determined, in a very close case where both parents love and want the best for their children (who have been diagnosed with autism), father did not demonstrate a sound basis for modifying the custody arrangement to allow relocation with his son to Massachusetts:

… [I]t is clear that the son is very strongly bonded to the mother. Indeed, he has lived with the mother for the last six years since the father moved to Massachusetts, except for short periods of visitation with the father. Moreover, the son has had very little visitation with the father since the 2019 holiday season due largely to the COVID-19 pandemic. Additionally, although the father cites the living conditions at the mother’s home as the motivation for initially seeking custody, we find this questionable given that he testified that the condition of the mother’s home has long been problematic and that, despite this, he relocated to Massachusetts and left both children in her care. Although … issues with the hot water heater were no doubt problematic, that matter was remedied prior to trial. Even more troubling, however, is the father’s strong opposition to the son changing schools because the son has difficulty with change, yet he feels it is in the son’s best interests to relocate him to Massachusetts away from the mother and the life he has established with her. Although relocation would certainly enhance the son’s life, as his living conditions would improve due to the father being more financially secure, this is only one factor

in our analysis … . Finally, although not dispositive, given the advanced age of the son [born 2005], as well as testimony regarding how intelligent he is, we find that Family Court did not give proper weight to his wishes … . Matter of Daniel G. v Marie H., 2021 NY Slip Op 04178, Third Dept 7-1-21

SEPARATION AGREEMENTS, UNCONSCIONABILITY, OVERREACHING.

THE SEPARATION AGREEMENT WAS NOT UNCONSCIONABLE, BUT THERE WAS A QUESTION WHETHER THE AGREEMENT WAS THE PRODUCT OF OVERREACHING, HEARING ORDERED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined that, although the separation agreement was not unconscionable, there were questions of fact whether the agreement was the product of overreaching requiring a hearing:

While the defendant waived the right to maintenance, this provision, by itself, is insufficient to render the agreement unconscionable … .

Nevertheless, the Supreme Court should have held a hearing on the issue of whether the agreement should be set aside on the ground of overreaching. "Although courts may examine the terms of the agreement as well as the surrounding circumstances to ascertain whether there has been overreaching, the general rule is that if the execution of the agreement is fair, no further inquiry will be made" … . No actual fraud needs to be shown in order to set aside an agreement, but "the challenging party must show overreaching in the execution, such as the concealment of facts, misrepresentation, cunning, cheating, sharp practice, or some other form of deception" … .

Here, the agreement reflects a vast disparity between the parties' assets at the time of its execution. Moreover, the defendant's submissions suggest that the plaintiff may have unilaterally selected and paid the defendant's attorney, and that negotiations between the parties' attorneys went on for approximately six weeks prior to the defendant's initial consultation with her attorney. Marinakis v Marinakis, 2021 NY Slip Op 04218, Second Dept 7-7-21

SOLEMNIZED MARRIAGE, MARRIAGE LICENSES.

IN NEW YORK A MARRIAGE WHICH HAS BEEN SOLEMNIZED IS VALID IN THE ABSENCE OF A MARRIAGE LICENSE (SECOND DEPT).

The Second Department noted that a marriage which has been solemnized is valid in the absence of a marriage license:

There is a strong presumption favoring the validity of marriages … . While the Domestic Relations Law deems it necessary for all persons intending to be married to obtain a marriage license … , a marriage is not void for the failure to obtain a marriage license if the marriage is solemnized … . A marriage is solemnized where the parties "solemnly declare in the presence of a clergyman or magistrate and the attending witness or witnesses that they take each other as husband and wife"… . Thus, under New York law, the marriage between parties will be valid, even without a marriage license, in instances where it is solemnized … . Pursuant to Domestic Relations Law § 12, "[n]o particular form or ceremony is required when a marriage is solemnized as herein provided by a clergyman or magistrate, but the parties must solemnly declare in the presence of a clergyman or magistrate and the attending witness or witnesses that they take each other as husband and wife. In every case, at least one witness beside the clergyman or magistrate must be present at the ceremony." … . Yusupov v Baraev, 2021 NY Slip Op 04634, Second Dept 8-4-21

SUSPENSION OF ORDER OF COMMITMENT, REVOCATION OF.

BECAUSE A LIBERTY INTEREST IS AT STAKE, RESPONDENT SHOULD HAVE BEEN AFFORDED AN OPPORTUNITY TO BE HEARD IN OPPOSITION TO THE REVOCATION OF THE SUSPENSION OF THE ORDER OF COMMITMENT (SECOND DEPT).

The Second Department, reversing Family Court, reversing the revocation of the suspension of the order of commitment, determined respondent was entitled to an opportunity to be heard because a liberty interest is at stake:

"The court may suspend an order of commitment upon reasonable conditions and is also authorized to revoke such suspension at any time for good cause shown" … . However, given the liberty interest at stake, the Family Court, before revoking a suspension of an order of commitment, must provide to a respondent an opportunity to be heard and to present witnesses on the issue of whether good cause exists to revoke the suspension … . Here, because the father was deprived of this opportunity, we must reverse the order of commitment appealed from and remit the matter to the Family Court … for a hearing and a determination thereafter of whether good cause exists to revoke the suspension. Matter of Gast v Faria, 2021 NY Slip Op 04549, Second Dept 7-28-21

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