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An Organized Compilation of Summaries of Selected Decisions, Mostly Reversals, Addressing Family-Law Issues Released and Posted on the New York Appellate Digest Website January – March 2022. 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 Reversal Report.

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The First Department refused to dismiss the appeal of this Family Court civil contempt matter pursuant to the fugitive disentitlement doctrine (which authorizes the dismissal of an appeal if the appellant has left the jurisdiction). Here father was in Japan:

Although the father is in Japan, we decline to dismiss the appeal pursuant to the fugitive disentitlement doctrine. There is no "nexus" connecting the father's fugitive status and these proceedings … . The father has continued to appear virtually in court, communicate with his counsel, and consent to relief sought by the mother. He has complied with the terms of his probation and submitted an affidavit stating that he will return to New York to comply with any court order. Under these circumstances, we find that the father has not "flout[ed] the judicial process," frustrated the operation of the courts, or prejudiced the mother's rights by leaving the jurisdiction to warrant dismissal of the appeal … .Matter of Hilary C. v Michael K., 2022 NY Slip Op 01512, First Dept 3-10-22

Practice Point: If an appellant leaves the court's jurisdiction (here father went to Japan), the appeal may be dismissed pursuant to the fugitive disentitlement doctrine. The doctrine was not applied in this Family Court civil contempt case

because father participated in court proceedings virtually and stated he would return to New York to comply with any court order.

APPEALS, NO APPEAL FROM A DEFAULT.

THE MAJORITY HELD THE APPELLATE DIVISION PROPERLY REFUSED TO HEAR APPELLANT FATHER'S APPEAL IN THIS TERMINATION OF PARENTAL RIGHTS PROCEEDING BECAUSE FATHER WAS IN DEFAULT (NO APPEAL LIES FROM A DEFAULT); THE DISSENT ARGUED FATHER WAS NOT IN DEFAULT BECAUSE HE APPEARED BY COUNSEL (CT APP).

The Court of Appeals, affirming the Appellate Division, over a strong dissent, determined the Appellate Division properly concluded it could not hear the appellant father's appeal in this termination-of-parental-rights proceeding because he was in default (no appeal lies from a default judgment). The dissent argued father appeared by counsel and therefore was not in default:

Before this Court, appellant does not dispute the Appellate Division's determination that his failure to appear constituted a default.

From the dissent:

The only reviewable issue before us is whether the Appellate Division properly dismissed appellant father's appeal from a Family Court order terminating his parental rights on the ground that appellant defaulted. That decision was in error because appellant appeared through counsel during the fact-finding and dispositional hearings, as acknowledged by Family Court, and in accordance with the Family Court Act and the CPLR (see Family Ct Act § 165; CPLR 3215 [a]). Matter of Irelynn S., 2022 NY Slip Op 01869, Ct App 3-17-22

Practice Point: No appeal lies from a default judgment. The dissent argued: A party who appears by counsel, as appellant father did in these termination-of-parental-rights proceedings, is not in default.

ATTORNEY FOR THE CHILD, NO AUTOMATIC DISQUALIFACTION, MOTHER HAD APPEARED BEFORE THE ATTORNEY WHEN THE ATTORNEY WAS A JUDGE.

THE FACT THAT THE ATTORNEY FOR THE CHILD (AFC) IN THIS CUSTODY MATTER HAD, AS A JUDGE, PRESIDED OVER A DIFFERENT CUSTODY MATTER INVOLVING MOTHER, BUT INVOLVING DIFFERENT CHIDREN AND A DIFFERENT FATHER, DID NOT REQUIRE AUTOMATIC DISQUALIFACTION OF THE AFC PURSUANT TO JUDICIARY LAW 17 (THIRD DEPT).

The Third Department, over a two-justice dissent, determined the attorney for the child (AFC) in the instant custody matter, who, as a judge, had presided over another custody case involving mother and different children, was not subject to automatic disqualification:

Various factual circumstances exist where disqualification of an attorney under Judiciary Law § 17 has been found. * * *

… [T]he custody case noted by the mother neither involved the subject children nor the subject children's father] Rather, it was an entirely separate proceeding involving different children and a different father. Furthermore, the mother does not allege any factual ties between these underlying proceedings and the prior custody case … . Indeed, the only common tie between them is that the mother was a litigant. … [O]nly the mother, and not her present custody claim over the subject children, had been before the AFC during his tenure as a judge.

… [T]he mother's fitness as the custodial parent presumably was an issue presented in her prior custody case. It is also an issue present here. Equating a discrete issue with a "matter" provided in Judiciary Law § 17, however, impermissibly stretches the meaning of "matter" such that it does not comport with "action, claim, . . . motion or proceeding" — the other terms in Judiciary Law § 17 … . … [I]n view of the jurisdiction of Family Court and the particular cases such court hears, a party's fitness as a custodial parent frequently arises as an issue whether directly or indirectly. By giving an expansive view to "matter," the AFC, a former Family Court judge who had presided over countless proceedings in the

past, would be disqualified from representing any party in any future case where another party in such case was previously before the AFC in one of those past proceedings — a result that would occur without regard to the nature of either the past proceeding or future case. Matter of Corey O. v Angela P., 2022 NY Slip Op 02044, Third Dept 3-24-22

Practice Point: The fact that the attorney for the child (AFC) in this custody case presided, as a judge, over another custody case involving mother, but involving different children and a different father, did not require automatic disqualification of the AFC pursuant to Judiciary Law section 17.

CHILD SUPPORT PROCEEDINGS, RIGHT TO COUNSEL.

THE SUPPORT MAGISTRATE DID NOT ENSURE THAT FATHER KNOWINGLY, INTELLIGENTLY AND VOLUNTARILY WAIVED HIS RIGHT TO COUNSEL IN THIS CHILD SUPPORT PROCEEDING; ORDER OF COMMITMENT REVERSED (SECOND DEPT).

The Second Department, reversing Family Court's order of commitment for father's failure to pay child support, determined the Support Magistrate did not ensure that father's waiver of counsel was knowing, intelligent and voluntary:

… [A]t the beginning of the hearing, the Support Magistrate asked the father what he "want[ed] to do about legal representation," to which the father responded, "I'm speaking for myself at this point." The Support Magistrate did not make any further inquiries regarding counsel. The Support Magistrate also failed to advise the father about the potential pitfalls of proceeding pro se. Thus, the Support Magistrate failed to conduct a sufficiently searching inquiry to ensure that the father's waiver of his right to counsel was knowing, intelligent, and voluntary … . Under these circumstances, the father was deprived of his right to counsel at the hearing. Contrary to the mother's contention, this violation was not cured by the fact that the father was later represented by assigned counsel during the confirmation hearing … . Matter of Sylvester v Goffe, 2022 NY Slip Op 01028, Second Dept 2-16-22

CHILD SUPPORT, FAILURE TO PAY, CIVIL CONTEMPT.

FAMILY COURT SHOULD HAVE HELD A HEARING ON PLAINTIFF'S MOTION TO HOLD DEFENDANT IN CIVIL CONTEMPT FOR FAILURE TO PAY CHILD SUPPORT AND DEFENDANT'S PETITION TO REDUCE THE CHILD SUPPORT PAYMENTS; FAMILY COURT HAD GRANTED DEFENDANT'S PETITION AND DENIED PLAINTIFF'S MOTION WITHOUT HOLDING A HEARING (SECOND DEPT).

The Second Department, reversing Family Court, determined a hearing was necessary on plaintiff's motion to hold defendant in civil contempt for failure to pay child support and on defendant's petition to reduce his child support payments:

… [T]he parties' submissions presented issues of fact with regard to the defendant's actual income … , which the Supreme Court failed to ascertain … and whether or not he was and is able to comply with his child support obligation under the judgment of divorce … . Under such circumstances, the court erred in granting the defendant's petition to modify the child support provisions of the judgment of divorce to the extent of directing him to pay $25 per month in child support retroactive to July 10, 2018, and in denying that branch of the plaintiff's motion which was to adjudge the defendant in civil contempt for failure to pay child support without conducting a hearing … . Zeidman v Zeidman, 2022 NY Slip Op 00906, Second Dept 2-9-22

CHILD SUPPORT, MAGISTRATE SHOULD NOT HAVE DEVIATED FROM CHILD SUPPORT STANDARDS ACT.

THE SUPPORT MAGISTRATE SHOULD NOT HAVE DEVIATED FROM THE PRESUMPTIVE SUPPORT OBLIGATION CALCULATED PURSUANT TO THE CHILD SUPPORT STANDARDS ACT (CSSA) BASED UPON THE EXPENSES INCURRED BY MOTHER WHEN THE CHILDREN WERE WITH HER; THE EXPENSES DID NOT QUALIFY AS "EXTRAORDINARY EXPENSES" (FOURTH DEPT).

The Fourth Department, reversing Family Court, determined the support magistrate should not have deviated from the presumptive support obligation calculated pursuant to the Child Support Standards Act (CSSA):

… [T]he Support Magistrate determined that, because the children spent approximately 50% of the parenting time with the mother and because the mother incurred expenses for the children's "food, clothing, shelter, utilities, cell phones, transportation[,] and extracurricular activities" during the times they were with her, she should be granted a variance from the presumptive support obligation. That was error. Although "extraordinary expenses incurred by the non-custodial parent in exercising visitation" with a child not on public assistance may support a finding that the presumptive support obligation is unjust or inappropriate … , "[t]he costs of providing suitable housing, clothing and food for [a child] during custodial periods do not qualify as extraordinary expenses so as to justify a deviation from the presumptive amount" … , "nor is the cost of entertainment, including sports, an extraordinary visitation expense for purposes of calculating child support" … . Matter of Livingston County Support Collection Unit v Sansocie, 2022 NY Slip Op 01914, Fourth Dept 3-18-22

Practice Point: Mother's expenses for the children when they stayed with her did not qualify as "extraordinary expenses." Therefore the support magistrate should not have deviated from the presumptive support obligation calculated pursuant to the Child Support Standards Act (CSSA).

CRIMINAL LAW, RESENTENCING FOR VICTIMS OF DOMESTIC VIOLENCE.

DEFENDANT WAS ENTITLED TO A HEARING ON HER MOTION FOR RESENTENCING WHICH ALLEGED SHE WAS THE VICTIM OF DOMESTIC VIOLENCE AT THE TIME OF THE COMMISSION OF THE CRIME (SECOND DEPT).

The Second Department, reversing Supreme Court, determined defendant was entitled to a hearing on her motion for resentencing which alleged she was a victim of domestic violence at the time of the commission of the crime:

Provided that the defendant meets certain threshold eligibility requirements pertaining to, inter alia, the length of incarceration and the type of offense … , a defendant may move for resentencing in accordance with Penal Law § 60.12 (see CPL 440.47[1][c]). The motion itself … must make a preliminary evidentiary showing consisting of "at least two pieces of evidence corroborating the applicant's claim that he or she was, at the time of the offense, a victim of domestic violence subjected to substantial physical, sexual or psychological abuse inflicted by a member of the same family or household as the applicant as such term is defined in" CPL 530.11(1) (CPL 440.47[2][c]). Furthermore, "[a]t least one piece of evidence must be either a court record, presentence report, social services record, hospital record, sworn statement from a witness to the domestic violence, law enforcement record, domestic incident report, or order of protection" … .

Here, the defendant's evidence in support of her motion included affidavits of her sister and mother, as well as a purported transcription of her interrogation by the police. Together, this evidence corroborated her allegations that she was subjected to domestic violence by the codefendant at the time of the offense … , and that the defendant and the codefendant were "member[s] of the same family or household" … . People v Coles, 2022 NY Slip Op 00678, Second Dept 2-2-22

CUSTODY MODIFICATION.

FATHER ALLEGED CHANGES IN HIS WORK SCHEDULE ALLOWED MORE TIME FOR PARENTAL ACCESS WITH THE CHILD; A HEARING SHOULD HAVE BEEN ORDERED ON FATHER'S MODIFICATION PETITION (SECOND DEPT).

The Second Department, reversing Family Court, determined father had submitted sufficient evidence to warrant a hearing on his petition to modify the custody or parental access arrangement:

… [F]ather stated that his probationary employment period had since ended, and his schedule was more consistent, and he was off from work on Saturdays and Sundays. Given this change, the father sought expanded parental access with the child. …

Entitlement to a hearing on a modification petition … is not automatic; the petitioning parent must make a threshold evidentiary showing of a change in circumstances demonstrating a need for modification in order to insure the child's best interests … . Requiring parents to make this threshold showing before a hearing is ordered serves an important purpose because … litigation of custody and visitation issues is emotionally fraught and "can create trauma and uncertainty for the child, as well as trauma, uncertainty, and expense for the parents" … .

… Family Court improperly dismissed the father's petition. … [T]he father's assertions, which were supported by the requisite threshold evidentiary showing, warranted a hearing to resolve whether the existing parental access arrangement continued to serve the child's best interests … .

CUSTODY MODIFICATION.

FATHER'S PETITION FOR A MODIFICATION OF CUSTODY, REQUESTING AN AWARD OF SOLE CUSTODY, SHOULD NOT HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Family Court, over a dissent, in a decision too comprehensive to fairly summarize here, determined father's petition for a modification of custody (awarding him sole custody) should not have been granted:

… Family Court's determination that there was a change of circumstances since the issuance of the prior custody order such that an award of sole legal and physical custody to the father was required to protect the best interests of the child lacks a sound and substantial basis in the record … . * * *

… Family Court also placed undue weight on an alleged suicide attempt by the mother in 2013, which predated the award of sole legal and residential custody to the mother in 2018 by several years, and thus, could not constitute a "change of circumstances since the [prior] custody determination" … . …

… Family Court failed to afford sufficient weight to conduct by the father which militated against awarding him sole custody. In particular, the mother testified that the father did not allow her to speak to the child by phone, Facetime, or other means while the child was at the father's home. …

… Family Court failed to afford sufficient weight to conduct by the father which militated against awarding him sole custody. In particular, the mother testified that the father did not allow her to speak to the child by phone, Facetime, or other means while the child was at the father's home. Matter of Paige v Paige, 2022 NY Slip Op 00866, Second Dept 2-9-22

CUSTODY MODIFICATION.

IN THIS MODIFICATION OF CUSTODY PROCEEDING, FATHER PRESENTED SUFFICIENT EVIDENCE OF A CHANGE OF CIRCUMSTANCES TO WARRANT A HEARING ON THE BEST INTERESTS OF THE CHILD (FOURTH DEPT).

The Fourth Department, reversing Family Court, determined respondent-father had presented sufficient evidence of a change in circumstances to warrant a hearing on the best interests of the child:

Where … " 'a respondent moves to dismiss a modification proceeding at the conclusion of the petitioner's proof, the court must accept as true the petitioner's proof and afford the petitioner every favorable inference that reasonably could be drawn therefrom' " … . Here, the father testified that, at the time the order of custody and visitation was entered into and for a short time thereafter, the mother and the father were communicating effectively and, in addition to scheduled visitation, were able to agree to further overnight and weekend visitation. That arrangement subsequently changed, however, and the father could not get the mother to agree to any visitation time apart from his scheduled day. The father further testified that communication with the mother regarding additional visitation time essentially ended after he moved to a new home 30 miles away. Taking the father's testimony as true and considering the circumstances of the father's move and the development of "extreme acrimony between the parties," we conclude that the father met his burden of showing a change in circumstances warranting an inquiry into the best interests of the child … . Matter of Cooley v Roloson, 2022 NY Slip Op 00534, Fourth Dept 1-28-22

CUSTODY, GRANDPARENTS' PETITION.

THE "SPECIAL CIRCUMSTANCES" WHICH MAY HAVE JUSTIFIED AWARDING CUSTODY OF THE CHILD TO THE GRANDPARENTS APPLIED ONLY TO FATHER AND NOT AT ALL TO MOTHER; FOR THAT REASON THE GRANDPARENTS' PETITION FOR CUSTODY OF THE CHILD SHOULD NOT HAVE BEEN GRANTED (THIRD DEPT).

The Third Department, reversing (modifying) Family Court, determined the grandparents' petition for custody of the child should not have been granted. Father has a criminal history and has been incarcerated. He was arrested with the child and drug paraphernalia in his car, where he was found asleep. Mother has no criminal history and no drug problems. The "special circumstances" which may have supported granting custody to the grandparents related only to father, not al all to mother. Therefore the grandparents' petition should have been denied:

The record reflects that the child was not subject to surrender, abandonment or persistent neglect nor is the mother unfit. Although the father was the subject of an indicated report relative to the incident when he fell asleep in his vehicle with drug paraphernalia near the child, a finding of neglect was not indicated as to the mother. Moreover, this was an isolated incident and not part of a pattern of persistent neglect. Although there was evidence that the father has a history of drug abuse and criminal convictions, the mother has neither. There was no evidence that the child was at risk of being harmed while in the mother's care; instead, the record demonstrates that the mother provided appropriate shelter, clothing, food and medical attention to the child. Additionally, the mother did not allow the father to have contact with the child in accordance with Family Court's orders. As Family Court found that the grandparents did not meet their burden on extraordinary circumstances as to the mother, the court erred in engaging in a best interests analysis and, instead, the custody petition should have been dismissed … . Matter of Anne MM. v Vasiliki NN, 2022 NY Slip Op 02161, Third Dept 3-31-22

Practice Point: Here "special circumstances" which may have supported granting the grandparents' petition for custody of the child with respect to father, did not apply at all to mother. Family Court should not have proceeded with a "best interests" analysis and should have denied the petition.

DIVORCE, DEFAULT JUDGMENT AGAINST HUSBAND IMPROPER.

SUPREME COURT SHOULD NOT HAVE ENTERED A DEFAULT JUDGMENT OF DIVORCE AGAINST THE HUSBAND, WHO WAS REPRESENTING HIMSELF, WHEN HE DID NOT APPEAR AT THE INQUEST; BOTH THE COURT AND THE WIFE WERE AWARE THE HUSBAND HAD BEEN DIAGNOSED WITH A SIGNIFICANT MENTAL HEALTH CONDITION (FIRST DEPT).

The First Department, reversing Supreme Court, determined the judgment of divorce should not have been entered after the husband, who was representing himself, failed to appear at an inquest. Both the court and his wife were aware he had been diagnosed with a mental health condition, resulting in episodes when he could not care for himself or protect his interests:

… [A]t the conclusion of the inquest, the court explicitly acknowledged that the husband's absence was likely attributable to his mental health. Thus, before entering judgment upon the husband's default, there should have been an inquiry into whether a guardian ad litem was necessary (see CPLR 1201, 1203 …). Because there was no inquiry, the judgment must be vacated and the matter remanded for further proceedings, including, if necessary, an inquiry into the husband's current capacity … . Richard v Buck, 2022 NY Slip Op 02101, First Dept 3-29-22

Practice Point: Here both the court and the wife were aware the husband, who was representing himself and did not appear at the inquest, suffered from a significant mental health condition. The default judgment of divorce should not have been entered. The judgment was vacated. If necessary, Supreme Court should hold a hearing to determine the husband's capacity.

DIVORCE, MAINTENANCE SHOULD HAVE BEEN AWARDED, JUDGE SHOULD NOT HAVE ADOPTED HUSBAND'S FINDINGS OF FACT AND CONCLUSIONS OF LAW.

THE WIFE'S REQUEST FOR MAINTENANCE WAS REJECTED WITHOUT EXPLANATION AND THE HUSBAND'S FINDINGS OF FACT AND CONCLUSIONS OF LAW WERE WHOLLY ADOPTED BY SUPREME COURT; THE THIRD DEPARTMENT AWARDED MAINTENANCE ON APPEAL (THIRD DEPT).

The Third Department, reversing (modifying) Supreme Court, determined the wife was entitled to maintenance in this divorce proceeding. The parties had been married for 44 years. The wife's income was around $31,000 and the husband's income was around $117,000. Both were retired. The Third Department noted that Supreme Court did not give any indication of its rationale for rejecting the wife's application and adopted the husband's findings of fact and conclusions of law:

"The amount and duration of a maintenance award are addressed to the sound discretion of the trial court, and will not be disturbed provided that the statutory factors and the parties' predivorce standard of living are considered" … .. "The court need not articulate every factor it considers, but it must provide a reasoned analysis of the factors it ultimately relies upon in awarding or declining to award maintenance" … .

Supreme Court wholly adopted verbatim the husband's proposed findings of fact and conclusions of law, without articulating the factors it considered or providing a reasoned analysis for its rulings on the proposed findings of fact and conclusions of law. "[F]indings of fact submitted pursuant to CPLR 4213 (a) cannot constitute the decision of the court [as] mandated by Domestic Relations Law § 236 (B) (5) (g)" … . Although Supreme Court failed to set forth its rationale for rejecting the wife's request for maintenance, "because our authority is as broad as that of the Supreme Court, we need not remit this issue" … . Louie v Louie, 2022 NY Slip Op 02172, Third Dept 3-31-22

Practice Point: Here in this divorce proceeding the judge did not give any indication of the rationale for rejecting the wife's request for maintenance and

wholly adopted the husband's findings of fact and conclusions of law. Findings of fact cannot constitute a court's decision. Rather than remitting the matter, the Third Department awarded maintenance.

DIVORCE, VENUE, SEASONAL HOME, COVID.

THE COUNTY WHERE PLAINTIFF AND DEFENDANT OWNED A SEASONAL SECOND HOME (WHERE DEFENDANT LIVED AFTER COVID REACHED NEW YORK CITY) WAS NOT THE PROPER VENUE FOR THE DIVORCE ACTION (SECOND DEPT).

The Second Department, in a full-fledged opinion by Justice Lasalle, reversing Supreme Court, determined the county where plaintiff and defendant owned a seasonal second home, and where defendant moved when COVID reached New York City, was not the proper venue for the divorce action:

The parties to this divorce action primarily resided in New York County, while maintaining a seasonal second home in Suffolk County. In March 2020, when the COVID-19 pandemic first reached New York City, the defendant retreated to the Suffolk County residence along with her pregnant and immunocompromised daughter and began spending more time there in order to assist the daughter during the pregnancy and after the child's birth. In August 2020, the plaintiff commenced this action for a divorce and ancillary relief in Suffolk County, on the ground that the parties were residents of Suffolk County. The defendant moved pursuant to CPLR 510 and 511 for a change of venue, and the Supreme Court denied the motion.

This case presents the issue of whether sheltering in place in a seasonal home creates a sufficient degree of permanence to establish residency at that location. We hold that it does not under the circumstances of this case. Because the parties' stays in Suffolk County were only seasonal and temporary, we hold that neither of them were residents of Suffolk County at the time of the commencement of the action. Accordingly, the Supreme Court should have granted the defendant's motion pursuant to CPLR 510 and 511 to change the venue of the action from

Suffolk County to New York County. Fisch v Davidson, 2022 NY Slip Op 01442, Second Dept 3-9-22

Practice Point: In this divorce action commenced in August 2020 (during the pandemic), the county were plaintiff and defendant owned a seasonal home, and where defendant moved when COVID reached New York City, was not the proper venue. New York County, where the couple primarily resided, was deemed the proper venue for the divorce proceedings.

MALTREATMENT FINDINGS, EXPUNGEMENT.

PETITIONER-MOTHER'S APPLICATION TO HAVE THE MALTREATMENT FINDING DEEMED UNFOUNDED AND EXPUNGED PROPERLY DENIED; MOTHER WOULD NOT ALLOW HER 16-YEAR-OLD DAUGHTER INTO THE HOME; TWO-JUSTICE DISSENT (THIRD DEPT).

The Third Department, over a two-justice dissent, affirmed the NYS Office of Children and Family Services' (OCFS's) denial of petitioner-mother's application to have reports by the Central Register of Child Abuse and Maltreatment amended to be unfounded and expunged. Petitioner allegedly refused to allow her 16-year-old daughter into the home, which caused her daughter to find other places to stay. The dissent agreed with the majority's conclusion that mother's failure to exercise adequate care and supervision constituted maltreatment, but disagreed with the majority's finding that the daughter was placed in imminent risk of danger:

From the dissent:

OCFS's decision recited a plethora of facts relative to petitioner's failure to exercise the requisite degree of care or supervision. The same cannot be said regarding whether such failure harmed the child or imminently harmed the child. Rather, only in a conclusory fashion did OCFS find that petitioner's failure to exercise a minimum degree of care caused the child's physical, mental or emotional condition to be impaired or to be in imminent danger of being impaired. Indeed, OCFS's decision noted, and the record confirms, that, when the child stayed with the neighbor, the neighbor's residence was "safe" and posed "no

concerns." OCFS also noted that the neighbor was approached about potentially obtaining custody of the child. Based on what OCFS found, substantial evidence, in our view, does not support the determination that the child was harmed or was in imminent risk of harm … . Matter of Tammy OO. v New York State Off. of Children & Family Servs., 2022 NY Slip Op 00706, Third Dept 2-3-22

MEDIA SHOULD NOT HAVE BEEN EXCLUDED FROM HEARING RE: DISQUALIFICATION OF AN ATTORNEY FOR CONFLICT OF INTEREST.

A LOCAL ONLINE NEWS OUTLET SHOULD NOT HAVE BEEN EXCLUDED FROM A FAMILY COURT HEARING REGARDING WHETHER A DEPUTY COUNTY ATTORNEY SHOULD BE DISQUALIFIED FROM A NEGLECT PROCEEDING ON CONFLICT OF INTEREST GROUNDS; THE OUTLET IS ENTITLED TO A TRANSCRIPT OF THE HEARING (FOURTH DEPT).

The Fourth Department, reversing Family Court, determined appellant, an online local news outlet, should not have been excluded from an attorney-disqualification hearing and was entitled to a transcript of the hearing. The respondent in a neglect proceeding had moved to disqualify the deputy county attorney on conflict of interest grounds. Appellant's owner deemed the motion newsworthy because the deputy county attorney had just been elected City-Court Judge. When appellant's owner attempted to attend the disqualification hearing he was denied entry:

… "[T]he general public may be excluded from any hearing under [Family Court Act] article [10] and only such persons and the representatives of authorized agencies admitted thereto as have an interest in the case" (§ 1043). In making that determination, however, "[a]ny exclusion of courtroom observers must . . . be accomplished in accordance with 22 NYCRR 205.4 (b)" … . That rule provides that "[t]he general public or any person may be excluded from a courtroom [in Family Court] only if the judge presiding in the courtroom determines, on a case-by-case basis based upon supporting evidence, that such exclusion is warranted in that case" … . The rule further provides certain nonexclusive factors that a Family Court judge may consider in exercising his or her discretion, and requires that the judge make findings prior to ordering any exclusion … .

… [T]he court abused its discretion in excluding appellant from the hearing on the underlying disqualification motion. … [T]he court violated 22 NYCRR 205.4 (b) by failing to make findings prior to ordering the exclusion, and … there is no indication … that the court rendered its determination based on … evidence or considered any of the relevant factors in exercising its discretion. Moreover, … the court lacked an adequate basis to exclude appellant from the hearing on the disqualification motion … . * * *

… [T]he release of the transcript is consistent with Family Court Act § 166 and 22 NYCRR 205.5. … [T]he statute provides in relevant part that although "[t]he records of any proceeding in the family court shall not be open to indiscriminate public inspection[,] . . . the court in its discretion in any case may permit the inspection of any papers or records" … . The statute thus "does not render Family Court records confidential, but merely provides that they are not open to indiscriminate public inspection" … . The statute makes clear that Family Court "has the discretionary statutory authority to permit the inspection of any record by anyone at any time … .Matter of Rajea T. (Niasia J.), 2022 NY Slip Op 01940, Fourth Dept 3-18-22

Practice Point: Although the general public can be excluded from Family Court Article 10 proceedings, the judge exercising the discretion to exclude an observer must make certain findings in accordance with 22 NYCRR 205-4 (b). Family Court here made no findings and abused its discretion by excluding the news outlet. The court proceeding concerned whether the county attorney handling the neglect case should be disqualified on conflict of interest grounds, and did not concern the underlying allegations of neglect. The news outlet is entitled to a transcript of the hearing.

MEDICAL MALPRACTICE, DISCOVERY OF CHILD CUSTODY AND CHILD PROTECTIVE SERVICES RECORDS.

CERTAIN CHILD CUSTODY RECORDS AND CHILD PROTECTIVE SERVICES RECORDS (WHICH DO NOT RELATE TO AN INVESTIGATION) MAY BE DISCOVERABLE IN THIS MEDICAL MALPRACTICE ACTION BROUGH ON BEHALF OF AN INFANT (THIRD DEPT).

The Third Department, reversing (modifying) Supreme Court, determined certain child custody records and Child Protective Services (CPS) records were or may be discoverable in this negligence and medical malpractice case brought on behalf of an infant. The custody records were relevant to plaintiff's standing to sue and to family dynamics which may have affected the child's health, and there may be some CPS records which are discoverable because they do not relate to an investigation, Therefore the matter was remitted for an in camera review:

Supreme Court did not address the second basis upon which defendants sought disclosure of the custody records, however, which was that they may contain information on family dynamics that impacted the infant's development and would therefore be relevant as to plaintiff's allegations, in her bill of particulars, that the infant's learning disabilities and intellectual and emotional deficits arose out of defendants' conduct. …

… [D]efendants are not entitled to disclosure of records relating to either a report of abuse or an investigation into one … . …

… [C]hild protective officials and related child welfare organizations may well possess discoverable documents that were not generated in the course of a child protective investigation but do contain information relevant to assessing whether the infant's claimed injuries were linked to defendants' actions or some other cause. C.T. v Brant, 2022 NY Slip Op 01090, Third Dept 2-17-22

NEGLECT, INSUFFICIENT EVIDENCE.

THE NEGLECT FINDING WAS NOT SUPPORTED BY A PREPONDERANCE OF THE EVIDENCE, CRITERIA EXPLAINED (FOURTH DEPT).

The Fourth Department, reversing Family Court's neglect finding, determined the finding was not supported by the preponderance of the evidence:

"[A] party seeking to establish neglect must show, by a preponderance of the evidence … , first, that a child's physical, mental or emotional condition has been impaired or is in imminent danger of becoming impaired and second, that the actual or threatened harm to the child is a consequence of the failure of the parent or caretaker to exercise a minimum degree of care in providing the child with proper supervision or guardianship" … .. In considering whether the requisite minimum degree of care was provided, "[c]ourts must evaluate parental behavior objectively: would a reasonable and prudent parent have so acted, or failed to act, under the circumstances then and there existing" … . Here, the evidence at the fact-finding hearing establishes that the mother acknowledged her mental health issues and had been compliant with treatment following her discovery that she was pregnant … ; and that she was engaged in a supportive housing program that would allow her to care for the child, thereby limiting any extended need for foster care … . Matter of Isabella S. (Nicole S.), 2022 NY Slip Op 01897, Fourth Dept 3-18-22

Practice Point: Although the specific allegations of neglect are not described in this decision, the criteria for a neglect finding are clearly explained.

NEGLECT, MOTHER'S MENTAL ILLNESS AND FAILURE TO TREAT IT.

EVIDENCE OF MOTHER'S MENTAL ILLNESS AND HER FAILURE TO PROPERLY TREAT IT WAS SUFFICIENT TO SUPPORT A FINDING OF NEGLECT, EVEN IN THE ABSENCE OF PROOF OF A SPECIFIC INSTANCE OF CHILD NEGLECT (SECOND DEPT).

The Second Department, reversing Family Court, determined the Administration for Children's Services (ACS) presented sufficient proof to support a finding of neglect based upon mother's mental illness (schizophrenia) which mother failed to properly treat. Evidence of an actual instance of child neglect is not necessary:

"Even though evidence of a parent's mental illness, alone, is insufficient to support a finding of neglect of a child, such evidence may be part of a neglect determination when the proof further demonstrates that the parent's condition creates an imminent risk of physical, mental, or emotional harm to the child" … . "Indeed, even when a child has not been actually impaired, a finding of neglect is appropriate to prevent imminent impairment, which is an independent and separate ground on which a neglect finding may be based" … . In such cases, the court is not required to wait until a child has already been harmed before it enters a neglect finding … . Proof of a parent's "ongoing mental illness and the failure to follow through with aftercare medication is a sufficient basis for a finding of neglect where such failure results in a parent's inability to care for [his or] her child in the foreseeable future" … . Matter of Khaleef M. S.-P. (Khaleeda M. S.), 2022 NY Slip Op 02124, Second Dept 3-30-22

Practice Point: Here the Second Department determined proof of mother's mental illness and her failure to properly treat it was sufficient to support a finding of child neglect, even the absence of a specific instance of child neglect.

NEGLECT, MOTION TO VACATE.

MOTHER'S MOTION TO VACATE THE NEGLECT FINDING SHOULD HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Family Court, determined mother's motion to vacate the neglect finding should have been granted:

… [T]he mother demonstrated good cause to modify the order of disposition and to vacate the order of fact-finding, which found that she neglected the children. The mother demonstrated her lack of a prior child protective history, her remorse and insight into how her actions affected the children, and her commitment to ameliorating the issues that led to the finding of neglect, including her compliance with court-ordered services and treatment … . In addition, she demonstrated that the requested relief was in the best interests of the children … . Matter of Nila S. (Priscilla S.), 2022 NY Slip Op 00670, Second Dept 2-2-22

NEGLECT, PERSON LEGALLY RESPONSIBLE FOR THE CHILD.

DESPITE THE ORDER OF PROTECTION EXCLUDING RESPONDENT FROM THE HOME, THE PETITIONER PRESENTED SUFFICIENT EVIDENCE RESPONDENT WAS A PERSON LEGALLY RESPONSIBLE FOR THE CHILD; PEITIONER DEMONSTRATED RESPONDENT HAD NEGLECTED THE CHILD BY COMMITTING DOMESTIC VIOLENCE IN THE CHILD'S PRESENCE (FIRST DEPT).

The First Department, reversing Family Court, determined the evidence demonstrated respondent was a person legally responsible (PLR) for the child and respondent neglected the child by committing domestic violence in the child's presence:

Petitioner demonstrated by a preponderance of the evidence that respondent was a person legally responsible (PLR) for the subject child, as well as for the child's three older siblings. Respondent and the children's mother were in a romantic

relationship and lived together before the child was born, and they both represented to caseworkers that respondent was the child's biological father. There is evidence that, although he was excluded from the home because of an order of protection against him, respondent maintained communication with the mother and slept at the home at least on occasion, sharing the mother's bed. Respondent failed to appear or testify to dispute the evidence that he was the child's biological father or a PLR for him … . The fact that respondent was excluded from the household before the child's birth as a result of having committed acts of excessive corporal punishment against the child's eldest sibling does not outweigh the evidence that demonstrates that he is a PLR for the child … . The finding that respondent is a PLR for the child is further supported by his failure to appear in court, "allowing the court to draw a negative inference against him" … . Matter of Tristian B. (Winston B.), 2022 NY Slip Op 00498, First Dept 1-27-22

ORDER-DECISION CONFLICT.

WHERE AN ORDER CONFLICTS WITH A DECISION, THE DECISION CONTROLS (FOURTH DEPT).

The Fourth Department, modifying Supreme Court in this post-judgment matrimonial case, determined the decision controls the discrepancy between the order and the decision:

… [B]oth parties expressly agreed in the oral stipulation that plaintiff's benefits would be distributed "[i]n accordance with the Majauskas formula." That oral stipulation was an unambiguous expression of the parties' intent to follow Majauskas, …

… [T]he amended order conflicts with the court's written decision insofar as the … amended order purports to award defendant 23.86% of a former spouse survivor annuity under 5 USC § 8341 (h) (1). The stated percentage represents defendant's share of plaintiff's gross monthly annuity, as calculated by the court pursuant to the Majauskas formula, but the court in its decision made no award to defendant of a former spouse survivor annuity, which, had it been awarded, would have expressly conflicted with the parties' agreement. Where, as here, there is a conflict between the decision and the order, the decision controls, and we therefore modify

the amended order accordingly … . Reukauf v Kraft, 2022 NY Slip Op 01898, Fourth Dept 3-18-22

Practice Point: If there is a conflict between an order and a decision, the decision controls.

POSTADOPTION CONTACT AGREEMENT, JUDGE TERMINATED BIOLOGICAL MOTHER'S VISITS.

THE BIOLOGICAL MOTHER AND THE ADOPTIVE MOTHER ENTERED A POSTADOPTION CONTACT AGREEMENT WHICH ALLOWED TWO SUPERVISED VISITS WITH THE BIOLOGICAL MOTHER PER YEAR; THE EVIDENCE OF THE CHILDREN'S BEHAVIOR AFTER VISITING WITH THE BIOLOGICAL MOTHER SUPPORTED FAMILY COURT'S CONCLUSION IT WAS IN THE BEST INTERESTS OF THE CHILDREN TO TERMINATE VISITATION WITH THE BIOLOGICAL MOTHER; THE DISSENT ARGUED THE EVIDENCE OF THE DAUGHTER'S, IN CONTRAST TO THE SON'S, POST-VISIT BEHAVIOR DID NOT SUPPORT TERMINATION OF VISITATION WITH THE DAUGHTER (THIRD DEPT).

The Third Department, over a two-justice partial dissent, determined Family Court properly terminated the biological mother's visitation with her children who had been adopted. The biological mother and the adoptive mother had entered a postadoption contact agreement which allowed the biological mother two supervised visits per year with her son and daughter. The evidence at the fact-finding hearing demonstrated that the son's behavior changed drastically after visits. His behavior was characterized as "out of control." There was evidence the daughter began banging her head and had nightmares after a visit. The dissent argued the evidence supported termination of visits with the son, but did not support the termination of visits with the daughter:

The adoptive mother testified that after visiting the biological mother in December 2017, the son destroyed rooms in the house and was completely out of control for close to a month. After the July 2018 visit with the biological mother, the son

"climb[ed] the walls in [his] classroom," hit his friend, hurt his sister and had difficulties regulating his behavior for several months. * * *

With respect to the dissent's reference to the policy concerns underlying postadoption contact agreements, we note that we wholeheartedly embrace and promote the policies and goals of these types of agreements and encourage open adoptions. However, it is not our intention to address the underlying policies of postadoption contact agreements, but, instead, to focus solely upon the principle governing and guiding the initiation and continuation of open contact between the children and the biological parent — the best interests of the children. Here, it is uncontroverted that the daughter displayed a persistent pattern of bizarre and harmful behavior — head banging and disrupted sleep due to nightmares — commensurate with visits with her biological mother. These behaviors continued for 1½ years. Although the daughter did not display the behaviors at the time of the visits, a time when the adoptive parents were present and the daughter's attention was directed toward other activities, the behaviors were manifested subsequent to each visit. … [W]e cannot agree that enforcing visitation with respect to one sibling but not the other serves the best interests of either. Matter of Jennifer JJ. v Jessica JJ., 2022 NY Slip Op 02043, Third Dept 3-24-22

Practice Point: The postadoption contact agreement allowing the biological mother to visit her children after adoption was properly terminated by the court because the evidence of the children's post-visit behavior supported the conclusion continued visitation was not in the best interests of the children.

SEPARATION AGREEMENT, FAMILY COURT DID NOT HAVE JURISDICTION TO MODIFY, AGREEMENT INCORPORATED BUT NOT MERGED INTO JUDGMENT OF DIVORCE.

FAMILY COURT DID NOT HAVE JURISDICTION TO MODIFY A SEPARATION AGREEMENT WHICH WAS INCORPORATED BUT NOT MERGED INTO THE JUDGMENT OF DIVORCE; A PLENARY ACTION IS REQUIRED (FIRST DEPT).

The First Department, reversing (modifying) Family Court, determined Family Court did not have jurisdiction to modify the separation agreement by putting a cap

on the child-support/spousal-support credit father was entitled to for his payment of the mortgage and apartment expenses:

A stipulation of settlement which is incorporated but not merged into the parties' judgment of divorce may be reformed only in a plenary action … . Family Court does not have jurisdiction to modify a separation agreement … . Under the terms of the parties' stipulation of settlement, the father is entitled to pay his $2,100 in monthly child support directly to the mortgagee of the parties' former marital apartment. However, the Family Court erred in capping the father's credit against support arrears at $25,200 per year based on this provision. Although Family Court found that there was no similar provision with respect to spousal support, in fact the parties' stipulation permits the father to also deduct the payment of apartment expenses, including the mortgage, from his spousal support. Accordingly, Family Court improperly amended the stipulation by imposing an annual maximum credit to which the father is entitled based solely on his child support obligation. Matter of Deborah K. v Richard K., 2022 NY Slip Op 01391, First Dept 3-3-22

SEXUAL ABUSE, DISCOVERY, JUDICIAL REVIEW OF CHILD'S MENTAL HEALTH RECORDS.

IN THIS SEXUAL ABUSE CASE, THE CHILD'S MENTAL HEALTH RECORDS SHOULD BE REVIEWED BY THE JUDGE IN CAMERA TO DETERMINE WHETHER ANY RECORDS ARE RELEVANT TO THE RESPONDENT'S CLAIM THE CHILD FABRICATED THE SEXUAL ABUSE ALLEGATIONS; FAMILY COURT PROPERLY DENIED RESPONDENT'S REQUEST FOR DISCOVERY OF THE RECORDS (FIRST DEPT).

The First Department, reversing (modifying) Family Court, held the judge properly denied discovery of the child's mental health records in this sexual abuse proceeding, but the judge should review the records in camera to determine if any records support respondent's position that the child fabricated the sexual abuse allegations:

Confidential mental health records may only be disclosed upon a finding by a court that "the interests of justice significantly outweigh the need for confidentiality" (Mental Hygiene Law § 33.13[c][1]). Pursuant to Family Court Act § 1038(d), the court must conduct a balancing test to weigh "the need of the [moving] party for the discovery to assist in the preparation of the case" against "any potential harm to the child [arising] from the discovery" … .

… [G]iven respondent's need to prepare his defense, his right to impeach the child's credibility as she is likely to be a witness, and the child's diminished interest in the confidentiality of older records from an institution that is not currently providing services to her, we find that an in camera review of the … records is warranted … . …

… [W]e find that the Family Court properly denied his request for those records … . Were a court to grant such a request on the sparse showing in this case, virtually every child's therapy records would be subject to exposure. Matter of Briany T. (Justino G.), 2022 NY Slip Op 00629, First Dept 2-1-22

TERMINATION OF PARENTAL RIGHTS, FATHER IMPROPERLY DENIED HIS RIGHT TO BE HEARD.

IN THIS TERMINATION OF PARENTAL RIGHTS PROCEEDING, ALTHOUGH FAMILY COURT THREATENED TO FIND RESPONDENT IN DEFAULT WHEN HE DID NOT PROVIDE PROOF HE FAILED TO APPEAR BECAUSE HE WAS HOSPITALIZED, FAMILY COURT DID NOT ULTIMATELY GIVE RESPONDENT A "DEFAULT WARNING;" RESPONDENT AND HIS COUNSEL WERE PRESENT AT THE FACT-FINDING BUT WERE PRECLUDED BY THE COURT FROM PARTICIPATING; RESPONDENT HAS A RIGHT TO BE HEARD ON THE ABANDONMENT ISSUE; REVERSED AND REMITTED (THIRD DEPT).

The Third Department, reversing Family Court, determined respondent father in this termination of parental rights proceeding was not in default and that he was entitled to present a defense. To explain his failure to appear, respondent said he was hospitalized but he did not provide any proof of hospitalization when the court

requested it. The court then found respondent to be in default and precluded respondent and his counsel from participating in the termination hearing:

Petitioner and the attorney for the child argue that the appeal must be dismissed because the challenged order was entered upon respondent's default. We disagree. In its written decision, Family Court stated that it had advised respondent's counsel at the December 18, 2019 appearance that, if the requested medical documentation was not timely provided, it "would find [respondent] in default" and "the trial would be an [i]nquest." Our review of the record, however, confirms that no such warning was given. Instead, the court cautioned that if respondent failed to comply, it would "proceed with the proceeding with regard to the termination of his parental rights." This is not a default warning but notice that the hearing would go forward on January 15, 2020. However frustrating respondent's noncompliance with the court's reasonable directive to provide documentation of his hospitalization may have been, the key point here is that respondent and his counsel were in attendance at the fact-finding hearing. We fully appreciate that trial courts are vested with broad authority to maintain the integrity of their calendars. Under the circumstances presented, however, we conclude that Family Court abused its discretion in holding respondent to be in default and precluding any participation at the hearing … . Matter of Makayla NN. (Charles NN.), 2022 NY Slip Op 02165, Third Dept 3-31-22

Practice Point: Here Family Court never gave a "default warning" to respondent father when he failed to provide proof he did not appear because he was hospitalized. Father, who was present at the fact-finding, should not have been found to be in default and precluded from participating in the termination of parental rights proceeding.

VISITATION ORDER, MOTHER DID NOT WILLFULLY VIOLATE THE ORDER.

MOTHER DID NOT WILLFULLY VIOLATE THE ORDER OF VISITATION; COVID MADE MEETING IN A PUBLIC PLACE DIFFICULT, THERE WAS CONFUSION ABOUT WHICH ORDER APPLIED, AND MOTHER RELIED ON HER ATTORNEY'S ADVICE (THIRD DEPT).

The Third Department, reversing Family Court, determined mother did not willfully violate an order of visitation. There was confusion about which order applied and mother relied on her attorney's advice:

The mother contends that Family Court abused its discretion when it found that she willfully violated the visitation order. Specifically, she asserts that she did not produce the child because the father unilaterally canceled visits, there was confusion over what order was in effect, and she relied upon the communications between the parties' attorneys to establish when the visitation would occur. * * *

… Family Court erred in finding that she willfully violated the order. Under these circumstances, where both parties testified as to the difficulties involved in having parenting time take place in a public venue during COVID-19, there was confusion among the parties as to which order was in effect at the time, and the mother relied on her attorney's advice, which had a sound basis … , it is clear that any violation was not willful. Matter of Damon B. v Amanda C., 2022 NY Slip Op 01082, Third Dept 2-17-22