NEW YORK APPELLATE DIGEST, LLC

Family Law Quarterly
Reversal Report
April – June 2022

An Organized Compilation of Summaries of Selected Decisions, Mostly Reversals, Addressing Family Law, Released by Our New York State Appellate Courts and Posted on the New York Appellate Digest Website April – June 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 Reversal Report.

Table of Contents

Contents

ADOPTION. 5

ALTHOUGH FATHER, WHO HAD BEEN IN THE MILITARY, HAD NOT PROCURED HOUSING FOR HIMSELF AND HIS UNDER-SIX-MONTH-OLD SON, HE DEMONSTRATED HE WAS WILLING AND ABLE TO CARE FOR THE CHILD; THEREFORE HIS CONSENT TO ADOPTION BY PETITIONERS-RESPONDENTS WAS REQUIRED AND CUSTODY WAS PROPERLY AWARDED TO HIM; THE DISSENT ARGUED FATHER'S FAILURE TO PROCURE HOUSING RENDERED HIM UNABLE TO CARE FOR THE CHILD (FOURTH DEPT). 5

APPEALS, INAUDIBLE RECORDED RECORD. 6

THE ELECTRONICALLY RECORDED HEARING INCLUDED 80 QUESTIONS POSED TO A WITNESS BY COUNSEL BUT ONLY FOUR ANSWERS WERE AUDIBLE; NEW HEARING WITH A STENOGRAPHER ORDERED (THIRD DEPT). 6

APPEALS, ATTORNEYS, DEFAULT. 7

ALTHOUGH FATHER FAILED TO APPEAR, HIS COUNSEL APPEARED AND FATHER WAS THEREFORE NOT IN DEFAULT; BECAUSE FATHER WAS NOT IN DEFAULT, APPEAL IS NOT PRECLUDED (FOURTH DEPT). 7

ATTORNEYS, INEFFECTIVE ASSISTANCE, NEGLECT. 7

MOTHER WAS ENTITLED TO A HEARING ON HER CLAIM SHE ADMITTED TO PERMANENT NEGLECT BECAUSE HER COUNSEL WAS INEFFECTIVE; MOTHER ALLEGED COUNSEL DID NOT INFORM HER OF THE RELEVANT BURDENS OF PROOF AT TRIAL (SECOND DEPT). 7

CUSTODY, APPEALS, JUDGES. 9

FAMILY COURT HELD A HEARING IN THE MODIFICATION OF CUSTODY PROCEEDING BUT DID NOT STATE IN ITS DECISION THE FACTS RELIED UPON TO DENY THE PETITION; THE APPELLATE DIVISION REVIEWED THE EVIDENCE, REVERSED FAMILY COURT, AND GRANTED MOTHER'S PETITION (SECOND DEPT). 9

CUSTODY, APPEALS. 10

CHANGED CIRCUMSTANCES BROUGHT TO THE APPELLATE COURT'S ATTENTION BY THE ATTORNEYS FOR THE CHILDREN RENDERED THE RECORD INSUFFICIENT FOR REVIEW OF THE CUSTODY RULING; MATTER REMITTED (SECOND DEPT). 10

Table of Contents

CUSTODY, ATTORNEYS. 11

THE EVIDENCE SUPPORTED FATHER'S PETITION FOR A MODIFICATION OF CUSTODY, REQUIRING A "BEST INTERESTS OF THE CHILD" HEARING; THE APPELLATE COURT ORDERED A "BEST INTERESTS" HEARING, INCLUDING A LINCOLN HEARING, AND ORDERED THE APPOINTMENT OF A NEW ATTORNEY FOR THE CHILD BECAUSE THE PRESENT ATTORNEY HAD EXPRESSED AN OPINION ON THE APPROPRIATE CUSTODY ARRANGEMENT (THIRD DEPT). 11

CUSTODY, EVIDENCE. 12

MOTHER FAILED TO APPEAR IN THE PROCEEDING TO DETERMINE FATHER'S PETITION FOR MODIFICATION OF CUSTODY; THE PETITION WAS GRANTED; BUT NO EVIDENCE WAS PRESENTED ON WHETHER MODIFICATION WAS IN THE BEST INTERESTS OF THE CHILDREN; MOTHER'S MOTION TO VACATE THE ORDER GRANTING FATHER'S PETITION SHOULD HAVE BEEN GRANTED (SECOND DEPT). ... 12

CUSTODY. 13

FATHER'S PETITION FOR A MODIFICATION OF CUSTODY SHOULD NOT HAVE BEEN DENIED WITHOUT A HEARING (THIRD DEPT). 13

CUSTODY. 14

THE PETITIONER SEEKING TO MODIFY A CUSTODY ARRANGEMENT MUST MAKE A THRESHOLD SHOWING THAT THERE HAS BEEN A CHANGE IN CIRCUMSTANCES SINCE THE LAST CUSTODY ORDER WAS ISSUED; HERE, FATHER'S WANTING MORE PARENTING TIME TO DEVELOP A CLOSER RELATIONSHIP WAS NOT A CHANGED CIRCUMSTANCE (THIRD DEPT). 14

DIVORCE, APPRECIATION OF VALUE OF PREMARITAL BUSINESS. 15

PLAINTIFF HUSBAND WAS ENTITLED TO 15% OF THE APPRECIATON OF THE WIFE'S PREMARITAL ART-GALLERY BUSINESS IN THIS DIVORCE PROCEEDING REQUIRING THE DISTRIBUTION OF A NUMBER OF SUBSTANTIAL ASSETS (FIRST DEPT). 15

DIVORCE, COLLEGE EXPENSES. 16

THE DIVORCE STIPULATION OF SETTLEMENT REQUIRED DEFENDANT TO PAY THE CHILDREN'S COLLEGE EXPENSES FOR FOUR YEARS AND DID NOT MENTION AN AGE CUT-OFF; SUPREME COURT SHOULD NOT HAVE DETERMINED DEFENDANT'S OBLIGATION CEASED AT AGE 21 (SECOND DEPT). 16

DIVORCE, MARITAL PROPERTY. 17

A REJECTED PURCHASE OFFER WAS NOT ADMISSIBLE AT TRIAL TO PROVE THE FAIR MARKET VALUE OF THE MARITAL RESIDENCE (FIRST DEPT). 17

Table of Contents

DIVORCE, PRENUPTIAL AGREEMENTS. 18

THE WIFE RAISED QUESTIONS OF FACT ABOUT (1) THE FAIRNESS OF THE NEGOTIATIONS FOR THE PRENUPTIAL AGREEMENT, (2) WHETHER HER ATTORNEY, CHOSEN FOR HER, ENGAGED IN MEANINGFUL NEGOTIATIONS, (3) WHETHER SHE RATIFIED THE AGREEMENT, AND (4) WHETHER SHE WAS ENTITLED TO TEMPORARY MAINTENANCE (THIRD DEPT). 18

FAMILY OFFENSES. 19

THE RELATIONSHIP BETWEEN PETITIONER AND RESPONDENT IN THIS FAMILY OFFENSE PROCEEDING MET THE DEFINITION OF "INTIMATE RELATIONSHIP" SUCH THAT FAMILY COURT HAD SUBJECT MATTER JURISDICTION (SECOND DEPT). 19

HOME VISITS, ATTORNEYS. 20

NO REASON MOTHER'S ATTORNEY COULD NOT BE PRESENT, EITHER IN PERSON OR ELECTRONICALLY, DURING A HOME VISIT BY THE ADMINISTRATION FOR CHILDREN'S SERVICES (ACS) (SECOND DEPT). 20

JUVENILE DELINQUENCY, DISMISSAL IN THE INTEREST OF JUSTICE. 21

THIS JUVENILE DELINQUENCY PROCEEDING STEMMED FROM ALLEGATIONS RESPONDENT COMMITTED VIOLENT ACTS AGAINST THE MOTHER OF HIS CHILD; THE PROCEEDING SHOULD NOT HAVE BEEN DISMISSED "IN FURTHERANCE OF JUSTICE;" CRITERIA EXPLAINED (THIRD DEPT). 21

JUVENILE DELIQUENCY, CONSTITUTIONAL LAW, DNA. 23

APPELLANT, 16, IN THIS JUVENILE DELINQUENY PROCEEDING, WAS BEING INTERROGATED ABOUT A ROBBERY WHEN HE DRANK WATER FROM A DISPOSABLE CUP; THE INTERROGATING OFFICER SENT THE CUP FOR DNA ANALYSIS; THERE WAS NO INVESTIGATORY PURPOSE FOR THE DNA COLLECTION; APPELLANT'S MOTION TO EXPUNGE THE DNA EVIDENCE SHOULD HAVE BEEN GRANTED (FIRST DEPT). 23

NEGLECT, CRITERIA FOR ORDERS OF PROTECTION. 24

IN THIS NEGLECT PROCEEDING AGAINST STEPMOTHER, THE STATUTORY REQUIREMENTS FOR THE ISSUANCE OF ORDERS OF PROTECTION IN FAVOR OF THE CHILDREN WERE NOT MET (FOURTH DEPT). . 24

NEGLECT, MARIJUANA USE. 25

MOTHER'S MARIJUANA USE DURING PREGNANCY AND THE FACT THAT MOTHER AND CHILD TESTED POSITIVE FOR MARIJUANA AT THE TIME OF THE CHILD'S BIRTH WERE NOT SUFFICIENT TO DEMONSTRATE NEGLECT; NEW YORK HAS LEGALIZED MARIJUANA USE (FIRST DEPT). 25

NEGLECT, TERMINATION OF PARENTAL RIGHTS, PLACEMENT. 26

FOR PURPOSES OF A PERMANENT NEGLECT/TERMINATION-OF-PARENTAL-RIGHTS PROCEEDING, DIRECT PLACEMENT OF THE CHILD WITH A SUITABLE PERSON MEETS THE DEFINITION OF PLACEMENT IN THE "CARE OF AN AUTHORIZED AGENCY" SUCH THAT A PERMANENT NEGLECT PROCEEDING IS AVAILABLE AFTER DIRECT PLACEMENT FOR ONE YEAR; ALTHOUGH RESPONDENT'S PARENTAL RIGHTS HAD BEEN TERMINATED WHEN THIS APPEAL WAS CONSIDERED, THE "EXCEPTION TO THE MOOTNESS DOCTRINE" WAS INVOKED (THIRD DEPT). 26

NEGLECT. 28

WHEN HER CHILDREN WERE ASLEEP, MOTHER WENT INTO THE BATHROOM, DRANK BRANDY, AND FELL ASLEEP; THERE WAS INSUFFICIENT EVIDENCE OF A THREAT OF IMMINENT HARM TO THE CHILDREN OR THAT THE CHILDREN SUFFERED ANY EMOTIONAL HARM; NEGLECT FINDING REVERSED (THIRD DEPT).. 28

PARENTAL RIGHTS, TERMINATION OF. 29

THE "ABANDONMENT" EVIDENCE WAS NOT SUFFICIENT; MOTHER'S PARENTAL RIGHTS SHOULD NOT HAVE BEEN TERMINATED (SECOND DEPT). 29

SPECIAL IMMIGRANT JUVENILE STATUS. 30

FAMILY COURT SHOULD HAVE MADE THE FINDING THAT PETITIONER'S REUNIFICATION WITH HER FATHER IN THE IVORY COAST WAS NOT VIABLE TO ENABLE HER TO APPLY FOR SPECIAL IMMIGRANT JUVENILE STATUS (SIJS) AND REMAIN IN THE US (SECOND DEPT). 30

SPECIAL IMMIGRANT JUVENILE STATUS. 31

FAMILY COURT SHOULD HAVE MADE FINDINGS TO ENABLE THE CHILD TO PETITION FOR SPECIAL IMMIGRANT JUVENILE STATUS (SIJS) SUCH THAT THE CHILD WOULD NOT BE RETURNED TO GUATEMALA (SECOND DEPT). 31

SUPPORT, JURISDICTION, OUT-OF-STATE ORDER. 32

THE ORIGINAL CHILD SUPPORT ORDER WAS ISSUED IN VIRGINIA, WHERE FATHER RESIDES; FATHER'S NEW YORK CHILD SUPPORT PETITION WAS ACTUALLY SEEKING MODIFICATION OF THE VIRGINIA ORDER; NEW YORK THEREFORE DID NOT HAVE JURISDICTION OVER FATHER'S PETITION (SECOND DEPT). 32

VISITATION, JUDGES, IMPROPER DELEGATION OF JUDICIAL AUTHORITY. 33

FAMILY COURT IMPROPERLY DELEGATED TO FATHER THE COURT'S AUTHORITY TO DETERMINE MOTHER'S ACCESS TO THE CHILD (SECOND DEPT). 33

VISITATION. 34

TERMINATION OF MOTHER'S SUPERVISED VISITATION IS A "DRASTIC REMEDY" WHICH MUST BE SUPPORTED BY "SUBSTANTIAL PROOF" CONTINUED VISITATION "WOULD BE HARMFUL TO THE CHILD;" THE PROOF HERE DID NOT MEET THOSE CRITERIA (THIRD DEPT). 34

ADOPTION.

ALTHOUGH FATHER, WHO HAD BEEN IN THE MILITARY, HAD NOT PROCURED HOUSING FOR HIMSELF AND HIS UNDER-SIX-MONTH-OLD SON, HE DEMONSTRATED HE WAS WILLING AND ABLE TO CARE FOR THE CHILD; THEREFORE HIS CONSENT TO ADOPTION BY PETITIONERS-RESPONDENTS WAS REQUIRED AND CUSTODY WAS PROPERLY AWARDED TO HIM; THE DISSENT ARGUED FATHER'S FAILURE TO PROCURE HOUSING RENDERED HIM UNABLE TO CARE FOR THE CHILD (FOURTH DEPT).

The Fourth Department, over a dissent, determined father demonstrated he is willing and able to enter a full relationship with his under-six-year-old child and, therefore, his consent to adoption by the petitioners-respondents was required and he was properly awarded custody of the child. The dissent argued father, who was in the military, made no attempt to procure housing for himself and the child and, therefore, did not demonstrate he was able to care for the child:

We … disagree with our dissenting colleague and conclude that the father established his ability to assume custody of the child. Contrary to the position of the dissent and petitioners, custody and housing are separate and distinct concepts. A parent who lacks housing for a child is not legally precluded from obtaining custody. Certainly, active military members should not lose custody of a child due to their service to our country. Many parents enlist the aid of family members to help them provide housing, including single parents who serve in the military. That

temporary inability to provide housing should not preclude them from asserting their custodial rights to the children where, as here, they have established their intent to embrace their parental responsibility. Matter of William, 2022 NY Slip Op 03831, Fourth Dept 6-9-22

Practice Point: The Fourth Department noted that custody and housing are separate and distinct concepts. Although father, who had been in the military, had not procured housing for himself and the child, he demonstrated he was willing and able to care for the child. Therefore his consent to adoption by the petitioners-respondents was required and custody was properly awarded to him.

JUNE 09, 2022

APPEALS, INAUDIBLE RECORDED RECORD.

THE ELECTRONICALLY RECORDED HEARING INCLUDED 80 QUESTIONS POSED TO A WITNESS BY COUNSEL BUT ONLY FOUR ANSWERS WERE AUDIBLE; NEW HEARING WITH A STENOGRAPHER ORDERED (THIRD DEPT).

The Third Department determined the record on appeal was insufficient and ordered a new hearing with a stenographer. The hearing was electronically recorded. Counsel ask a witness 80 questions but only four answers were audible. Matter of Jereline Z. v Joseph AA., 2022 NY Slip Op 02848, Third Dept 4-28-22

Practice Point: If a hearing is electronically recorded but most of a significant witness's answers are inaudible, the appeal cannot be considered. Here a new hearing with a stenographer was ordered.

APRIL 28, 2022

APPEALS, ATTORNEYS, DEFAULT.

ALTHOUGH FATHER FAILED TO APPEAR, HIS COUNSEL APPEARED AND FATHER WAS THEREFORE NOT IN DEFAULT; BECAUSE FATHER WAS NOT IN DEFAULT, APPEAL IS NOT PRECLUDED (FOURTH DEPT).

The Fourth Department, vacating the portions of the order entered on default, determined father's failure to appear was not a default because his counsel appeared. Because father was not in default, appeal is not precluded:

We agree with the father that Family Court erred in entering the order upon his default based on his failure to appear in court. The record establishes that the father "was represented by counsel, and we have previously determined that, [w]here a party fails to appear [in court on a scheduled date] but is represented by counsel, the order is not one entered upon the default of the aggrieved party and appeal is not precluded" … . Matter of Akol v Afet, 2022 NY Slip Op 03641, Fourth Dept 6-3-22

Practice Point: When counsel appears in Family Court, the party represented by counsel is not in default. An appeal is available to a party not in default.

JUNE 03, 2022

ATTORNEYS, INEFFECTIVE ASSISTANCE, NEGLECT.

MOTHER WAS ENTITLED TO A HEARING ON HER CLAIM SHE ADMITTED TO PERMANENT NEGLECT BECAUSE HER COUNSEL WAS INEFFECTIVE; MOTHER ALLEGED COUNSEL DID NOT INFORM HER OF THE RELEVANT BURDENS OF PROOF AT TRIAL (SECOND DEPT).

The Second Department, reversing Family Court, determined mother was entitled to a hearing on whether her counsel was ineffective in failing to inform her of the applicable burdens of proof and in allowing her to admit to permanent neglect:

"'A respondent in a proceeding pursuant to Social Services Law § 384-b has the right to the assistance of counsel (see Family Ct Act § 262[a][iv]), which encompasses the right to the effective assistance of counsel'" … . "[T]he statutory right to counsel under Family Court Act § 262 affords protections equivalent to the constitutional standard of effective assistance of counsel afforded to defendants in criminal proceedings" … . Effective assistance is predicated on the standard of "meaningful representation" … .

… [M]other submitted an affidavit alleging that, prior to entering her admission to permanent neglect, counsel failed to inform her of the burden and standard of proof at trial and that she made the admission "because [she] was advised that it was necessary in order to have [her] children returned." She further alleged that she "would not have made the statements that [she] made to the court if [she] had been fully advised of [her] rights." The Family Court did not ameliorate these purported deficiencies in its colloquy with the mother, and also omitted any reference to the possible consequences of the finding, including termination of her parental rights … . Matter of Skylar P. J., 2022 NY Slip Op 02793, Second Dept 4-27-22

Practice Point: A party in a neglect proceeding has a right to effective assistance of counsel. Here mother was entitled to a hearing on her claim she would not have admitted to permanent neglect had she been informed of the relevant burdens of proof at trial.

APRIL 27, 2022

CUSTODY, APPEALS, JUDGES.

FAMILY COURT HELD A HEARING IN THE MODIFICATION OF CUSTODY PROCEEDING BUT DID NOT STATE IN ITS DECISION THE FACTS RELIED UPON TO DENY THE PETITION; THE APPELLATE DIVISION REVIEWED THE EVIDENCE, REVERSED FAMILY COURT, AND GRANTED MOTHER'S PETITION (SECOND DEPT).

The Second Department, reversing Family Court, determined mother's petition to modify custody should have been granted. Family Court held a hearing but did not, in its decision, state the facts relied upon to deny the petition. Because the record was sufficient, the Second Department exercised its authority to review the evidence and make its own determination:

… [T]o facilitate effective appellate review, the hearing court "must state in its decision 'the facts it deems essential' to its determination" … .

… [W]hile the Family Court stated in its decision that the allegations in the mother's petition "largely stem from the difficulties that the parties have in co-parenting which predate her petition," and that "both parties contribute to continuing the conflict between one another," the court did not identify the facts adduced at the hearing that supported its denial of the mother's petition. … . …

The evidence at the hearing showed that, on numerous occasions after the issuance of the 2018 custody order, the father, in the child's presence, denigrated the mother and behaved inappropriately toward her … . The father consistently failed to make the child available for telephone and video calls with the mother as required by the original custody order, routinely ignored the mother's attempted communications with the child, and repeatedly failed to adhere to the court-ordered parental access schedule … . The hearing testimony established that the father not only refused to foster a good relationship between the mother and the child—he expressly testified that he did not believe he had an obligation to do so—but actively sought to thwart such a relationship. "Parental alienation of a child from the other parent is an act so inconsistent with the best interests of the child[ ] as to, per se, raise a strong probability that the offending party is unfit to act as custodial parent" …

… [T]he father demonstrated a lack of interest in the child's education and development by, among other things, refusing to have the child evaluated for learning disabilities or treated for his speech impediment … . … [T]he father failed to respond to the mother's inquiries about the child's health, education, and safety. Matter of Smith v Francis, 2022 NY Slip Op 04026, Second Dept 6-22-22

Practice Point: After a hearing on a petition to modify custody, Family Court, in its decision, must, but did not, state the facts relied upon in making its ruling denying the petition. The appellate division exercised its authority to review the evidence and make its own determination (reversing Family Court and granting mother's petition for residential custody).

JUNE 22, 2022

CUSTODY, APPEALS.

CHANGED CIRCUMSTANCES BROUGHT TO THE APPELLATE COURT'S ATTENTION BY THE ATTORNEYS FOR THE CHILDREN RENDERED THE RECORD INSUFFICIENT FOR REVIEW OF THE CUSTODY RULING; MATTER REMITTED (SECOND DEPT).

The Second Department determined changed circumstances brought to the Second Department's attention by the attorneys for children rendered the appellate record insufficient for review of Family Court's custody ruling. The matter was remitted:

… [T]he Family Court determined that it was in the best interests of the children for the mother to have sole residential custody. However, the respective attorneys for the children, in their briefs submitted to this Court, have brought to this Court's attention certain alleged new developments since the order under review was issued in June 2019. As the Court of Appeals has recognized, changed circumstances may have particular significance in child custody matters and may render the record on appeal insufficient to review whether a child custody determination is still in the best interests of the children … . Matter of Fitzsimmons v Fitzsimmons, 2022 NY Slip Op 02411, Second Dept 4-13-22

Practice Point: In a child custody case, changed circumstances may render the record on appeal insufficient. Here the attorneys for the children brought the changed circumstances to the attention of the appellate court in their briefs and the court remitted the matter to Family Court.

APRIL 13, 2022

CUSTODY, ATTORNEYS.

THE EVIDENCE SUPPORTED FATHER'S PETITION FOR A MODIFICATION OF CUSTODY, REQUIRING A "BEST INTERESTS OF THE CHILD" HEARING; THE APPELLATE COURT ORDERED A "BEST INTERESTS" HEARING, INCLUDING A LINCOLN HEARING, AND ORDERED THE APPOINTMENT OF A NEW ATTORNEY FOR THE CHILD BECAUSE THE PRESENT ATTORNEY HAD EXPRESSED AN OPINION ON THE APPROPRIATE CUSTODY ARRANGEMENT (THIRD DEPT).

The Third Department, reversing (modifying) Family Court, determined father had demonstrated a change in circumstances sufficient to support a modification of the custody arrangement. The original custody order provided that the 50/50 custody sharing would change to mother's having primary custody when the child started school. Father explained that mother's primary custody was necessary because his work prevented him from taking the child to and from school. However, father had since changed jobs and moved to the school district where the child attended to school. The Third Department ordered a "best interests of the child" hearing, including a Lincoln hearing, and ordered the appointment of a different attorney for the child because the present attorney had expressed an opinion about the appropriate custody arrangement:

"A party seeking to modify a prior order of custody must show that there has been a change in circumstances since the prior order and, then, if such a change occurred, that the best interests of the child would be served by a modification of that order" … . According to the father's petition, the sole reason for the parties' initial agreement to decrease the father's parenting time during the school year was

because, at the time of the agreement, the father's work schedule prevented him from transporting the child to and from school. According to the father's hearing testimony, that circumstance had since changed. The father testified that, while the 50/50 custody arrangement was still in effect, he obtained a new job with a higher salary and more flexible hours, and bought a house in what was at that time the child's school district, such that the school transportation issue had been alleviated. Matter of Thomas SS. v Alicia TT., 2022 NY Slip Op 04213, Third Dept 6-30-22

Practice Point: This case is an example of evidence which is deemed sufficient to support a modification of custody such that a "best interests of the child" hearing should be held. Here, as part of the "best interests" fact-finding, the Third Department ordered that a Lincoln hearing be held and that a different attorney for the child be appointed because the present attorney had expressed an opinion on custody.

JUNE 30, 2022

CUSTODY, EVIDENCE.

MOTHER FAILED TO APPEAR IN THE PROCEEDING TO DETERMINE FATHER'S PETITION FOR MODIFICATION OF CUSTODY; THE PETITION WAS GRANTED; BUT NO EVIDENCE WAS PRESENTED ON WHETHER MODIFICATION WAS IN THE BEST INTERESTS OF THE CHILDREN; MOTHER'S MOTION TO VACATE THE ORDER GRANTING FATHER'S PETITION SHOULD HAVE BEEN GRANTED (SECOND DEPT).

The Second Department, reversing Family Court, determined the judge should not have granted father's petition for a modification of custody upon mother's failure to appear. No evidence was taken on whether modification was in the best interests of the children. Mother's motion to vacate the order should have been granted:

"A custody determination, whether made upon the default of a party or not, must always have a sound and substantial basis in the record" … .

… Family Court … granted the father's oral application and modified the order of custody and visitation … , so as to grant the father relief which far exceeded that requested in his petition, without first receiving any testimony or other admissible evidence in the matter upon which it could determine whether modification was required to protect the best interests of the children. Under these circumstances, and in light of the policy favoring resolutions on the merits in child custody proceedings, the court improvidently exercised its discretion in denying the mother's motion to vacate the final order of custody and visitation … . Matter of Hogan v Smith, 2022 NY Slip Op 03894, Second Dept 6-15-22

Practice Point: Even when mother fails to appear in the proceeding to determine father's petition for modification of custody, the petition should not be granted in the absence of evidence modification in in the best interests of the children.

JUNE 15, 2022

CUSTODY.

FATHER'S PETITION FOR A MODIFICATION OF CUSTODY SHOULD NOT HAVE BEEN DENIED WITHOUT A HEARING (THIRD DEPT).

The Third Department, reversing Family Court, determined the court should have held a hearing on father's petition for a modification of custody:

… [T]he father alleged … that, since the prior order, he has relocated to a small, quiet apartment but now has a lengthy commute each way to exercise his parenting time, the child wishes to spend more time with him and the prior order provides him with a limited amount of a parenting time when considering the progress he has made to care for the child. Family Court sua sponte dismissed the father's petition without prejudice, finding that the father failed to allege a sufficient change in circumstances. The father appeals.

Family Court erred in dismissing the petition without holding a hearing. "A parent seeking to modify a prior order of custody and visitation is required to demonstrate that a change in circumstances has occurred since entry thereof that then warrants the court engaging in an analysis as to the best interests of the child" … . "While

not every petition in a Family Ct Act article 6 proceeding is automatically entitled to a hearing" … , "[g]enerally, where a facially sufficient petition has been filed, modification of a Family Ct Act article 6 custody order requires a full and comprehensive hearing at which a parent is to be afforded a full and fair opportunity to be heard" … . Matter of Neil VV. v Joanne WW., 2022 NY Slip Op 03557, Third Dept 6-2-22

Practice Point: Where, as here, a facially sufficient petition for a modification of custody had been filed, petitioner is entitled to a hearing.

JUNE 02, 2022

CUSTODY.

THE PETITIONER SEEKING TO MODIFY A CUSTODY ARRANGEMENT MUST MAKE A THRESHOLD SHOWING THAT THERE HAS BEEN A CHANGE IN CIRCUMSTANCES SINCE THE LAST CUSTODY ORDER WAS ISSUED; HERE, FATHER'S WANTING MORE PARENTING TIME TO DEVELOP A CLOSER RELATIONSHIP WAS NOT A CHANGED CIRCUMSTANCE (THIRD DEPT).

The Third Department, reversing Family Court, determined father did not meet his burden of showing changed circumstances warranting an increase in parenting time. Father's simply wanting more parenting time is not a changed circumstance:

Family Court found that a change in circumstances existed — namely, that the father wanted to have a closer relationship with the child and the amount of parenting time provided in the January 2019 order was insufficient to develop that relationship. Even crediting the father's testimony, the father's mere dissatisfaction with the amount of parenting time provided in the January 2019 order and the desire for more time do not constitute a change in circumstances … .. Furthermore, the record fails to show any "new developments or changes that have occurred since the [January 2019] order was entered" … . Accordingly, because the father did not satisfy his threshold burden of establishing a change in circumstances, the modification petition should have been dismissed … . Matter of Joshua KK. v Jaime LL., 2022 NY Slip Op 02847, Third Dept 4-28-22

Practice Point: A party seeking a modification of a custody order must make a threshold showing of changed circumstances. Here father's wanting more parenting time to develop a closer relationship was not a changed circumstance. Therefore father's petition should have been dismissed.

APRIL 28, 2022

DIVORCE, APPRECIATION OF VALUE OF PREMARITAL BUSINESS.

PLAINTIFF HUSBAND WAS ENTITLED TO 15% OF THE APPRECIATON OF THE WIFE'S PREMARITAL ART-GALLERY BUSINESS IN THIS DIVORCE PROCEEDING REQUIRING THE DISTRIBUTION OF A NUMBER OF SUBSTANTIAL ASSETS (FIRST DEPT).

The First Department, in a full-fledged opinion by Justice Gesmer, modified some of some of Supreme Court's distribution of marital assets in this divorce action. The opinion is too detailed, and addressed too many substantial assets to be fairly summarized here. With respect to the valuation of the husband's portion of the appreciation of the wife's art gallery, AWI, founded before the marriage, the First Department wrote:

… [P]laintiff met his burden to show that the appreciation in value of defendant's pre-marital business, AWI, during the marriage constituted marital property subject to distribution … . …

An award to plaintiff of significantly less than half of the marital portion of AWI is justified by the following facts: defendant started her business years before she met plaintiff; plaintiff was not involved with defendant's acquisition or sale of art; plaintiff's conduct was at times problematic and even a hindrance to defendant's business success; plaintiff's contributions to the marriage diminished over time; and defendant will bear substantial tax consequences when she sells art to pay plaintiff a distributive award (see Domestic Relations Law § 236[B][5][d][7], [8], [11]; see also Cotton, 170 AD3d at 596). * * * Considering all of the circumstances, we find that plaintiff's share of AWI's appreciation during the

marriage should be 15%, or $3,486,821 … . Culman v Boesky, 2022 NY Slip Op 03440, First Dept 5-26-22

Practice Point: In this complex divorce action involving may substantial assets, based upon the husband's limited participation in the wife's pre-marital art-gallery business, the husband was entitled to 15% of the appreciation of the business during the marriage.

MAY 26, 2022

DIVORCE, COLLEGE EXPENSES.

THE DIVORCE STIPULATION OF SETTLEMENT REQUIRED DEFENDANT TO PAY THE CHILDREN'S COLLEGE EXPENSES FOR FOUR YEARS AND DID NOT MENTION AN AGE CUT-OFF; SUPREME COURT SHOULD NOT HAVE DETERMINED DEFENDANT'S OBLIGATION CEASED AT AGE 21 (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the stipulation of settlement in the divorce stated that defendant would pay the children's college expenses for four years with no mention of a cut-off at age 21. Supreme Court should not have ruled that the obligation ceased when the child turned 21:

… [T]he stipulation clearly and unambiguously required the defendant to pay 50% of the costs and expenses for each child's college education for a total of four years, though his obligation to contribute to room and board expenses would be offset by any child support payments he made during that time. Contrary to the defendant's contention, no age limitation or restriction was placed on his obligation to pay his share of these costs and expenses, and the stipulation cannot be fairly interpreted to provide that this obligation terminated upon the child's emancipation … . Pape v Pape, 2022 NY Slip Op 03246, Second Dept 5-18-22

Practice Point: Here the divorce stipulation of settlement clearly stated defendant was obligated to pay the children's college expenses for four years. Supreme Court should not have ruled the obligation ceased at age 21.

MAY 18, 2022

DIVORCE, MARITAL PROPERTY.

A REJECTED PURCHASE OFFER WAS NOT ADMISSIBLE AT TRIAL TO PROVE THE FAIR MARKET VALUE OF THE MARITAL RESIDENCE (FIRST DEPT).

The First Department, reversing (modifying) Supreme Court in this divorce case, determined a purchase offer was not admissible to show the fair market value of the marital residence:

Order … which … granted plaintiff's motion to set a minimum net value for marital real property located in Southampton, New York, at $20 million for equitable distribution purposes, unanimously reversed … .

With respect to the parties' Southampton marital property, we find that the court erred in imposing a minimum value based on a purchase offer of $20 million rejected by defendant, as evidence of an offer to purchase is generally inadmissible at trial to show fair market value … . Lauren S. v Alexander S., 2022 NY Slip Op 03462, First Dept 5-26-22

Practice Point: In a divorce action, a rejected purchase offer was not admissible at trial to prove the fair market value of a marital residence.

MAY 26, 2022

DIVORCE, PRENUPTIAL AGREEMENTS.

THE WIFE RAISED QUESTIONS OF FACT ABOUT (1) THE FAIRNESS OF THE NEGOTIATIONS FOR THE PRENUPTIAL AGREEMENT, (2) WHETHER HER ATTORNEY, CHOSEN FOR HER, ENGAGED IN MEANINGFUL NEGOTIATIONS, (3) WHETHER SHE RATIFIED THE AGREEMENT, AND (4) WHETHER SHE WAS ENTITLED TO TEMPORARY MAINTENANCE (THIRD DEPT).

The Third Department, reversing Supreme Court, determined the wife raised questions of fact about the fairness of the prenuptial agreement negotiations and whether she ratified the agreement. The wife alleged her husband chose the attorney who represented her merely to ensure she understood the agreement and not to negotiate its terms. In addition, Supreme Court should not have denied the wife's motion for temporary maintenance:

On the last day of negotiations between counsel, the wife averred that she was preparing to travel to Florida with the parties' children. While the communications submitted by the husband in support of his motion indicate that counsel for the parties continued discussing potential changes to the agreement, there is conflicting evidence establishing the extent that the wife was meaningfully involved in those discussions. The wife further averred that the first opportunity she had to review the agreement was in Florida, at which point it was already in its final form. We find that the foregoing facts, if established, raise issues concerning whether the wife was meaningfully represented during the abbreviated negotiations, and also raise an inference that the husband did not intend on engaging in a good faith negotiation of the agreement from the outset, which, if true, would be sufficient to establish overreaching on his part … . …

We further … the husband's contention that the wife ratified the agreement and is therefore foreclosed from challenging its validity. … [I]t is clear that the wife did not begin receiving benefits under the agreement until the husband commenced this divorce action, and she took sufficiently prompt action to challenge the validity of the agreement in the context of this litigation … . …

… Supreme Court improperly denied the wife's cross motion for temporary maintenance. To this end, the wife argues that the maintenance provision of the

agreement must be invalidated for failing to comply with the requirements of Domestic Relations Law former § 236 (B) (5-a) (f). We agree. Spiegel v Spiegel, 2022 NY Slip Op 03778, Third Dept 6-9-22

Practice Point: Here in this divorce action there were questions of fact whether the wife was meaningfully represented in the prenuptial-agreement negotiations and whether she ratified the agreement. In addition, pursuant to the Domestic Relation Law, Supreme Court should have awarded temporary maintenance.

JUNE 09, 2022

FAMILY OFFENSES.

THE RELATIONSHIP BETWEEN PETITIONER AND RESPONDENT IN THIS FAMILY OFFENSE PROCEEDING MET THE DEFINITION OF "INTIMATE RELATIONSHIP" SUCH THAT FAMILY COURT HAD SUBJECT MATTER JURISDICTION (SECOND DEPT).

The Second Department, reversing Family Court, determined the family-offense petition should not have been dismissed for lack of subject matter jurisdiction. The Second Department determined the respondent met the "intimate relationship" criteria which provided Family Court with subject matter jurisdiction:

"[T]he determination as to whether persons are or have been in an 'intimate relationship' within the meaning of Family Court Act § 812(1)(e) is a fact-specific determination which may require a hearing" … . Although Family Court Act § 812(1)(e) expressly excludes a "casual acquaintance" and "ordinary fraternization between two individuals in business or social contexts" from the definition of "intimate relationship," "the legislature left it to the courts to determine on a case-by-case basis what qualifies as an intimate relationship within the meaning of Family Court Act § 812(1)(e) based upon consideration of factors such as 'the nature or type of relationship, regardless of whether the relationship is sexual in nature; the frequency of interaction between the persons; and the duration of the relationship'" …. .

… [T]he record demonstrated that the petitioner knew the respondent for more than 20 years, and the respondent and the petitioner's sister held themselves out as husband and wife. During that period of time, the petitioner and the respondent engaged in general social activities at each other's homes, attended holiday and birthday celebrations together, and traveled together. The petitioner's sister and the respondent had a daughter together who identified the petitioner as her aunt. The petitioner resided in one of the units of a three-family home. The petitioner's sister, the respondent, and their daughter, who was approximately 18 years old at the time of the hearing, resided in one of the other units of that three-family home. The home was owned by the mother of the petitioner and the petitioner's sister. Under the circumstances, the Family Court should have denied the respondent's application to dismiss the petition for lack of subject matter jurisdiction (see Family Ct Act § 812[1]). Matter of Charter v Allen, 2022 NY Slip Op 04167, Second Dept 6-29-22

Practice Point: This case demonstrates that an "intimate relationship" which gives Family Court subject matter jurisdiction in a family offense proceeding need not be a sexual relationship.

JUNE 29, 2022

HOME VISITS, ATTORNEYS.

NO REASON MOTHER'S ATTORNEY COULD NOT BE PRESENT, EITHER IN PERSON OR ELECTRONICALLY, DURING A HOME VISIT BY THE ADMINISTRATION FOR CHILDREN'S SERVICES (ACS) (SECOND DEPT).

The Second Department, reversing Family Court, determined there was no reason mother's attorney could not be present, either in person of electronically, during a home visit by the Administration for Children's Services (ACS):

Where, as here, the Family Court issued an order temporarily releasing a child who is the subject of a neglect proceeding to a parent pending a final order of disposition (see Family Ct Act § 1027[d]), the order may include a direction for the parent to "cooperat[e] in making the child available for . . . visits by the child

protective agency, including visits in the home" (id. § 1017[3]). However, there are no provisions of the Family Court Act—nor does ACS cite to any other authority—prohibiting a respondent in a proceeding pursuant to Family Court Act article 10 from having counsel present during a home visit. Thus, the respondent is not automatically prohibited from having an attorney—or any other individual—present in her home during the home visit, either in person or electronically. Matter of Lexis B. (Natalia B.), 2022 NY Slip Op 03721, Second Dept 6-8-22

Practice Point: The Administration for Children's Services (ASC) did not cite any authority for its attempt to preclude mother's attorney from being present, either in person or electronically, during ASC's home visits.

JUNE 08, 2022

JUVENILE DELINQUENCY, DISMISSAL IN THE INTEREST OF JUSTICE.

THIS JUVENILE DELINQUENCY PROCEEDING STEMMED FROM ALLEGATIONS RESPONDENT COMMITTED VIOLENT ACTS AGAINST THE MOTHER OF HIS CHILD; THE PROCEEDING SHOULD NOT HAVE BEEN DISMISSED "IN FURTHERANCE OF JUSTICE;" CRITERIA EXPLAINED (THIRD DEPT).

The Third Department, reversing Family Court, determined this juvenile delinquency proceeding should not have been dismissed "in furtherance of justice." The respondent was charged with acts of violence against the mother of his child:

Dismissal in the furtherance of justice is an extraordinary remedy that must be employed "sparingly, that is, only in those rare cases where there is a compelling factor which clearly demonstrates that prosecution . . . would be an injustice" … . In determining such a motion, the statutory factors which must be considered, individually and collectively, are as follows: "(a) the seriousness and circumstances of the crime; (b) the extent of harm caused by the crime; (c) any exceptionally serious misconduct of law enforcement personnel in the investigation and arrest of the respondent or in the presentment of the petition; (d) the history, character and condition of the respondent; (e) the needs and best interest of the

respondent; (f) the need for protection of the community; and (g) any other relevant fact indicating that a finding would serve no useful purpose" … . "At least one of these factors must be readily identifiable and sufficiently compelling to support the dismissal" …

According to the sworn statement of the victim — the mother of respondent's child — respondent became verbally abusive toward her when she got pregnant, and physically abusive after their child was born, including pinching, punching and slapping her, once when she was holding the child. On the date in question, respondent threw a full, eight-ounce baby bottle at the victim, which hit her in the face, when she asked him to feed the child, who was crying. The victim stated that, although she was bleeding heavily, respondent and his father discouraged her from seeking medical attention. When she eventually did go to the hospital the next day, a cut on her face was glued shut by a doctor and she was told to return for X rays after the swelling had abated. The victim indicated that she felt unsafe living with the child in the home of respondent and his father. Matter of James JJ., 2022 NY Slip Op 03555, Third Dept 6-2-22

Practice Point: The allegations of violence in this juvenile delinquency proceeding were deemed too serious to warrant dismissal of the juvenile delinquency proceeding "in furtherance of justice." This remedy should be used sparingly and at least one of the statutory factors for dismissal in furtherance of justice must be readily identifiable.

JUNE 02, 2022

JUVENILE DELIQUENCY, CONSTITUTIONAL LAW, DNA.

APPELLANT, 16, IN THIS JUVENILE DELINQUENY PROCEEDING, WAS BEING INTERROGATED ABOUT A ROBBERY WHEN HE DRANK WATER FROM A DISPOSABLE CUP; THE INTERROGATING OFFICER SENT THE CUP FOR DNA ANALYSIS; THERE WAS NO INVESTIGATORY PURPOSE FOR THE DNA COLLECTION; APPELLANT'S MOTION TO EXPUNGE THE DNA EVIDENCE SHOULD HAVE BEEN GRANTED (FIRST DEPT).

The First Department, in a full-fledged opinion by Justice Mendez, over a dissent, reversing Family Court, determined appellant's motion to expunge all DNA evidence collected from him in this juvenile delinquency proceeding should have been granted. When appellant,16, was being interrogated by the police about a robbery, he was given a disposable cup from which he drank water. The cup was then sent by the interrogating officer for DNA analysis. No DNA had been collected from the robbery scene, so there was no investigatory purpose for collection of appellant's DNA:

A juvenile delinquency adjudication, just as a youthful offender adjudication, is not a criminal conviction and a juvenile delinquent should not be denominated a criminal by reason of such adjudication … . A juvenile delinquent is not and should not be afforded fewer adjudication protections than a youthful offender or an adult in the equivalent circumstances … . Family Court, therefore, has the discretion to order the expungement of appellant's DNA and any other documents related to the testing of his DNA sample. * * *

It has not been established that appellant purposefully divested himself of the cup or his DNA, thereby relinquishing his expectation of privacy. Nor has it been established that he waived, impliedly or explicitly, his constitutional rights to that expectation. * * *

DNA evidence obtained after an arrest should be material and relevant and should have a link to the charges for which the individual is arrested. There must be an articulable basis to obtain this DNA evidence and a correlation to the investigation or prosecution of the charged offense. That articulable basis to obtain appellant's DNA is lacking here. * * *

Under the totality of the circumstances, maintaining appellant's DNA profile in OCME's database in perpetuity is completely incompatible with the statutory goal and would result in a substantial injustice to the appellant. Matter of Francis O., 2022 NY Slip Op 03969, First Dept 6-16-22.

Practice Point: Here the appellant was 16 when he was interrogated by the police. He drank water from a paper cup. The interrogating officer sent the cup for DNA analysis. There was no investigative purpose for the DNA collection. The appellant did not abandon the cup and did not waive his privacy interest in it. His constitutional rights were therefore violated by the collection of his DNA and he was entitled to expungement of the DNA evidence.

JUNE 16, 2022

NEGLECT, CRITERIA FOR ORDERS OF PROTECTION.

IN THIS NEGLECT PROCEEDING AGAINST STEPMOTHER, THE STATUTORY REQUIREMENTS FOR THE ISSUANCE OF ORDERS OF PROTECTION IN FAVOR OF THE CHILDREN WERE NOT MET (FOURTH DEPT).

The Fourth Department, vacating the five-year orders of protection in favor of the children (re: respondent stepmother) in this neglect proceeding, determined the statutory criteria for issuance of the orders of protection were not met:

… [T]he stepmother contends that the court erred in issuing orders of protection in favor of the children with a duration of five years. We agree, and we therefore reverse the orders of protection … . In an article 10 proceeding, the court may issue an order of protection, but such order shall expire no later than the expiration date of "such other order made under this part, except as provided in subdivision four of this section" (Family Ct Act § 1056 [1]). Subdivision (4) of section 1056 allows a court to issue an independent order of protection until a child's 18th birthday, but only against a person "who was a member of the child's household or a person legally responsible . . . , and who is no longer a member of such household at the time of the disposition and who is not related by blood or marriage to the child or a member of the child's household." Here, the orders of

protection do not comply with Family Court Act § 1056 (1) and (4) because no other dispositional orders were issued with respect to the children at the time the court issued the orders of protection and the stepmother, although no longer living in the home, remains married to the children's mother … . Moreover, the court erred in issuing the dispositional orders of protection without first holding a dispositional hearing. "The Family Court Act directs that a dispositional hearing be held as a condition precedent to the entry of a dispositional order such as the order of protection granted by Family Court here" … . Matter of Kayla K. (Emma P.-T.), 2022 NY Slip Op 02668, Fourth Dept 4-22-22

APRIL 22, 2022

NEGLECT, MARIJUANA USE.

MOTHER'S MARIJUANA USE DURING PREGNANCY AND THE FACT THAT MOTHER AND CHILD TESTED POSITIVE FOR MARIJUANA AT THE TIME OF THE CHILD'S BIRTH WERE NOT SUFFICIENT TO DEMONSTRATE NEGLECT; NEW YORK HAS LEGALIZED MARIJUANA USE (FIRST DEPT).

The First Department, reversing Family Court, determined mother's marijuana use during pregnancy, and the fact that mother and the child tested positive for marijuana at the time of birth, were insufficient to demonstrate neglect:

… [T]he evidence that the mother smoked marijuana while pregnant with her youngest daughter, and that the mother and child both tested positive for marijuana at the time of the birth, is insufficient, in and of itself, to sustain a finding that the child was physically, mentally or emotionally impaired, or was in imminent danger of being impaired … . Here, as acknowledged by the agency, there was no evidence that the mother's marijuana use impacted her judgment or behavior, or that the child was impaired or placed in imminent risk of impairment by the mother's drug use … . Furthermore, the finding of neglect based solely on use of marijuana, without a finding of actual or imminent impairment of the child's physical or emotional condition, is inconsistent with this State's public policy legalizing marijuana, as reflected in the recent amendment to the Family Court Act

(Family Court Act § 1046[a][iii] …). Matter of Saaphire A.W. (Lakesha B.), 2022 NY Slip Op 02382, First Dept 4-12-22

Practice Point: Because marijuana use has been legalized, proof mother smoked marijuana and mother and child tested positive for marijuana at the time of birth was not enough to demonstrate neglect. There must be proof, for example, that mother's judgment was affected or the child was harmed in some way.

APRIL 12, 2022

NEGLECT, TERMINATION OF PARENTAL RIGHTS, PLACEMENT.

FOR PURPOSES OF A PERMANENT NEGLECT/TERMINATION-OF-PARENTAL-RIGHTS PROCEEDING, DIRECT PLACEMENT OF THE CHILD WITH A SUITABLE PERSON MEETS THE DEFINITION OF PLACEMENT IN THE "CARE OF AN AUTHORIZED AGENCY" SUCH THAT A PERMANENT NEGLECT PROCEEDING IS AVAILABLE AFTER DIRECT PLACEMENT FOR ONE YEAR; ALTHOUGH RESPONDENT'S PARENTAL RIGHTS HAD BEEN TERMINATED WHEN THIS APPEAL WAS CONSIDERED, THE "EXCEPTION TO THE MOOTNESS DOCTRINE" WAS INVOKED (THIRD DEPT).

The Third Department, considering the appeal as an exception to the mootness doctrine in this neglect/termination-of-parental rights proceeding, determined that direct placement of the child with a suitable person met the definition of placement in the "care of an authorized agency" for purposes of the pre-requisite for a permanent neglect proceeding seeking to terminate parental rights. Family Court had ruled placement with a suitable person was not placement in the "care of an authorized agency" and dismissed the permanent neglect proceeding on that ground. The Third Department, after finding the permanent neglect proceeding should not have been dismissed, went ahead and ruled on the merits, finding that mother had permanently neglected the child:

… [W]e find Family Court's interpretation of Social Services Law § 384-b too narrow and calling for a result that is "unnecessarily circuitous" … and ultimately

contrary to the stated legislative intent (see generally Social Services Law § 384-b [1] [a]-[b]). A proceeding for termination of parental rights may be originated by an "authorized agency" such as petitioner … , seeking an order for guardianship and custody when a child is a permanently neglected child … . A "permanently neglected child" is defined as "a child who is in the care of an authorized agency and whose parent or custodian has failed for a period of either at least one year or [15] out of the most recent [22] months . . . substantially and continuously or repeatedly to maintain contact with or plan for the future of the child, although physically and financially able to do so, notwithstanding the agency's diligent efforts to encourage and strengthen the parental relationship when such efforts will not be detrimental to the best interests of the child" … .

Regarding the phrase "care of an authorized agency," courts have consistently held that a direct placement authorized by Family Court, like the order of fact-finding and disposition issued … pursuant to Family Ct Act § 1055, falls within the purview of Social Services Law § 384-b. Matter of Frank Q. (Laurie R.), 2022 NY Slip Op 02843, Third Dept 4-28-22

Practice Point: For purposes of the prerequisite for a permanent neglect/termination-of-parental rights proceeding, a child's direct placement with a suitable person meets the definition of placement in the "care of an authorized agency" such that the permanent neglect proceeding is available after direct placement for one year. Here, the mother's parental rights had been terminated at the time the appeal was considered, but the "exception to the mootness doctrine" was invoked because the issue was deemed likely to recur.

APRIL 28, 2022

NEGLECT.

WHEN HER CHILDREN WERE ASLEEP, MOTHER WENT INTO THE BATHROOM, DRANK BRANDY, AND FELL ASLEEP; THERE WAS INSUFFICIENT EVIDENCE OF A THREAT OF IMMINENT HARM TO THE CHILDREN OR THAT THE CHILDREN SUFFERED ANY EMOTIONAL HARM; NEGLECT FINDING REVERSED (THIRD DEPT).

The Third Department, reversing Family Court, over a dissent, determined the neglect finding against mother was not supported by evidence of a threat of imminent harm to the children. While the children were sleeping, mother went into the bathroom, drank brandy and fell asleep:

… [W]e find that petitioner failed to establish that respondent's ill-advised conduct placed the children at risk of anything beyond, "at most, possible harm" … . To this point, respondent testified that her youngest children were in age-appropriate sleeping arrangements that presented no inherent danger resulting from respondent's inebriated state … . Further, although there was a period when the children were no longer supervised by respondent when she was taken to the hospital, the testimony reveals that shelter staff were watching the children until petitioner's supervisor arrived and took custody of them, and there is no indication that they were in any danger during this period of time … .

… [T]he record is devoid of any proof that the children were upset or suffered any emotional harm at any point during the incident … . Matter of Hakeem S. (Sarah U.), 2022 NY Slip Op 04214, Third Dept 6-30-22

Practice Point: Children are not neglected unless there is a threat of imminent harm or actual harm. Here mother went into the bathroom, drank brandy and fell asleep while her children were asleep. The neglect finding was reversed.

JUNE 30, 2022

PARENTAL RIGHTS, TERMINATION OF.

THE "ABANDONMENT" EVIDENCE WAS NOT SUFFICIENT; MOTHER'S PARENTAL RIGHTS SHOULD NOT HAVE BEEN TERMINATED (SECOND DEPT).

The Second Department, reversing Family Court, determined the petitioner did not prove mother had abandoned her children. Mother's parental rights should not have been terminated:

… [T]he petitioner failed to establish by clear and convincing evidence that the mother evinced an intent to forego her parental rights. The record demonstrates that, during the six-month abandonment period, the mother visited with the children on two occasions, saw the children on at least one additional occasion at a family gathering, purchased clothing for the children, spoke with the case worker on the phone multiple times, and objected to the goal for the children's placement changing to a kinship adoption rather than returning the children to the mother. Under these circumstances, the Family Court should have denied the petitions on the merits, insofar as asserted against the mother … . We further note that the record contains testimony from a case worker that, during family visits subsequent to the filing of the petitions, the mother's interactions with the children were "very positive." "While a parent's conduct outside the abandonment period is not determinative in an abandonment proceeding, it may be relevant to assessing parental intent" … . Matter of Grace E. W.-F. (Zanovia W.), 2022 NY Slip Op 03119, Second Dept 5-11-22

Practice Point: The petitioner did not present clear and convincing evidence that mother abandoned her children. The termination of parental rights petition should not have have been granted. Mother had visited the children, seen the children at a family gathering, purchased clothing for the children and frequently talked to the case worker.

MAY 11, 2022

SPECIAL IMMIGRANT JUVENILE STATUS.

FAMILY COURT SHOULD HAVE MADE THE FINDING THAT PETITIONER'S REUNIFICATION WITH HER FATHER IN THE IVORY COAST WAS NOT VIABLE TO ENABLE HER TO APPLY FOR SPECIAL IMMIGRANT JUVENILE STATUS (SIJS) AND REMAIN IN THE US (SECOND DEPT).

The First Department, reversing (modifying) Family Court, determined Family Court should have found reunification with petitioner's father in the Ivory Coast was not viable. Petitioner, 16 years old, sought findings from Family Court which would allow her to apply for special immigrant juvenile status (SIJS) and remain in the United States:

Family Court erred in not making any findings of fact as to reunification with petitioner's father. Exercising our power to review the record and to make our own factual determinations … , we find that the record supports a finding that reunification of petitioner with her father, respondent Lassina D., is not viable due to neglect within the meaning of Family Court Act § 1012 (f)(i) (A)—(B). Petitioner's testimony shows that the father did not meet the minimal degree of care since he did not provide for her medical and emotional needs while she was in the Ivory Coast, and has not contributed to her financial support or maintained regular contact with her since she has been in the United States … Her uncontroverted testimony also supports a finding of neglect based on the father's excessive use of corporal punishment … .Matter of Sara D. v Lassina D., 2022 NY Slip Op 04119, First Dept 6-28-22

Practice Point: Family Court can be petitioned to make findings which will allow a juvenile to apply for special immigrant juvenile status in order to avoid deportation to the juvenile's home country. Here the court was asked to make findings that reunification with the petitioner's parents is not viable. The First Department found that father had neglected petitioner and she therefore could not be returned to his care.

JUNE 28, 2022

SPECIAL IMMIGRANT JUVENILE STATUS.

FAMILY COURT SHOULD HAVE MADE FINDINGS TO ENABLE THE CHILD TO PETITION FOR SPECIAL IMMIGRANT JUVENILE STATUS (SIJS) SUCH THAT THE CHILD WOULD NOT BE RETURNED TO GUATEMALA (SECOND DEPT).

The Second Department, reversing Family Court, determined Family Court should have made findings to enable the child to petition for special immigrant juvenile status (SIJS) such that the child would not be returned to Guatemala:

… [A] special immigrant juvenile is a resident alien who … is under 21 years of age, unmarried, and dependent upon a juvenile court or legally committed to an individual appointed by a state or juvenile court. … [F]or a child to qualify for SIJS, a court must find that reunification of the child with one or both parents is not viable due to parental abuse, neglect, abandonment, or a similar basis found under state law … , and that it would not be in the child's best interests to be returned to his or her country of nationality or country of last habitual residence … . …

The Family Court should have granted that branch of the child's motion which was for a specific finding that reunification with his father is not viable due to parental neglect. Based upon our independent factual review, the record demonstrates that the child's father physically and emotionally mistreated the child, and prevented him from attending school for more than one year and on other occasions without a reasonable justification, and that the child's mother failed to protect him from such mistreatment. Thus, the record supports the requisite finding that reunification with the child's father is not viable due to parental neglect … . Matter of Jose F. M. P. (Francisco D. M. G.), 2022 NY Slip Op 02414, Second Dept 4-13-22

APRIL 13, 2022

SUPPORT, JURISDICTION, OUT-OF-STATE ORDER.

THE ORIGINAL CHILD SUPPORT ORDER WAS ISSUED IN VIRGINIA, WHERE FATHER RESIDES; FATHER'S NEW YORK CHILD SUPPORT PETITION WAS ACTUALLY SEEKING MODIFICATION OF THE VIRGINIA ORDER; NEW YORK THEREFORE DID NOT HAVE JURISDICTION OVER FATHER'S PETITION (SECOND DEPT).

The Second Department, reversing Family Court, determined New York did not haver jurisdiction over father's petition for child support. The original child support order was issued in Virginia, where father resides. Therefore the New York petition was a petition for modification of the Virginia order, which cannot be addressed by a New York court:

The mother and the father are the parents of a child who was born in the Commonwealth of Virginia in 2007. In September 2020, the father commenced the instant proceeding in New York for child support pursuant to the Uniform Interstate Family Support Act (Family Ct Act art 5-B; hereinafter UIFSA). * * *

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

Here … support for the parties' child was previously awarded to the mother in an order issued by a court within the jurisdiction of the Commonwealth of Virginia prior to the filing of the father's petition. Accordingly … his petition was in the nature of a "modification" petition, rather than a "de novo" application … . Since the father resides in the Commonwealth of Virginia, that entity retains continuing, exclusive jurisdiction of its child support order, and New York does not have jurisdiction to modify it … . Matter of Salim v Freeman, 2022 NY Slip Op 02268, Second Dept 4-6-22

Practice Point: The original child support order was issued in Virginia, where father resides. Father's New York petition for child support, therefore, was not a

"de novo" petition, but rather was a petition for modification of the Virginia order, which a New York court cannot entertain.

APRIL 06, 2022

VISITATION, JUDGES, IMPROPER DELEGATION OF JUDICIAL AUTHORITY.

FAMILY COURT IMPROPERLY DELEGATED TO FATHER THE COURT'S AUTHORITY TO DETERMINE MOTHER'S ACCESS TO THE CHILD (SECOND DEPT).

The Second Department, reversing (modifying) Family Court, determined father should not have been given the power to suspend mother's access to the child:

… [T]he Family Court erred in including two provisions in the order appealed from that effectively allow the father to determine whether parental access with the mother should be suspended. These provisions do not appear to give the mother the opportunity to judicially challenge the father's determinations concerning her compliance with the Personalized Recovery Oriented Services (PROS) program or whether she had unsupervised parental access with the child … , and, consequently, constitute an improper delegation of authority by the Family Court to the father to determine when the child can have parental access time with the mother … . Matter of Felgueiras v Cabral, 2022 NY Slip Op 02410, Second Dept 4-13-22

Practice Point: Here Family Court should not have allowed father to control mother's access to the child—an improper delegation of the court's authority.

APRIL 13, 2022

VISITATION.

TERMINATION OF MOTHER'S SUPERVISED VISITATION IS A "DRASTIC REMEDY" WHICH MUST BE SUPPORTED BY "SUBSTANTIAL PROOF" CONTINUED VISITATION "WOULD BE HARMFUL TO THE CHILD;" THE PROOF HERE DID NOT MEET THOSE CRITERIA (THIRD DEPT).

The Third Department determined the evidence did not support the "drastic remedy" of terminating mother's supervised visitation with the child:

Although Family Court found that both the mother and the father "testified credi[]bly that relations between the mother and child ha[d] deteriorated" — a determination that was borne out by the testimony — the "denial of visitation to a noncustodial parent is a drastic remedy" … and the record does not contain "substantial proof" that continued supervised visitation "would be harmful to the child" … . We are mindful of the father's testimony that the child had returned home from a visit with bent glasses and marks on his leg. However, Family Court did not make any factual findings regarding these allegations, and the maternal grandfather — who drove the child home from that visit — denied ever observing the child's glasses to be "messed up" or witnessing marks on the child's legs. On this record, there is an insufficient basis to conclude that the bent glasses and marks observed by the father were caused by the mother's conduct. Moreover, while the mother herself acknowledged that there were issues in the relationship between her and the child, she indicated that this stemmed from the child's difficult behavior and her concern about the child making racist comments in front of his three-year-old half-sibling. There was also testimony regarding the positive aspects of their relationship and the maternal grandfather, who did all the driving, corroborated that the child generally seemed content during visits. Notwithstanding the father's testimony to the contrary, we conclude that the evidence presented was not sufficiently compelling and substantial to justify a wholesale suspension of the mother's supervised visitation … . Matter of William V. v Christine W., 2022 NY Slip Op 04199, Third Dept 6-30-22

Practice Point: The termination of supervised visitation is a "drastic remedy" which requires "substantial proof" continued visitation "would be harmful to the child." The proof was lacking in this case.

JUNE 30, 2022