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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 October – December 2022. The Entries in the Table of Contents Link to the Summaries Which Link to the Full 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.

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APPEALS, DEFECTIVE AUDIO RECORDING, RECONSTRUCTION HEARING.

A MALFUNCTION OF THE AUDIO RECORDING DEVICE MADE IT IMPOSSIBLE TO TRANSCRIBE PORTIONS OF THE TRIAL; THE APPELLATE COURT SENT THE MATTER BACK FOR A RECONSTRUCTION HEARING (FOURTH DEPT).

The Fourth Department, sending the matrimonial action back for a reconstruction hearing, determined the inability to transcribe portions of the audio recording prejudiced the parties:

"Parties to an appeal are entitled to have that record show the facts as they really happened at trial, and should not be prejudiced by an error or omission of the stenographer" or the audio recording device … . Here, contrary to the court's determination, the record establishes that significant portions of the testimony of plaintiff and defendant, including testimony related to child custody and certain other issues, could not be transcribed due to malfunctions of the audio recording system, which would preclude meaningful appellate review of those issues . To the extent that they are properly before us, we have considered and rejected the parties' remaining contentions. We therefore reverse the order, grant the motion,

and remit the matter to Supreme Court to hold a reconstruction hearing with the parties and any witnesses or evidence the court deems helpful in reconstructing, if possible, those portions of the testimony of plaintiff and defendant that could not be transcribed … . Wagner v Wagner, 2022 NY Slip Op 06600, Fourth Dept 11-18-22

Practice Point: If a recording device malfunctions making it impossible to transcribe portions of a trial, the appellate court may send the matter back to reconstruct the missing parts of the record.

NOVEMBER 18, 2022

CHILD SUPPORT, MONEY JUDGMENTS.

ALTHOUGH FATHER DEMONSTRATED HIS FAILURE TO PAY CHILD SUPPORT WAS NOT WILLFUL, FAMILY COURT SHOULD HAVE ENTERED A MONEY JUDGMENT BASED ON HIS FAILURE TO OBEY THE LAWFUL ORDER OF CHILD SUPPORT (SECOND DEPT).

The Second Department, modifying Family Court, determined that although father demonstrated his failure to pay child support was not willful, a money judgment for father's failure to obey a lawful order of child support should have been entered:

"Proof of failure to pay child support as ordered constitutes prima facie evidence of willful violation of an order of support" … . Here, the mother presented evidence at the hearing of the father's failure to pay child support as ordered. Specifically, the mother presented evidence that the father had made only one child support payment during the relevant period, and that he owed basic child support in the sum of $19,591.43. Therefore, the mother met her prima facie burden … .

The burden then shifted to the father to offer some competent, credible evidence that his failure to pay child support in accordance with the order was not willful … . The father testified, and presented proof, that he intended to pay, but his employer and/or the Support Collection Unit had not properly followed through with the

wage garnishment procedure. The Support Magistrate found the father's testimony credible. "Great deference should be given to the credibility determinations of the Support Magistrate, who is in the best position to assess the credibility of the witnesses" … .. Under the circumstances of this case, the father's showing was sufficient to establish that his failure to pay was not willful.

Nevertheless, as there was competent proof at the hearing that the father failed to obey a lawful order of child support (see Family Ct Act § 454[1]), a money judgment should be entered in favor of the mother for the amount of child support arrears that accrued during the relevant period … . Matter of Santman v Schonfeldt, 2022 NY Slip Op 05693, Second Dept 10-12-22

Practice Point: Here father demonstrated his failure to pay child support was not willful. But the court still should have entered a money judgment against father based upon his failure to obey a lawful order of child support.

OCTOBER 12, 2022

CHILD VICTIMS ACT, FAMILY SERVICES AS DEFENDANT.

PLAINTIFF, IN THIS CHILD VICTIMS ACT SUIT, ALLEGED HE WAS ABUSED BY AN EMPLOYEE OF FAMILY SERVICES OF WESTCHESTER (FSW) AND BROUGHT CAUSES OF ACTION FOR NEGLIGENT HIRING AND NEGLIGENT SUPERVISION AGAINST FSW; THOSE CAUSES OF ACTION WERE DISMISSED FOR FAILURE TO SUFFICIENTLY ALLEGE FSW WAS AWARE OF THE EMPLOYEE'S PROPENSITY TO COMMIT THE WRONGFUL ACTS ALLEGED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined plaintiff's negligence hiring and negligent supervision causes of action against Family Services of Westchester (FSW) should have been dismissed. Plaintiff, in this Child Victims Act suit, alleged he was abused by a youth mentor employed by FSW when he was 10 – 12 years old:

To sustain a cause of action sounding in negligent supervision of a child under the alleged facts of this case, the plaintiff must establish that the defendant "had sufficiently specific knowledge or notice of the dangerous conduct which caused injury; that is, that the third-party acts could reasonably have been anticipated" … . Similarly, "'[t]o establish a cause of action based on negligent hiring, negligent retention, or negligent supervision [of an employee], it must be shown that the employer knew or should have known of the employee's propensity for the conduct which caused the injury'" … .

Here, the complaint failed to state a cause of action to recover damages for negligent supervision of the plaintiff, since it failed to sufficiently allege that the third party acts were foreseeable … . Similarly, the complaint failed to state causes of action to recover damages for negligent hiring and negligent training and supervision related to the plaintiff's alleged youth mentor, since it failed to sufficiently allege that FSW knew, or should have known, of a propensity on the part of the youth mentor to commit the alleged wrongful acts … . Fuller v Family Servs. of Westchester, Inc., 2022 NY Slip Op 05992, Second Dept 10-26-22

Practice Point: Here in this Child Victims Act suit alleging abuse by an employee of Family Services of Westchester (FSW), the complaint did not state causes of action against FSW for negligent hiring or negligent supervision because the complaint did not sufficiently allege FSW was aware of the employee's propensity for the wrongful conduct alleged.

OCTOBER 26, 2022

CHILD VICTIMS ACT, FOSTER CARE RECORDS.

IN THIS CHILD VICTIMS ACT SUIT ALLEGING ABUSE BY AN EMPLOYEE OF A GROUP FOSTER HOME, THE JUDGE SHOULD HAVE HELD A DISCOVERABILITY HEARING BEFORE DETERMINING WHICH FOSTER-CARE RECORDS WERE DISCOVERABLE (SECOND DEPT).

The Second Department, reversing Supreme Court in this Child Victims Act case, determined the judge should have held a discoverability hearing before which

foster-care records could be released to the plaintiff. Plaintiff alleged he was abused in 1991 and 1992 by an employee of a group foster home (Little Flower):

Social Services Law § 372(3) requires "authorized agenc[ies]," including Little Flower, to "generate and keep records of those [children] who are placed in [their] care" … . Foster care records are deemed confidential (see Social Services Law § 372[3]), "considering that they must contain individualized and often highly personal information about the [children]" … . The confidential nature of such records serves "[t]o safeguard both the child and [his or her] natural parents" … , as well as others who may be "the subjects of such records" … . Although foster care records are entitled to a presumption of confidentiality, they may nonetheless be deemed discoverable pursuant to the provisions of CPLR article 31 … . Moreover, since "[the] statutory confidentiality requirement is intended [in part] to protect the privacy of children in foster care," it should not be used "to prevent former foster children from obtaining access to their own records" … , although this does not mean that they are always entitled to unfettered disclosure thereof. Even when considering a request for disclosure from a former foster child, "[a]n agency [may] move for a protective order where some part of the record should not be produced" … . * * *

Supreme Court improvidently exercised its discretion when it declined to conduct a discoverability hearing before deciding that branch of Little Flower's motion which sought a protective order regarding the purportedly confidential portions of the records. We therefore remit the matter to the Supreme Court, Nassau County, to conduct such a hearing and to "clearly specify the grounds for its denial or approval of disclosure with respect to each document or category of documents" … . Cowan v Nassau County Dept. of Social Servs., 2022 NY Slip Op 05989, Second Dept 10-26-22

Practice Point: Here, in this Child Victims Act suit, the judge should have held a discoverability hearing before deciding which foster-care records could be released to plaintiff. Plaintiff alleged he was abused in 1991 and 1992 by an employee of a group foster home.

OCTOBER 26, 2022

CRIMINAL LAW, RAISE THE AGE ACT, TRANSFER TO FAMILY COURT.

BG, AN ADOLESCENT OFFENDER (AO) WITHIN THE MEANING OF THE "RAISE THE AGE ACT," ASSAULTED A MAN AND THREW HIM ON THE SUBWAY TRACKS; A BYSTANDER JUMPED DOWN TO HELP THE ASSAULT VICTIM; THE BYSTANDER WAS KILLED BY A SUBWAY TRAIN WHICH STOPPED BEFORE REACHING THE ASSAULT VICTIM; THE JUDGE RULED THE MATTER SHOULD BE TRANSFERRED TO FAMILY COURT; THE PEOPLE SOUGHT A WRIT OF PROHIBITION WHICH WAS DENIED (FIRST DEPT).

The First Department denied the People's request for a writ of prohibition to prevent respondent judge from sending a criminal case involving an adolescent offender (AO) to Family Court pursuant to the "Raise the Age Law." In criminal matters involving AO's the Raise the Age Law allows judges to decide whether the matter should heard in Family Court. Here BG, the AO, assaulted the victim in a subway station and threw the victim on the tracks. A bystander jumped down to try to help the victim. The train was able to stop before reaching the assault victim, but the bystander who tried to help the victim was killed by the train:

Justice Semaj rejected the People's argument that BG engaged in "heinous" conduct by pushing the surviving victim onto the tracks and leaving him there unconscious, observing that this argument was "rebutted by the video footage offered by the People," which showed that the surviving victim "was conscious at the time he was pushed on to the tracks and even if he became unconscious once on the tracks, [BG] and another young person are seen going into the tracks and seemingly moving [him], possibly inadvertently, but . . . out of harm's way." The court further noted that Hueston [the bystander] chose to jump onto the train tracks, and that BG left after he "was told to leave by [Hueston]." … . * * *

"A writ of prohibition against a judge may be issued only when a court acts or threatens to act without jurisdiction in a matter of which it has no power over the subject matter or where it exceeds its authorized powers in a proceeding over which it has jurisdiction" … . "Prohibition cannot be used merely to correct errors of law, however egregious and however unreviewable" … . The Court of Appeals has stressed that, in the context of criminal proceedings, the writ should be issued "only when a court exceeds its jurisdiction or authorized power in such a manner

as to implicate the legality of the entire proceeding, as for example, the prosecution of a crime committed beyond the county's geographic jurisdiction" … . "Although the distinction between legal errors and actions in excess of power is not always easily made, abuses of power may be identified by their impact upon the entire proceeding as distinguished from an error in a proceeding itself" … . Matter of Clark v Boyle, 2022 NY Slip Op 06316, First Dept 11-10-22

Practice Point: Pursuant to the "Raise the Age Law" criminal cases involving adolescent offenders (AO's) are reviewed by a judge who can chose to have the case heard in Family Court. The AO in this case assaulted a man and threw him onto subway tracks. The man survived but a bystander who tried to help him was killed by the train. The People sought a writ of prohibition to prevent the transfer to Family Court. The First Department laid out the strict criteria for a writ of prohibition and denied it.

NOVEMBER 10, 2022

CUSTODY, APPEALS.

CHANGED CIRCUMSTANCES RENDERED THE RECORD ON APPEAL INADEQUATE IN THIS CHILD CUSTODY CASE; MATTER SENT BACK TO FAMILY COURT FOR A HEARING (SECOND DEPT).

The Second Department, reversing Family Court, determined that changed circumstances brought to the court's attention by the attorney for the child in this child custody matter rendered the record on appeal in sufficient. The matter was sent back for a hearing:

… [N]ew developments have arisen since the orders appealed from were issued, which have been brought to this Court's attention by the attorney for the child and acknowledged by the father. These developments include the father's incarceration, allegations of neglect against the father, and the Family Court's issuance of an order temporarily placing the child in the custody of the child's paternal grandmother. As the Court of Appeals has recognized, changed circumstances may have particular significance in child custody matters and may

render a record on appeal insufficient to review whether the Family Court's determination is still in the best interests of the child … . In light of the new developments brought to this Court's attention, the record is no longer sufficient to review whether the Family Court's determination regarding custody and parental access is in the best interests of the child … . Matter of Baker v James, 2022 NY Slip Op 06125, Second Dept 11-2-22

Practice Point: Where changed circumstance in a child custody case render the record on appeal inadequate, the appellate court will sent the case back to Family Court for a hearing.

NOVEMBER 02, 2022

CUSTODY, ATTORNEYS, INEFFECTIVE ASSISTANCE.

A CHILD IN A CUSTODY PROCEEDING IS ENTITLED TO EFFECTIVE ASSISTANCE OF COUNSEL BY THE ATTORNEY-FOR-THE-CHILD (AFC), WHICH INCLUDES ADVOCATING THE CHILD'S POSITION EVEN IF THE AFC DISAGREES (FOURTH DEPT).

The Fourth Department, reversing Family Court, determined the child received ineffective assistance in this modification of custody proceeding. With a couple of exceptions, even if the attorney-for-the-child (AFC) doesn't agree with it, he or she must argue the child's position:

… [T]he AFC "must zealously advocate the child's position" (22 NYCRR 7.2 [d]). "[I]n ascertaining the child's position, the [AFC] must consult with and advise the child to the extent of and in a manner consistent with the child's capacities, and have a thorough knowledge of the child's circumstances" (22 NYCRR 7.2 [d] [1]). "[I]f the child is capable of knowing, voluntary and considered judgment, the [AFC] should be directed by the wishes of the child, even if the [AFC] believes that what the child wants is not in the child's best interests" (22 NYCRR 7.2 [d] [2]). There are two exceptions, not relevant here, where the child lacks the capacity for knowing, voluntary and considered judgment, or following the child's wishes is

likel… y to result in a substantial risk of imminent, serious harm to the child (see 22 NYCRR 7.2 [d] [3]).

… [A] child in an article 6 custody proceeding is entitled to effective assistance of counsel … , which requires the AFC to take an active role in the proceeding … .

Here, the AFC at trial made his client's wish that there be a change in custody known to the court, but he did not "zealously advocate the child's position" (22 NYCRR 7.2 [d] …). He did not cross-examine the mother, the police officers, or the school social worker called by the father, and we agree with the AFC on appeal that the trial AFC's cross-examination of the father was designed to elicit unfavorable testimony related to the father, thus undermining the child's position . His questioning also seemed designed to show that there was no change in circumstances since the entry of the last order. Further, he submitted an email to the court in response to the mother's motion to dismiss in which he stated his opinion that there had been no change in circumstances, which again went against his client's wishes … . Matter of Sloma v Saya, 2022 NY Slip Op 06587, Fourth Dept 11-18-22

Practice Point: The attorney-for-the-child (AFC), absent two exceptions not relevant to this case, must argue the child's position in a modification of custody proceeding even if he or she disagrees. Here the AFC didn't cross-examine witnesses whose testimony was unfavorable to the child's position and questioned witnesses in a manner which elicited testimony against the child' position. The child was not afforded effective assistance of counsel.

NOVEMBER 18, 2022

CUSTODY, BEST INTERESTS RULING.

FAMILY COURT'S BEST INTERESTS RULING IN THIS MODIFICATION OF CUSTODY PROCEEDING DID NOT HAVE A SOUND AND SUBSTANTIAL BASIS IN THE RECORD; THE APPELLATE DIVISION AWARDED PRIMARY PHYSICAL CUSTODY TO MOTHER (THIRD DEPT).

The Third Department, reversing Family Court, determined mother's petition for a modification of custody should have been granted:

Having concluded that Family Court's determination lacks a sound and substantial basis in the record, we are empowered to make our own independent determination of the child's best interests, and our authority in that regard is as broad as that of Family Court … . In reviewing the record, we note that the mother testified without contradiction that she does not abuse alcohol or drugs, and while she previously struggled with her mental health, the hearing evidence showed that she has overcome that challenge and achieved a stable home life. By contrast, we find problematic the evidence of the father's regular drinking in the child's presence and his apparent lack of candor during the DWI assessment, as well as the dirty and unkempt condition of his apartment. We also find significant the strong position of the appellate attorney for the child in support of the mother's petition … . In light of the foregoing, we hold that the child's best interests are served by having the parents continue to share joint legal custody but awarding primary physical custody to the mother, with parenting time for the father as the parties shall mutually agree … . Matter of Brittni P. v Michael P., 2022 NY Slip Op 06667, Third Dept 11-23-22

Practice Point: The appellate court, reversing Family Court, held the evidence did not support Family Court's best interests ruling continuing primary physical custody with father. The appellate court undertook its own analysis of the record and awarded primary physical custody to mother.

NOVEMBER 23, 2022

CUSTODY, CHANGE IN CIRCUMSTANCES.

THE DETERIORATION OF THE RELATIONSHIP BETWEEN FATHER AND MOTHER WAS A SUFFICIENT CHANGE IN CIRCUMSTANCES TO WARRANT AN INQUIRY RE: FATHER'S PETITION FOR A MODIFICATION OF CUSTODY; AFTER CONSIDERING THE MERITS, THE APPELLATE COURT AWARDED SOLE CUSTODY TO FATHER (FOURTH DEPT).

The Fourth Department, reversing Family Court, determined father demonstrated a change in circumstance (deterioration of the relationship with mother, inability to communicate) sufficient to warrant an inquiry into whether the joint custody arrangement should be modified, and the record supported awarding father sole custody:

… [T]he court had previously awarded joint custody to the parties on the basis that communications between them had "improved and the two were working together more than ever before, the results of which were positive for [the subject child]." However, the evidence at the hearing established that, after the initial custody award was entered, the parties reverted to " 'an acrimonious relationship and are not able to communicate effectively with respect to the needs and activities of their child[ ], and it is well settled that joint custody is not feasible under those circumstances' " … . …

… [W]e conclude that it is in the child's best interests to award the father sole custody. Although the parties have shared alternating week custody since the entry of the prior custody order, the evidence at the hearing established that the father "provided a more stable environment for the child and was better able to nurture the child" … . The evidence further established that the mother made a concerted effort to interfere with the father's contact with the child by, inter alia, disparaging him to educational and medical professionals, which raises a strong probability that the mother " 'is unfit to act as custodial parent' " … and warrants the grant of sole custody to the father…. . Matter of Johnson v Johnson, 2022 NY Slip Op 05651, Fourth Dept 10-7-22

Practice Point: A deterioration of the relationship between father and mother was a sufficient change in circumstances to warrant an inquiry re: father's petition for a

modification of custody. The record was sufficient for the appellate court to determined sole custody should be awarded to father.

OCTOBER 07, 2022

CUSTODY, CHANGE IN CIRCUMSTANCES.

THE EVIDENCE DID NOT DEMONSTRATE A CHANGE IN CIRCUMSTANCES WARRANTING A MODIFICATION OF THE CUSTODY ARRANGEMENT, FAMILY COURT REVERSED (THIRD DEPT).

The Third Department, revering Family Court, determined the evidence did not demonstrate a change in circumstances sufficient to warrant a modification of the custody arrangement:

The father's primary contention was that the change in his work schedule constituted a sufficient change in circumstances. In that regard, at the time that the 2016 order was entered, the father was working weekday night shifts. When the father filed the instant petition, his work schedule was such that he was working a continuous four-day-on, four-day-off schedule. However, in the midst of the hearing, the father revealed that his work schedule had again changed, this time to Monday through Thursday from 4:00 p.m. to 2:00 a.m., which aligned much more closely with his schedule as of the 2016 order. In our view, this does not constitute a sufficient change in circumstances to trigger a best interests analysis. As for the other factors relied upon by Family Court, there was no showing that the mother's new job, the parties' new residences, their new relationships, or the introduction of half-siblings and a stepsibling into the child's life "constitute[d] changed circumstances evidencing any infirmity in the present custody arrangement" … . Accordingly, the father failed to meet his burden of establishing the necessary change in circumstances, and the petition should have been dismissed. Matter of Kenneth N. v Elizabeth O., 2022 NY Slip Op 05904, Third Dept 10-20-22

Practice Point: Here the evidence relied on by Family Court did not amount to a change in circumstances warranting a modification of custody. The evidence

included: mother's new job, the parties' new residences, the parties' new relationships, and more children.

OCTOBER 20, 2022

CUSTODY, CHANGE IN CIRCUMSTANCES.

THE EVIDENCE DID NOT SUPPORT FAMILY COURT'S SUA SPONTE FINDING THERE HAD BEEN A CHANGE IN CIRCUMSTANCES, I.E., A BREAKDOWN IN COMMUNICATION BETWEEN MOTHER AND FATHER, WARRANTING A MODIFICATION OF THE CUSTODY ARRANGEMENT AND AWARDING SOLE CUSTODY TO MOTHER (THIRD DEPT).

The Third Department, reversing Family Court, determined the judge should not have, sua sponte, found there had been a change in circumstances, i.e., a breakdown in communication between mother and father, justifying awarding sole custody to mother. The evidence did not support the finding that communication had broken down:

… Family Court erred in determining that the parties being unwilling or unable to cooperatively raise the child constituted a change in circumstances and sua sponte modifying the prior order. … Initially, the parties did provide some evidence as to how each has failed to properly communicate with respect to the child, such as the father being unresponsive to the mother's messages regarding child support payments and the mother failing to inform him that she had unenrolled the child from daycare. However, the mother acknowledged that the father has been able to communicate with her via the TalkingParents app to discuss issues regarding the child, such as custodial exchange dates. The father similarly stated that he has been able to communicate with the mother via email. Thus, although their communication is strained at times, partially as a result of these proceedings, the record does not establish that it has completely broken down … . Indeed, "[t]he record establishes that the parties' relationship was no more antagonistic during [the relevant time] period than it was at the time of the entry of the original order" … , which, in this case, was only two months prior to the filing of the father's petition. Accordingly, Family Court should not have proceeded to a best interest

analysis and, instead, should have continued the joint legal custody arrangement reflected in the prior order … .Matter of Karl II. v Maurica JJ., 2022 NY Slip Op 05905, Third Dept 10-20-22

Practice Point: Here the evidence did not support the Family Court judge's sua sponte finding that communication between mother and father had broken down warranting a modification of the custody arrangement.

OCTOBER 20, 2022

CUSTODY, EVIDENCE.

EVIDENCE OF ABUSE OR NEGLECT OF ANOTHER CHILD IS ADMISSIBLE IN A MODIFICATION OF CUSTODY PROCEEDING; ALTHOUGH CHILD PROTECTIVE SERVICES RECORDS REGARDING NEGLECT ARE HEARSAY, THE HEARSAY IS ADMSSSIBLE IF CORROBORATED (THIRD DEPT).

The Third Department, reversing Family Court in this modification of custody proceeding, determined it was error to exclude Child Protective Services (CPS) records regarding mother's alleged neglect of another child. Family Court excluded the records because the proceeding was not a neglect proceeding and because the evidence was hearsay. The Third Department noted that evidence of abuse or neglect is admissible in a custody proceeding and hearsay is admissible if corroborated:

The agency records that the father sought to admit are not in the record and, thus, not before this Court. A review of the father's modification petition reveals that he noted CPS's involvement with the mother and cited to such as establishing a change in circumstances. Specifically, he alleged there had been "ongoing child protective involvement in the [mother's] home[,]" that the subject child has indicated there is domestic abuse taking place in the home and that the child has reported that he is being neglected by the mother. The petition states that "it was revealed through the CPS open investigation that the child is reporting that there is no food at the [mother's] home and that he goes without meals." Based on the foregoing, Family Court erred in refusing to allow the CPS records into evidence

based upon the rationale that no hearsay exception existed for abuse and neglect allegations in a Family Ct Act article 6 proceeding. In this respect, although this is not a Family Ct Act article 10 proceeding, the law is well established that hearsay evidence as to allegations of abuse or neglect can be admitted into evidence during a custody proceeding if corroborated by other evidence . As such, this case must be reversed and remitted to Family Court for the admission of such evidence at a new fact-finding hearing on the parties' modification petitions. Matter of Sarah QQ. v Raymond PP., 2022 NY Slip Op 06659, Third Dept 11-23-22

Practice Point: Evidence of abuse or neglect of another child is admissible in a modification of custody proceeding. Although agency records concerning neglect are hearsay, the records would be admissible if the hearsay is corroborated.

NOVEMBER 23, 2022

CUSTODY, FAILURE TO COOPERATE WITH INVESTIGATION.

EVEN THOUGH FATHER REFUSED TO COOPERATE WITH AN INVESTIGATION RELATED TO HIS PETITION FOR CUSTODY, THE JUDGE SHOULD NOT HAVE AWARDED CUSTODY TO MOTHER WITHOUT FIRST HOLDING A HEARING (SECOND DEPT).

The Second Department, reversing (modifying) Supreme Court, determined the judge should not have awarded mother sole custody of the child without first holding a hearing:

Supreme Court directed that the Administration for Children's Services (hereinafter ACS) conduct an investigation and directed supervised visits between the father and the child. The father failed to comply with the investigation, including refusing to provide his address to ACS, and he failed to complete the intake process for arranging the supervised visits. * * *

"[C]ustody determinations should generally be made only after a full and plenary hearing and inquiry" … . "This general rule furthers the substantial interest, shared by the State, the children, and the parents, in ensuring that custody proceedings

generate a just and enduring result that, above all else, serves the best interest of a child" … . "[A] court opting to forgo a plenary hearing must take care to clearly articulate which factors were—or were not—material to its determination, and the evidence supporting its decision" … .

Here, the Supreme Court erred in making a final custody determination without a hearing and without inquiring into the best interests of the child … . Matter of Jones v Rodriguez, 2022 NY Slip Op 05529, Second Dept 10-5-22

Practice Point: Despite father's failure to cooperate with an investigation stemming from his petition for custody, the judge should have held a hearing before awarding custody to mother.

OCTOBER 05, 2022

CUSTODY, INTERSTATE COMPACT ON THE PLACEMENT OF CHILDREN.

THE INTERSATE COMPACT ON THE PLACEMENT OF CHILDREN (ICPC) APPLIES ONLY TO PLACEMENT IN FOSTER CARE OR PLACEMENT RELATED TO ADOPTION; THEREFORE THE ICPC DID NOT APPLY HERE WHERE FATHER, A NORTH CAROLINA RESIDENT, SOUGHT CUSTODY OF THE CHILD; NORTH CAROLINA, APPLYING THE ICPC, DID NOT APPROVE PLACEMENT WITH FATHER; THE APPELLATE DIVISION'S DENIAL OF FATHER'S CUSTODY PETITION ON THAT GROUND WAS REVERSED (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Cannataro, resolving a conflict between Second and First Departments, determined the Interstate Compact on the Placement of Children (ICPC), which requires that a state approve the placement of a child from another sate, applies only to placement in foster care or adoption, and not, as here, placement with a parent. In this case, the child was in foster care in New York and father, a North Carolina resident, sought custody. Applying the ICPC, North Carolina did not approve placement with father in North Carolina, and the New York courts denied father's custody petition on that ground.

The Court of Appeals held placement with father did not trigger the application of the ICPC:

By its terms, the ICPC governs the out-of-state "placement" of children "in foster care or as a preliminary to possible adoption" (Social Services Law § 374-a [1] [art III] [a] & [b]). The language of the statute thus unambiguously limits its applicability to cases of placement for foster care or adoption—which are substitutes for parental care that are not implicated when custody of the child is granted to a noncustodial parent. * * *

Although the ICPC does not apply to placement with a parent, the Family Court Act contains other effective means to ensure the safety of a child before awarding custody to an out-of-state parent. Family Court retains jurisdiction over custody proceedings and has a broad array of powers under the Family Court Act to ensure a child's safety. Matter of D.L. v S.B., 2022 NY Slip Op 05940, CtApp 10-25-22

Practice Point: The Interstate Compact on the Placement of Children (ICPC) applies only to foster-care placement and adoption-related placement in another state. The ICPC, therefore, did not apply here where father, a North Carolina resident, sought custody of the child, who was in foster care in New York. Applying the ICPC, North Carolina did not approve placement with father and father's New York custody petition was improperly denied on that ground.

OCTOBER 25, 2022

CUSTODY, JUDGES, RESTRICTIONS ON FURTHER PETITIONS.

THE JUDGE SHOULD NOT HAVE PRECLUDED MOTHER FROM BRINGING FURTHER PETITIONS WITHOUT COURT APPROVAL (SECOND DEPT).

The Second Department, reversing (modifying) Supreme Court, determined the judge should not have precluded mother from filing petitions for custody of a family offense without the court's permission:

… [T]he provisions of the order … directing the mother to seek permission from the court before filing any additional petitions, whether for custody or alleging a

family offense, constituted an improvident exercise of discretion. Here, the mother filed one family offense petition, ultimately determined to be unfounded, and filed one related petition to modify the parties' custody arrangement. On this record, it cannot be said that the mother engaged in vexatious litigation or that her petitions were filed in bad faith … . Matter of McDowell v Marshall, 2022 NY Slip Op 06248, Second Dept 11-9-22

Practice Point: Mother should not have been precluded from bringing further custody of family offense petitions without court permission. She had not filed petitions in bad faith.

NOVEMBER 09, 2022

CUSTODY, JUDGES.

IN THIS MODIFICATION OF CUSTODY PROCEEDING, MOTHER'S PROOF OF THE CHILD'S INJURIES IN FATHER'S CARE AND HER IMPROVED PARENTING SKILLS AND LIVING CONDITIONS WAS SUFFICIENT TO WITHSTAND FATHER'S MOTION TO DISMISS; THE JUDGE APPEARS TO HAVE PREJUDGED THE CASE; MATTER REMITTED TO BE HEARD BY A DIFFERENT JUDGE (THIRD DEPT).

The Third Department, reversing Family Court and remitting the case to a different judge, determined mother's petition for a modification of custody should not have been dismissed:

"A parent seeking to modify an existing custody order must first show that a change in circumstances has occurred since the entry of the existing custody order that then warrants an inquiry into what custodial arrangement is in the best interests of the child" … .. "Only after this threshold hurdle has been met will the court conduct a best interests analysis" … . "When, as here, Family Court is tasked with deciding a motion to dismiss at the close of the petitioner's proof, the court must accept the petitioner's evidence as true and afford the petitioner every favorable inference that could reasonably be drawn from that evidence, including resolving all credibility questions in the petitioner's favor" … . * * *

After reviewing the record, we find that the mother's proof regarding injuries suffered by the child during the father's parenting time, taken together with the mother's improved parenting abilities and living conditions, demonstrated a change in circumstances sufficient to overcome a motion to dismiss … . * * *

Based on Family Court's comments regarding its predispositions and its inappropriate comment regarding the mother's credibility, Family Court appears to have prejudged the case … . Therefore, this matter must be remitted for a new hearing before a different judge. Matter of Nicole B. v Franklin A., 2022 NY Slip Op 06672, Third Dept 11-23-22

Practice Point: Here the evidence of the child's injuries in father's care and mother's improved parenting skills and living conditions was sufficient to support her petition for a modification of custody. Father's motion to dismiss the petition should not have been granted. The judge's remarks about mother's credibility and his encouraging father to make a motion to dismiss indicated the judge had prejudged the case. The matter was sent back to be heard by a different judge.

NOVEMBER 23, 2022

CUSTODY, PARENT VS NONPARENT (GRANDMOTHER).

EVEN THOUGH THERE WAS A PRIOR STIPULATED ORDER OF CUSTODY AND VISITATION GRANTING PRIMARY CUSTODY TO GRANDMOTHER, THE NONPARENT (GRANDMOTHER), NOT THE FATHER, HAS THE BURDEN TO SHOW EXTRAORDINARY CIRCUMSTANCES JUSTIFYING THE DENIAL OF FATHER'S SUPERIOR RIGHT TO CUSTODY BEFORE THE BEST INTERESTS OF THE CHILDREN CAN BE CONSIDERED PURSUANT TO FATHER'S PETITION TO MODIFY CUSTODY (FOURTH DEPT).

The Fourth Department, reversing (modifying) Family Court, determined, in a modification of custody case, the nonparent (grandmother here), not the father, has the burden to demonstrate extraordinary circumstances exist before the court can consider the best interests of the children:

Pursuant to the prior order, the parties share joint legal custody of the subject children, with the grandmother having primary physical custody and the mother and the father having visitation under separate visitation schedules. …

Petitioner father appeals from an order granting the motion of respondent Dawn M. Freeland (grandmother), made at the close of the father's case at a hearing, to dismiss his petition seeking modification of a prior stipulated order of custody and visitation, and his petition alleging that the grandmother violated that prior order. …

… [T]he court erred in requiring the father to prove that there had been a change in circumstances prior to making a determination regarding extraordinary circumstances … . "It is well settled that, as between a parent and a nonparent, the parent has a superior right to custody that cannot be denied unless the nonparent establishes that the parent has relinquished that right because of surrender, abandonment, persisting neglect, unfitness or other like extraordinary circumstances" … . "The nonparent has the burden of establishing that extraordinary circumstances exist," and "it is only after a court has determined that extraordinary circumstances exist that the custody inquiry becomes 'whether there has been a change [in] circumstances [warranting further inquiry into] the best interests of the child[ren]' " … . "The foregoing rule applies even if there is an existing order of custody concerning th[e] child[ren] unless there is a prior determination that extraordinary circumstances exist" … . Here, "there is no indication in the record that, in the history of the parties' litigation, the court previously made a determination of extraordinary circumstances divesting the [father] of [his] superior right to custody" … . Matter of Wells v Freeland, 2022 NY Slip Op 07375, Fourth Dept 12-23-22

Practice Point: Here father brought a violation-of-visitation petition against grandmother and petitioned for a modification of custody which had been agreed to by a stipulated order. Family Court held the father had the burden to show extraordinary circumstances justifying modification of custody. The appellate division disagreed and held the nonparent (grandmother) had that burden because father still had the superior right to custody which could not be disturbed absent extraordinary circumstances. The prior stipulated order of custody and visitation was not a substitute for an extraordinary-circumstances finding.

DECEMBER 23, 2022

CUSTODY, CONTEMPT, APPEALS.

DIRECT APPEAL, AS OPPOSED TO AN ARTICLE 78, WAS APPROPRIATE IN THIS CONTEMPT PROCEEDING; MOTHER SHOULD HAVE BEEN GIVEN THE OPPORTUNITY TO ARGUE AGAINST THE CONTEMPT ADJUDICATIONS (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined direct appeal of the contempt adjudications in this custody matter, as opposed to an Article 78 action, was appropriate under the circumstances. The contempt adjudications were vacated because mother was not given the opportunity to argue she should not be held in contempt:

… [T]he mother's challenge to the summary contempt adjudications is properly raised via direct appeal from the order under the circumstances of this case. Although a direct appeal from an order punishing a person summarily for contempt committed in the immediate view and presence of the court ordinarily does not lie and a challenge must generally be brought pursuant to CPLR article 78 to allow for development of the record (see Judiciary Law §§ 752, 755 …), an appeal from such an order is appropriately entertained where, as here, there exists an adequate record for appellate review … .

With respect to the merits, "[b]ecause contempt is a drastic remedy, . . . strict adherence to procedural requirements is mandated" … . Here, we conclude that the court committed reversible error by failing to afford the mother the requisite "opportunity, after being 'advised that [she] was in peril of being adjudged in contempt, to offer any reason in law or fact why that judgment should not be pronounced' " … . S.P. v M.P., 2022 NY Slip Op 06377, Fourth Dept 11-10-22

Practice Point: A contempt adjudication based upon actions in the court's presence are usually properly contested in an Article 78 proceeding. Under the circumstances here, direct appeal was appropriate. The contempt adjudications were vacated because mother (in this custody proceeding) was not given the opportunity to contest them.

NOVEMBER 10, 2022

DIVORCE, ATTORNEYS, 60-DAY BILLING PERIODS.

ALTHOUGH DEFENDANT-WIFE'S ATTORNEY IN THIS DIVORCE ACTION MISSED A COUPLE OF THE 60-DAY BILLING PERIODS, THE ATTORNEY WAS IN SUBSTANTIAL COMPLIANCE WITH 22 NYCRR 1400.3(9) AND THE WIFE'S REQUEST FOR ATTORNEY'S FEES SHOULD NOT HAVE BEEN DENIED; $135,315.90 AWARDED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined defendant-wife's attorney was in substantial compliance with the billing requirements of 22 NYCRR 1400.3(9) and the wife's request for attorney's fess in this divorce action should not have been denied:

… [T]he defendant's attorney was in substantial compliance with 22 NYCRR 1400.3(9) … . Although the attorney for the defendant was dilatory in sending an initial invoice approximately 154 days after he was retained, the billable hours during that interval were itemized and accounted for, and the remainder of the invoices he sent all complied with the 60-day rule. Under the circumstances, the court should not have precluded the defendant from recovering an award of attorneys' fees for failure to comply with 22 NYCRR 1400.3(9), and we conclude that the plaintiff should be responsible for the balance of the defendant's attorneys' fees and expenses, net of his prior payments, less $3,487.50 related to a duplicative motion for expenses, which amounts to $135,315.90. Spataro v Spataro, 2022 NY Slip Op 07470, Second Dept 12-28-22

Practice Point: 22 NYCRR 1400.3(9) requires attorneys in divorce proceeding to bill every 60 days. Here the attorney missed a couple of the 60-day billing periods but the client's request for attorney's fees should not have been denied on that ground. The appellate division awarded $135,315.90.

DECEMBER 28, 2022

DIVORCE, DEFAULT, SEPARATE PROPERTY.

THE HUSBAND DEMONSTRATED HE WAS ILL WHEN THE DIVORCE TRIAL WAS HELD AND THE WIFE MAY NOT BE ENTITLED TO A PORTION OF HIS WORLD TRADE CENTER ACCIDENTAL DISABILITY RETIREMENT BENEFITS BECAUSE PERSONAL-INJURY BENEFITS CONSTITUTE SEPARATE PROPERTY; THE HUSBAND'S MOTION TO VACATE THE DEFAULT JUDGMENT SHOULD HAVE BEEN GRANTED (THIRD DEPT).

The Third Department, reversing Supreme Court in this divorce action, determined the husband's motion to vacate the default judgment should have been granted. The husband demonstrated he missed the trial because of illness and he had a meritorious argument that the World Trade Center accidental disability retirement benefits were personal-injury benefits which constituted his personal property:

Pursuant to CPLR 5015 … a court may vacate an order "upon the ground of excusable default, if such motion is made within one year" after such order … . "[A] party seeking to vacate a default must establish a reasonable excuse for the default and a potentially meritorious . . . defense" to the underlying claim … . Significantly, "in recognition of the important public policy of determining matrimonial actions on the merits, the courts of this State have adopted a liberal policy with respect to vacating defaults in actions for divorce" … . * * *

… [I]n support of his motion to vacate the default, the husband proffered an affidavit wherein he averred that on the day of the hearing he was suffering from shingles and, as such, he was in extreme pain, sleep deprived, disoriented and unable to leave his bed. The husband also submitted an affidavit from a physician's assistant who diagnosed him with, and treated him for, shingles approximately two weeks prior to the date of the trial. She also averred that she saw the husband again the day following the missed trial and that she "observed a noticeable progression of the shingles rash on [the husband's] body." … . …

… [T]he husband claims that the wife is not entitled to the portion of his pension that is for World Trade Center accidental disability retirement benefits. "While it is true that the portion of a disability pension which represents compensation for personal injuries is separate property, the party so claiming bears the burden of demonstrating what portion of the pension reflects compensation for personal

injuries, as opposed to deferred compensation" … . Zeledon v Zeledon, 2022 NY Slip Op 07279, Third Dept 12-22-22

Practice Point: Here the husband's illness at the time of trial was a reasonable excuse for his default and the argument that the wife was not entitled to his World Trade Center accidental disability retirement benefits which constituted his separate property (personal-injury benefits) was meritorious. Therefore the husband's CPLR 5015 motion to vacate the default judgment should have been granted.

DECEMBER 22, 2022

DIVORCE, INTERIM ATTORNEY'S FEES.

IN THIS DIVORCE PROCEEDING, IT WAS AN ABUSE OF DISCRETION TO DENY INTERIM ATTORNEY'S FEES TO THE NONMONIED SPOUSE (SECOND DEPT).

The Second Department, reversing (modifying) Supreme Court, determined interim attorney's fees should have been awarded to the nonmonied spouse:

Supreme Court improperly referred to the trial court that branch of the plaintiff's cross motion which was for an award of interim counsel fees (see Domestic Relations Law § 237[a] …). "Because of the importance of such awards to the fundamental fairness of the proceedings, . . . an application for interim counsel fees by the nonmonied spouse in a divorce action should not be denied—or deferred until after the trial, which functions as a denial—without good cause, articulated by the court in a written decision" … . Here, the court erred in summarily referring that branch of the plaintiff's cross motion which was for an award of interim counsel fees to the trial court, which functioned as a denial of that relief, and failed to articulate any reasons, much less good cause, for that determination. The evidence submitted by the plaintiff demonstrates that she is the nonmonied spouse, as the defendant earned five to seven times more income than the plaintiff in recent years … . While the defendant argues that the plaintiff has funds available to her, the plaintiff "cannot be expected to exhaust all, or a large portion, of the finite

resources available to her in order to pay her attorneys, particularly when the [defendant] is able to pay his own legal fees without any substantial impact upon his lifestyle" … . Fugazy v Fugazy, 2022 NY Slip Op 06115, Second Dept 11-2-22

Practice Point: Here in this divorce action it was deemed an abuse of discretion to, without explanation, deny interim attorney's fees to the nonmonied spouse.

NOVEMBER 02, 2022

DIVORCE, JUDGES, FAILURE TO HOLD HEARINGS.

THE JUDGE IN THIS POST-DIVORCE PROCEEDING ENCOMPASSING FIVE APPEALS, WAS DEEMED TO HAVE MADE MANY RULINGS NOT SUPPORTED BY THE RECORD, IN PART BECAUSE NECESSARY HEARINGS WERE NOT HELD; THE IMPROPER RULINGS INCLUDED A RESTRICTION OF THE ATTORNEY-FOR-THE-CHILD'S (AFC'S) INTERACTIONS WITH THE CHILDREN (FOURTH DEPT).

The Fourth Department, reversing (and modifying) Supreme Court in this post-divorce proceeding encompassing several appeals, determined many of the court's rulings were not supported by the record, due in part to the court's failure to hold hearings. The court had imposed "house rules" for the children, refused to hold a Lincoln hearing, made contempt findings, modified father's visitation, suspended father's child support obligations, ordered family unification therapy, limited the attorney-for-the-child's interactions with the children, and made several other rulings with which the appellate division found fault. The decision is far too detailed to fairly summarize here:

The mother and the AFC contend in appeal Nos. 1, 3, and 5 that the court erred in altering the terms of the parties' custody and visitation arrangement and in imposing its house rules without conducting a hearing to determine the children's best interests. We agree. We therefore modify the orders in appeal Nos. 1, 3, and 5 accordingly, and we reinstate the provisions of the agreement and remit the matter to Supreme Court for a hearing, including a Lincoln hearing, to determine whether

modification of the parties' custody and visitation arrangement is the children's best interests.

Where there is "a dispute between divorced parents, the first concern of the court is and must be the welfare and the interests of the children" … , and "[a]ny court in considering questions of child custody must make every effort to determine what is for the best interest of the child[ren], and what will best promote [their] welfare and happiness" … . Consequently, visitation and "custody determinations should '[g]enerally' be made 'only after a full and plenary hearing and inquiry' "… , "[u]nless there is sufficient evidence before the court to enable it to undertake a comprehensive independent review of" the children's best interests … . Burns v Grandjean, 2022 NY Slip Op 06577, Fourth Dept 11-18-22

Practice Point: Here the Fourth Department took issue with many, many rulings made by Supreme Court in this post-divorce proceeding. The decision encompassed five appeals and too many issues to fairly summarize. Many of Supreme Court's rulings were deemed to have been unsupported by record, in large part because necessary hearings were not held.

NOVEMBER 18, 2022

DIVORCE, MAINTENANCE, ATTORNEY'S FEES, EXPERT FEES.

ATTORNEY'S FEES AND EXPERT WITNESS FEES IN THIS MAINTENANCE-ARREARS ACTION SHOULD NOT HAVE BEEN AWARDED WITHOUT AN EVIDENTIARY HEARING (SECOND DEPT).

The Second Department, reversing (modifying) Supreme Court, determined that the award of attorney's fees and expert witness fees to defendant-wife who sued for and was awarded maintenance arrears:

… Supreme Court erred in awarding attorneys' fees and expert witness fees requested by the defendant without evaluating the defendant's claims concerning the extent and value of those services at an evidentiary hearing … . Accordingly, the matter must be remitted to the Supreme Court, Westchester County, for a hearing on those issues and a new determination thereafter of those branches of the

defendant's motions which were for an award of attorneys' fees and expert fees. Leung v Gose, 2022 NY Slip Op 06476, Second Dept 11-16-22

Practice Point: Here the wife was awarded maintenance arrears but the judge should have held an evidentiary hearing before awarding attorney's fees and expert witness fees to the wife.

NOVEMBER 16, 2022

DIVORCE, PRENUPTIAL AGREEMENT.

THE PHRASE "CONSUMMATION OF THE ANTICIPATED MARRIAGE" IN THE PRENUPTIAL AGREEMENT, A CONDITION PRECEDENT, MEANT THE MARRIAGE CEREMONY, NOT SEXUAL RELATIONS; THE WIFE'S ARGUMENT THAT THE PRENUPTIAL AGREEMENT COULD NOT BE ENFORCED BECAUSE THE COUPLE NEVER HAD SEXUAL RELATIONS WAS REJECTED BY THE APPELLATE COURT (FIRST DEPT).

The First Department, reversing Supreme Court, determined the phrase "consummation of the anticipated marriage" in the prenuptial agreement meant the marriage ceremony, not sexual relations. In these divorce proceedings, the wife argued the prenuptial agreement was unenforceable because the couple never had sexual relations and "consummation" of the marriage was a condition precedent to the prenuptial agreement:

While the word "consummation" connotes sexual relations in certain contexts, such as annulment proceedings, that is not the only meaning of the word, which may simply mean achieve or fulfill (see Black's Law Dictionary [11th ed 2019]). The plain meaning of "consummation," in the context of the section titled "Marriage — a Condition Precedent and Effective Date" and defining the effective date of agreement as the date of the parties' marriage, is consummation or fulfillment of the parties' intention to enter into a valid "marriage." Reading the contract as a whole, this interpretation of the section effectuates the parties' expressed intention to fix their respective rights accruing upon marriage and to avoid unnecessary and intrusive litigation in the event of divorce, and sets an

ascertainable date for determining the effectiveness and enforceability of the prenuptial agreement.

In contrast, accepting the wife's position would render the parties' respective rights uncertain and require the court to conduct a highly intrusive hearing into the parties' intimate relations, which is both contrary to the parties' stated intention and impractical. Fort v Haar, 2022 NY Slip Op 05660, First Dept 10-11-22

Practice Point: The condition precedent to the prenuptial agreement was the "consummation" of the marriage. The wife argued the agreement was unenforceable because the couple never had sexual relations. The appellate court found that the word "consummation" referred to the marriage ceremony, not sexual relations, and the agreement was therefore enforceable.

OCTOBER 11, 2022

DIVORCE, RESETTLEMENT OF JUDGMENT.

RESETTLEMENT OF THE JUDGMENT OF DIVORCE WAS PROPER ONLY TO THE EXTENT OF CORRECTING A MISTAKE IN THE JUDGMENT; RESETTLEMENT SHOULD NOT HAVE BEEN USED TO AMEND THE JUDGMENT (SECOND DEPT).

The Second Department, reversing (modifying) Supreme Court, determined the judgment of divorce should have been resettled to the extent that the judgment conform with the stipulation. But the judgment should not have been modified to include a provision which was not in the stipulation. Resettlement cannot be used to amend the judgment, as opposed to correcting a mistake:

Resettlement of a judgment of divorce pursuant to CPLR 5019(a) is an appropriate remedy when the judgment does not accurately incorporate the terms of a stipulation of settlement … . Here, although the judgment of divorce provided that the defendant was responsible for providing health insurance for the parties' children, that provision was inconsistent with the terms of the stipulation. Specifically, the stipulation contained a provision which set forth that the plaintiff

was responsible for providing health insurance for the parties' children through her employer unless she became unemployed, and then the defendant would be responsible for providing health insurance for them through his employer. …

… Supreme Court should have denied that branch of the defendant's motion which was to resettle the judgment of divorce to the extent it sought to replace the provision requiring the defendant to provide health insurance for the parties' children with a provision requiring the plaintiff to be solely responsible to provide health insurance for the parties' children … . The amendment proposed by the defendant failed to comport with the terms of the stipulation regarding the responsibility of the parties as to the health insurance for their children and was a substantive modification beyond the court's inherent authority to correct a mistake, defect, or irregularity in the original judgment "not affecting a substantial right of a party" (CPLR 5019[a] …). Ferrigan v Ferrigan, 2022 NY Slip Op 07058, Second Dept 12-14-22

Practice Point: Here resettlement of the judgment of divorce pursuant to CPLR 5019 was appropriate only to the extent of correcting a mistake by conforming the judgment to the stipulation. Resettlement should not have been used to amend the judgment to include a provision which was not in the stipulation.

DECEMBER 14, 2022

DIVORCE, SEPARATE PROPERTY, MARITAL PROPERTY.

THE NINE YEARS OF PENSION CREDITS THE HUSBAND EARNED BEFORE THE MARRIAGE ARE HIS SEPARATE PROPERTY; HOWEVER THE MARITAL FUNDS USED TO PURCHASE THOSE CREDITS DURING THE MARRIAGE ARE SUBJECT TO EQUITABLE DISTRIBUTION (THIRD DEPT).

The Third Department, reversing Supreme Court in this divorce proceeding, in a full-fledged opinion by Justice Reynolds Fitzgerald, determined the pension credits earned by the husband during the nine years prior to the marriage were his separate property. But the marital funds used to purchase those credits during the marriage were subject to equitable distribution:

"[A] pension benefit is, in essence, a form of deferred compensation derived from employment and an asset of the marriage that both spouses expect to enjoy at a future date" … . "Even though workers are unable to gain access to the money until retirement, their right to it accrues incrementally during the years of employment. Thus, that portion of a pension based on years of employment during the marriage is marital property" … . In effecting the intent of Domestic Relations Law § 236 (B), the Court of Appeals held that "these post-divorce benefits were marital property to the extent that they were compensation for past services rendered during the marriage" … . Accordingly, "it becomes evident that an employee's interest in such a plan, except to the extent that it is earned before marriage or after commencement of a matrimonial action, is marital property" … .
* * *

… [C]ompensation for past services earned prior to the marriage is separate property. The nine years of premarriage … credits were earned outside the marriage and are based on the fruit of the titled spouse's sole labors. As they are not due in any way to the indirect contributions of the non-titled spouse … , the wife's contention that she is entitled to an equitable share of any "appreciation" in the value of credits that have been classified as the husband's separate property is unpersuasive. The acquisition of the separate pension credits cannot serve to transform such property into a marital asset.

… [A]s marital funds were utilized to purchase the pension credits, said funds are subject to equitable distribution. Szypula v Szypula, 2022 NY Slip Op 06664, Third Dept 11-23-22

Practice Point: The husband earned nine years of pension credits before the marriage. Those pension credits are husband's separate property. During the marriage the pension credits were purchased with marital funds. [T]hose funds are subject to equitable distribution.

NOVEMBER 23, 2022

DIVORCE, TEMPORARY MAINTENANCE AND CHILD SUPPORT.

BECAUSE THE JUDGE DEVIATED FROM THE STATUTORY CRITERIA FOR THE CALCULATION OF TEMPORARY MAINTENANCE, THE JUDGE SHOULD HAVE EXPLAINED THE REASONS FOR THE DEVIATION; THE TEMPORARY MAINTENANCE AND CHILD SUPPORT AWARDS WERE VACATED (FIRST DEPT).

The First Department, vacating the award of pendente lite maintenance and child support, determined, because the temporary maintenance deviated from the statutory presumptive award,, the judge should have explained the reasons for the deviation:

To determine temporary maintenance, the motion court was required to apply Domestic Relations Law § 236(B)(5-a). While the court appears to have followed the calculations provided in that section to arrive at a presumptive award of temporary maintenance, it then deviated from the presumptive amount by directing the continued payment of the wife's rent, cell phone bills, utilities, and other household expenses. This statutory formula is intended to cover all the spouse's basic living expenses, including housing costs … . Where, as here, there is a deviation, the statute requires the court to explain the reasons for any deviation from the result reached by the formula factors … .

Accordingly, we vacate the pendente lite maintenance award and remand the matter for a reconsideration of the award in light of the directives of Domestic Relations Law § 236(B) (5-a), including the articulation of any other factors the court considers in deviating from the presumptive award … As the amount of maintenance affects calculation of child support, we further vacate the child support award for recalculation based on the directives of Domestic Relations Law § 240(1-b)(b)(5) (iii)(I) and (vii)(C), which require, for child support purposes, income adjustments based on the amount of maintenance ordered. Severny v Severny, 2022 NY Slip Op 06094, First Dept 11-1-22

Practice Point: Any deviation from the statutory criteria for the calculation of temporary maintenance must be explained. The failure to explain the deviation required the vacation of the both the temporary maintenance and the child support awards.

NOVEMBER 01, 2022

FAMILY OFFENSES, DISORDERLY CONDUCT.

THE THREATS ALLEGEDLY MADE TO PETITIONER WERE NOT MADE IN PUBLIC AND THERE WAS NO EVIDENCE THE THREATS WERE MADE WITH THE INTENTION TO CAUSE A PUBLIC DISTURBANCE; THEREFORE THE FAMILY OFFENSE PETITION ALLEGING DISORDERLY CONDUCT SHOULD HAVE BEEN DISMISSED (THIRD DEPT).

The Third Department, reversing Family Court, determined the alleged threats against petitioner were made privately and did not create a public disturbance. In addition, there was no proof the alleged threats were made with the intent to cause a public disturbance. Therefore the petition alleging disorderly conduct as a family offense should have been dismissed:

… "[A] person is guilty of disorderly conduct when, with intent to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof[,] . . . [h]e [or she] engages in fighting or in violent, tumultuous or threatening behavior" (Penal Law § 240.20 [1]). Pursuant to both CPL 530.11 (1) and Family Court Act § 812 (1), "'disorderly conduct' includes disorderly conduct not in a public place." Yet, "even where the conduct at issue is alleged to have occurred in a private residence, in order for a petitioner to meet his or her burden of establishing the family offense of disorderly conduct, there must be a prima facie showing that the conduct was either intended to cause, or recklessly created a risk of causing, public inconvenience, annoyance, or alarm. The intent to cause, or recklessness in causing, public harm, is the mens rea of the offense of disorderly conduct" … . * * *

… [P]etitioner failed to meet her burden of making a prima facie showing that respondent had the requisite intent to create public inconvenience, annoyance or alarm, or recklessly causing a risk of the same … . In this respect, petitioner's evidence does not establish that respondent's actions were public in a manner that would support such a finding … . Respondent's threat against petitioner's life would have undoubtedly caused public disorder if others had heard the threat … ;

however, the record reveals that respondent appears to have threatened petitioner's life in only their company, and without having drawn the attention of others to the scene … . Further, although the police were called on one instance, without a police report in evidence, it is impossible to determine which one of the parties — or if, in fact, a neighbor — had called the police to therefore permit a finding that respondent's conduct rose to the level of creating a public disturbance. Matter of Kilts v Kilts, 2022 NY Slip Op 06660, Third Dept 11-23-22

Practice Point: To prove the family offense of disorderly conduct, the conduct must occur in public or must have been motivated by the intention to cause a public disturbance. The petitioner did not meet her burden of proof and the family offense petition should have been dismissed.

NOVEMBER 23, 2022

JUVENILE DELINQUENCY, ALLOCUTION REQUIREMENTS.

THE ADMISSION ALLOCUTION IN THIS JUVENILE DELINQUENCY PROCEEDING, WHICH REQUIRES THAT THE JUDGE QUESTION THE JUVENILE AND A PARENT, FELL SHORT OF THE STATUTORY REQUIREMENTS IN THE FAMILY COURT ACT; PETITION DISMISSED (THIRD DEPT).

The Third Department, reversing respondent's admission to criminal mischief in this juvenile delinquency proceeding, determined: (1) the validity of the admission was not moot despite the completion of the one-year placement, and the issue need to be preserved for review; and (2) the admission allocution was insufficient:

… [R]espondent's argument that the plea allocution did not comply with Family Ct Act § 321.3 is not moot — despite the expiration of respondent's placement — because the delinquency determination challenged herein "implicates possible collateral legal consequences" … .

… Family Court must "ascertain through allocution of the respondent and his [or her] parent or other person legally responsible for his [or her] care, if present, that

(a) he [or she] committed the act or acts to which he [or she] is entering an admission, (b) he [or she] is voluntarily waiving his [or her] right to a fact-finding hearing, and (c) he [or she] is aware of the possible specific dispositional orders" (Family Ct Act § 321.3 [1]). Although respondent's mother was present at the April 2021 allocution, Family Court only asked her whether she had sufficient time to speak to respondent about the proceedings…. The record reflects that the court failed to question respondent's mother regarding the acts to which respondent admitted, his waiver of the fact-finding hearing or her awareness of the possible dispositional options. As a result, Family Court's allocution fell short of the statutory mandate … . Matter of Christian VV. (Christian VV.), 2022 NY Slip Op 07275, Third Dept 12-22-22

Practice Point: The Family Court Act requires that the admission allocution in a juvenile delinquency proceeding involve both the juvenile and a parent. Here the allocution of respondent and his mother fell short of the statutory requirements and the juvenile delinquent petition was dismissed. Although the respondent had already completed his placement, the issue was not moot because of the possible collateral consequences of the delinquency determination.

DECEMBER 22, 2022

NEGLECT, APPEALS.

FATHER WAS NOT SERVED WITH THE ORDER OF FACT-FINDING AND DISPOSITION IN THE MANNER PRESCRIBED BY FAMILY COURT ACT 1113 (FATHER WAS SERVED BY EMAIL) AND THEREFORE THE 30-DAY APPEAL DEADLINE DID NOT APPLY; FATHER'S STRIKING THE 14-YEAR-OLD CHILD ONCE DURING A MULTI-PERSON MELEE AFTER THE CHILD BROKE THE WINDOW OF FATHER'S CAR WITH A ROCK DID NOT CONSTITUTE NEGLECT (FOURTH DEPT).

The Fourth Department, reversing Family Court, determined: (1) Family Court did not follow the statutory procedure for serving father with the order of fact-finding and disposition and, therefore, father's appeal was timely; and (2) father's striking

the child once during a multi-person melee, after the child threw a rock at father's car, did not constitute neglect:

… "[T]here is no evidence in the record that the father was served with the order of fact-finding and disposition by a party or the child's attorney, that he received the order in court, or that the Family Court mailed the order to the father" … . Instead, despite using a form order that provided typewritten check boxes for the two methods of service by the court mentioned in the statute (i.e., in court or by mail) … , the court here crossed out the word "mailed" and edited the form to indicate that the order was emailed to, among others, the father's attorney. The statute, however, does not provide for service by the court through email or any other electronic means … . … Inasmuch as the father was served the order by the court via email, which is not a method provided for in Family Court Act § 1113, and there is no indication that he was served by any of the methods authorized by the statute, we conclude that the time to take an appeal did not begin to run and that it cannot be said that the father's appeal is untimely … .* * *

… [W]e conclude that, "[g]iven the age of the subject child, the provocation, and the dynamics of the incident, the [father's] act against [the child] did not constitute neglect" … . The record establishes that, during the course of a multi-person melee that included the 15-year-old sister beating up the 18-year-old daughter of the father's girlfriend, the 14-year-old child threw a rock at the vehicle causing the window to break, to which provocation the father instantly reacted by striking the child once either in the face or the back of the head … . Petitioner presented no evidence that the child sustained any injury or required medical treatment as a result of the single strike by the father during the altercation, and the police who investigated the incident did not file any charges … . Matter of Grayson S. (Thomas S.), 2022 NY Slip Op 05649, Fourth Dept 10-7-22

Practice Point: Here father was served with the order of fact-finding and disposition by email, a method not prescribed by Family Court Act 1113. Therefore the 30-day time limit for bringing an appeal did not apply and father's appeal was timely. Father struck the 14-year-old child once during a multi-person melee after the child broke the window of father's car with a rock. Father's striking the child, which did not cause injury, did not constitute neglect.

OCTOBER 07, 2022

NEGLECT, DERIVATIVE NEGLECT, NEWBORN.

ALTHOUGH TWO CHILDREN HAD BEEN REMOVED FROM MOTHER'S CARE AFTER NEGLECT FINDINGS AND MOTHER ALLEGEDLY CONCEALED HER PREGNANCY AND FAILED TO SEEK APPROPRIATE PRENATAL CARE, SUMMARY JUDGMENT FINDING MOTHER HAD NEGLECTED HER NEWBORN WAS NOT APPROPRIATE; MATTER REMITTED TO BE HEARD BY A DIFFERENT JUDGE (THIRD DEPT).

The Third Department, reversing Family Court, determined summary judgment finding respondent mother had neglected and derivatively neglected her newborn baby was not appropriate. Two children had been removed from mother's care based on neglect findings,. Mother allegedly had concealed her pregnancy and allegedly had not sought appropriate prenatal case. But triable issues of fact remained. The matter was sent back to be heard by a different judge:

Upon review of the record and considering the nature of the prior neglect findings, the passage of time, and the questions concerning the degree of progress made by respondent over that time, we find that there are triable issues of fact precluding summary judgment (see CPLR 3212 [b] …). Petitioner's motion was centered upon the two prior findings of neglect and respondent's failure to abide by the corresponding orders of disposition … . However, the petition itself acknowledged that respondent had recently become more compliant with petitioner, resulting in expanded visitation with her children, and had been making improvements in her engagement with services and communication skills. According to the petition, respondent had put together a safety plan for the subject child to live with her, and petitioner saw this as "a strength" and was "hopeful in working with" respondent on this plan. Further, petitioner pointed out in opposition to the motion that she had improved her housing and employment situation and ended a relationship with an abusive partner…. .

Accordingly, the matter must be remitted for a fact-finding hearing concerning the allegations in the petition … . Under the circumstances, we find it appropriate to remit to a different judge for the purpose of conducting the hearing. Matter of Ja'layna FF. (Jalyssa GG.), 2022 NY Slip Op 07271, Third Dept 12-22-22

Practice Point: Summary judgment is almost never appropriate in a child-neglect matter. Here summary judgment finding mother had neglected her newborn based on neglect findings re: two other children and allegations mother had concealed her pregnancy and failed to seek appropriate prenatal care was reversed. There existed several triable issue of fact, including recent cooperation by mother. The matter was remitted for a hearing in front of a different judge.

DECEMBER 22, 2022

NEGLECT, DERIVATIVE NEGLECT.

THE EVIDENCE SUPPORTED THE FINDING OF A SINGLE INSTANCE OF NEGLECT OF FATHER'S 14-YEAR-OLD DAUGHTER; BUT THAT EVIDENCE DID NOT SUPPORT A FINDING OF DERIVATIVE NEGLECT RE: FATHER'S YOUNGER DAUGHTER (SECOND DEPT).

The Second Department, reversing (modifying) Family Court, determined the evidence supporting the finding that father abused his 14-year-old daughter, Heymi M., on one occasion on a camping trip, but that evidence did not support the finding of derivative neglect re: the younger child, Katherine L.:

… [T]here was a nine-year age difference between Heymi M., the child found to have been abused, and the other child, Katherine L. Moreover, the evidence adduced at the hearing shows that the children had different mothers, different living situations, and markedly different relationships with the father. Among other things, the younger child, Katherine L., lived with the father for her entire life but the older child, Heymi M., only started having contact with the father approximately one year before the incident of abuse. Additionally, the record reflects that the abuse occurred on one occasion outside the home, Katherine L. was not in the room when it occurred, and there is no evidence that Katherine L. was aware of the abuse…. . Matter of Katherine L. (Adrian L.), 2022 NY Slip Op 05691, Second Dept 10-12-22

Practice Point: The finding that father abused his 14-year-old daughter on one occasion on a camping trip did not support the finding of derivative neglect re: father's younger daughter.

OCTOBER 12, 2022

NEGLECT, MARIHUANA USE.

THE AMENDED STATUTE CHANGING THE CRITERIA FOR NEGLECT BASED ON MARIHUANA USE WENT INTO EFFECT TWO DAYS BEFORE THE HEARING AND WAS NOT APPLIED TO THE FACTS; MATTER REMITTED (FOURTH DEPT).

The Fourth Department, modifying Family Court, determined whether mother neglected the children within the meaning of the statute as amended by the Marihuana Regulation and Taxation Act required remittal:

"The Marihuana Regulation and Taxation Act … amended Family [Court] Act § 1046 (a) (iii) … by specifically foreclosing a prima facie neglect finding based solely upon the use of marihuana, while still allowing for consideration of the use of marihuana to establish neglect, provided '[that there is] a separate finding that the child's physical[,] mental or emotional condition was impaired or is in imminent danger of becoming impaired' " … . The amendment to section 1046 (a) (iii) went into effect … two days before the court rendered its decision in this case and, "[a]s a general matter, a case must be decided upon the law as it exists at the time of the decision" … . Inasmuch as petitioner's presentation of evidence was based on the state of the law at the time of the hearing, however, petitioner may not have fully explored the issue of impairment. We therefore remit the matter to Family Court to reopen the fact-finding hearing on the issue whether the children's condition was impaired or at imminent risk of impairment as a result of the mother's use of marihuana … . Matter of Gina R. (Christina R.), 2022 NY Slip Op 07321, Fourth Dept 12-23-22

Practice Point: The Family Court Act was amended to prohibit a finding of neglect based solely on marihuana use unless there is a finding the child's physical, mental

or emotional condition was impaired or in danger of being impaired by the marihuana use.

DECEMBER 23, 2022

NEGLECT, MARIHUANA USE.

THE AMENDMENT TO THE FAMILY COURT ACT WHICH PRECLUDES A FINDING OF NEGLECT BASED SOLELY ON MARIJUANA USE SHOULD BE APPLIED RETROACTIVELY; HOWEVER HERE THERE WAS SUFFICIENT EVIDENCE OF MOTHER'S NEGLECT OF THE CHILD BASED UPON HER "ABUSE" (AS OPPOSED TO "USE") OF MARIJUANA (SECOND DEPT).

The Second Department, in a full-fledged opinion by Justice Zayas, determined (1) the amendment to the Family Court act precluding a finding of neglect based solely on marijuana use should be applied retroactively, and (2) the evidence mother neglected the child based upon abuse of marijuana was sufficient:

The 2021 amendment should not be interpreted as preventing any reliance on the misuse of marihuana, no matter how extensive or debilitating, to establish a prima facie case of neglect. After all, the statute still encompasses the misuse of other legal substances, such as alcoholic beverages and prescription drugs. Based on the plain language of the statute, the 2021 amendment does not prevent a court from finding that there has been a prima facie showing of neglect where the evidence establishes that the subject parent has, in fact, repeatedly misused marihuana in a manner that "has or would ordinarily have the effect of producing in the user thereof a substantial state of stupor, unconsciousness, intoxication, hallucination, disorientation, or incompetence, or a substantial impairment of judgment, or a substantial manifestation of irrationality" … . Such a finding is not based on "the sole fact" that the parent "consumes cannabis" … .

… In its order, the Family Court expressly determined that the mother had misused marihuana and "clearly had a substantial impairment of judgment, and/or substantial manifestation of irrationality and was disoriented and/or incompetent." Since this finding was not based on "the sole fact" that the mother "consumes

cannabis" (Family Ct Act § 1046[a][iii]), it provided a sufficient basis on which to apply the presumption of neglect arising from repeated misuse of drugs that is articulated in the statute, as amended … . Matter of Mia S. (Michelle C.), 2022 NY Slip Op 06932, Second Dept 12-7-22

Practice Point: The amendment of the Family Court Act to preclude a finding of neglect based solely on use of marijuana should be applied retroactively. But the amendment does not preclude a finding of neglect based on the "abuse," as opposed to "use," of marijuana.

DECEMBER 07, 2022

NEGLECT.

THE EVIDENCE DID NOT SUPPORT THE FINDING MOTHER NEGLECTED HER TWO-MONTH OLD CHILD BY EXPOSING THE CHILD TO DOMESTIC VIOLENCE; THAT THE CHILD MAY HAVE HEARD LOUD ARGUING BEFORE GRANDMOTHER TOOK THE CHILD TO HER APARTMENT WAS NOT ENOUGH (SECOND DEPT).

The Second Department, reversing Family Court, determined the evidence did not support finding mother abused her two-month old child. The child, who was removed from the scene by the grandmother before the acts of domestic violence took place:

"'[A] finding of neglect is proper where a preponderance of the evidence establishes that the child's physical, mental, or emotional condition was impaired or was in danger of becoming impaired by the parent's commission of an act, or acts, of domestic violence in the child's presence'" … . "However, 'exposing a child to domestic violence is not presumptively neglectful,'" and "'[n]ot every child exposed to domestic violence is at risk of impairment'" . "The Legislature's requirement of actual or imminent danger of impairment prevents st… ate intrusion into private family life in the absence of 'serious harm or potential harm to the child, not just . . . what might be deemed undesirable parental behavior'" … .

While testimony was elicited from the paternal grandmother that the subject child, then under two months old, was somewhere in an apartment with the mother and the father while they yelled at each other, the grandmother testified that she removed the child from that apartment prior to any acts of domestic violence. The evidence that the mother and the father engaged in a loud verbal argument in the presence of their infant child was insufficient to establish that the child's physical, mental, or emotional condition was impaired or in imminent danger of becoming impaired … . Matter of Kingston T. (Diamond T.), 2022 NY Slip Op 05694, Second Dept 10-12-22

Practice Point: Mother's two-month-old child may have heard loud arguing before grandmother removed the child from the scene. The evidence did not support a finding mother neglected the child by exposing the child to domestic violence.

OCTOBER 12, 2022

NEGLECT.

THE EVIDENCE FATHER NEGLECTED THREE OF THE CHILDREN BY THROWING AN OBJECT AT MOTHER AND YELLING AT MOTHER WAS INSUFFICIENT (SECOND DEPT).

The Second Department, reversing Family Court, determined the evidence father neglected three of the children by throwing an object at mother and yelling at mother was insufficient:

Family Court providently exercised its discretion in determining that the out-of-court statements of Tawdrea G., Terel R., and Micah M. G. to an ACS caseworker that the father threw an object at the mother cross-corroborated each other, and that the record as a whole demonstrated by a preponderance of the evidence that the physical, mental, or emotional condition of Tawdrea G., Terel R., and Micah M. G. was impaired or was in danger of becoming impaired when the father threw an object at the mother in their presence … .

However, the Family Court erred in determining that a preponderance of the evidence established that the father neglected Tyresse M., Makai G., Tamera P.-C.

M., or Divine K. M., based on the father throwing an object at the mother. There was no evidence that Tyresse M., Makai G., Tamera P.-C. M., or Divine K. M. witnessed that event. Moreover, there was insufficient evidence to establish that the physical, emotional, or mental condition of Tyresse M., Makai G., Tamera P.-C. M., or Divine K. M., was impaired or placed in imminent danger of impairment based on that incident … .

The Family Court also erred in determining that a preponderance of the evidence established that the father neglected any of the children by verbally abusing the mother in the presence of the children. While it was inappropriate for the father to yell at the mother in the presence of the children, the evidence concerning those arguments was insufficient to establish that the children's physical, mental, or emotional condition was impaired or in imminent danger becoming impaired … . Matter of Divine K. M. (Andre G.), 2022 NY Slip Op 06929, Second Dept 12-7-22

Practice Point: There was no evidence three of the children were present when father threw an object at mother and there was no evidence the children's physical, mental, or emotional condition was impaired by father's yelling at mother. The relevant neglect findings were reversed.

DECEMBER 07, 2022

ORDER OF PROTECTION, VIOLATION OF, ATTORNEY'S FEES, JUDGES.

ALTHOUGH THE JUDGE CAN PROPERLY AWARD COUNSEL FEES TO PETITIONER BASED UPON RESPONDENT'S VIOLATION OF AN ORDER OF PROTECTION, A HEARING IS NECESSARY TO DETERMINE THE AMOUNT OF THE FEE (SECOND DEPT).

The Second Department determined that the judge properly exercised discretion in awarding counsel fees to petitioner based upon appellant's (Gorish's) violation of an order of protection. However, the amount of counsel fees should have been determined by a hearing:

Under Family Court Act § 846-a, the court "may order the respondent to pay the petitioner's reasonable and necessary counsel fees in connection with the violation petition where the court finds that the violation of its order was willful." "The award of counsel fees is committed to the discretion of the Family Court" … . "[T]he reasonable amount and nature of the claimed services must be established at an adversarial hearing" … . Here, while the Family Court providently exercised its discretion in awarding counsel fees to the petitioner, the court erred in determining the amount of the counsel fees without a hearing. Matter of Sicina v Gorish, 2022 NY Slip Op 05535, Second Dept 10-5-22

Practice Point: The violation of an order of protection is a proper ground for awarding counsel fees to the petitioner, but the amount must be determined by a hearing.

OCTOBER 05, 2022

VISITATION, DELEGATION OF JUDICIAL AUTHORITY.

THE JUDGE SHOULD NOT HAVE DELEGATED THE COURT'S AUTHORITY TO DECIDE VISITATION ISSUES TO A MENTAL HEALTH PROFESSIONAL; THE PROPER PROCEDURE FOR MODIFYING VISITATION ONCE FATHER HAS GAINED INSIGHT INTO THE CHILD'S NEEDS WAS EXPLAINED (FIRST DEPT).

The First Department, reversing (modifying) Family Court, determined the judge should not have delegated the court's authority to decide visitation issues to a mental health professional:

… [T]he court improperly delegated to a mental health professional its authority to determine issues involving the child's best interests — namely, when visits could resume and whether they should be supervised … . Accordingly, we modify to delete that provision of the order only. Upon an application to resume the father's visits with the child, the applicant shall have the burden to demonstrate changed circumstances and that the modification requested is in the child's best interests … , at which time the court may consider evidence that includes, but is not limited to,

the testimony of a mental health expert about whether the father has gained insight into the child's medical and emotional needs and the impact of his behavior on the child. Matter of M.K. v H. M., 2022 NY Slip Op 05663, First Dept 10-11-22

Practice Point: Family Court cannot delegate its authority to decide visitation issues to a mental health professional. The proper procedure for allowing father's visitation to resume was explained, i.e., an application to resume visitation demonstrating a change in circumstances followed by an evidentiary hearing, including the testimony of a mental health expert.

OCTOBER 11, 2022

VISITATION, GRANDPARENTS.

BOTH PARENTS OPPOSED VISITATION WITH THE GRANDPARENTS AND THERE WAS EVIDENCE VISITATION WITH THE GRANDPARENTS HAD NEGATIVE EFFECTS ON ONE OF THE CHILDREN; IT WAS NOT DEMONSTRATED THAT VISITATION WITH THE GRANDPARENTS WAS IN THE CHILDREN'S BEST INTERESTS; MATTER REMITTED FOR A NEW HEARING BEFORE A DIFFERENT JUDGE (THIRD DEPT).

The Third Department, reversing Family Court, determined Family Court's ruling allowing visitation by the grandparents, which was opposed by both parents, was not demonstrated to be in the best interests of the children. The son is autistic and has frequent "meltdowns" which the grandparents allegedly didn't handle appropriately. The matter was sent back for a new hearing in front of a different judge:

In granting visitation to the grandparents, Family Court essentially based its determination on its belief that the son would benefit from frequent contact with family members who love him, and that "equity demand[ed]" that the daughter have the same level of visitation. While contact with loving family members is certainly a laudable goal for these and any other children, the record does not support the court's finding that the children's best interests would be served by visitation with the grandparents. Indeed, to the contrary, the mother and the father,

who were separated as of the time of the hearing but were united in their opposition to the grandparents' visitation petition, offered testimony detailing the negative effects that visitation with the grandparents had on the son. Matter of Virginia HH. v Elijah II., 2022 NY Slip Op 06970, Third Dept 12-8-22

Practice Point: Here both parents opposed visitation with the grandparents and there was evidence such visitation had negative effects on one of the children, who is autistic. It was not demonstrated visitation with the grandparents was in the children's best interests. The case was remitted for a new hearing before a different judge.

DECEMBER 08, 2022

VISITATION, JUDGES, FAILURE TO MAKE FINDINGS OF FACT.

THE JUDGE'S FAILURE TO MAKE FINDINGS OF FACT IN THIS VISITATION PROCEEDING REQUIRED REMITTAL FOR A NEW HEARING (THIRD DEPT).

The Third Department, reversing Family Court, determined the judge's failure to make findings of fact in the visitation proceedings required remittal:

Although the court recited that its determination was based upon the proof adduced at the fact-finding and Lincoln hearings, it did not make factual findings. Furthermore, the record is also not sufficiently developed in order for us to make an independent determination. In this regard, at the fact-finding hearing, the father withdrew his request for in-person visitation with the child and, on appeal, the father requests monthly telephone contact with the child. The mother testified that she opposed additional visitation than what was provided for in the 2013 order because the child showed signs of fear and apprehension, did not have a relationship with the father and was not engaged in writing letters to the father. The mother also testified that the child has a fear associated with prison and violence.

Other than the mother's conclusory testimony, there was scant evidence, if any, demonstrating that the child having telephone contact with the father would be detrimental to the child's welfare … . Moreover, even crediting the mother's testimony about the child's fear, it is unclear whether such fear relates to in-person

visitation with the father at a prison or to telephone calls, as the father now requests. Because the record evidence is not sufficiently developed to determine whether the father should be awarded monthly telephone contact with the child, the matter must be remitted for a new hearing … . Matter of Anthony T. v Melissa U., 2022 NY Slip Op 07287, Third Dept 12-22-22

Practice Point: In this "expansion of visitation" proceeding, the judge did not make findings of fact and the record was not sufficient for the appellate court to rule, the case was remitted to Family Court for a new hearing.

DECEMBER 22, 2022

VISITATION.

A DECISION TO RETURN TO THE REGULAR ACCESS SCHEDULE OF PARENTING TIME AFTER A PERIOD OF SUPERVISED PARENTAL VISITS MUST BE BASED UPON ADMISSIBLE EVIDENCE; WHERE FACTS REMAIN IN DISPUTE, A HEARING IS REQUIRED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined that a hearing should have been held before granting defendant's motion to return to the regular access schedule of parenting time because some facts were still in dispute:

… Supreme Court should have conducted an evidentiary hearing prior to directing that the regular access schedule as set forth in the parties' stipulation of settlement be implemented immediately. Although the court based its determination on information contained in the parties' applications, reports from Kids in Common, and statements from counsel for the parties and the attorney for the child during multiple conferences, Kids in Common had not yet advised that the child was ready for a fully normalized access schedule, and a decision regarding child custody and/or parental access should be based on admissible evidence … . Where, as here, facts material to a determination of what parental access is in the best interests of the child remain in dispute, a hearing is required … . Stolzenberg v Stolzenberg, 2022 NY Slip Op 05554, Second Dept 10-5-22

Practice Point: At the time defendant made a motion to return to the regular access schedule of parenting time after a period of supervised visitation facts remained in dispute. The motion should not have been granted without first holding a hearing where only admissible evidence is considered.

OCTOBER 05, 2022

VISITATION.

THE EVIDENCE INDICATED VISITATION WITH FATHER WOULD NOT BE IN THE BEST INTERESTS OF THE CHILD; FATHER'S PETITION FOR VISITATION SHOULD NOT HAVE BEEN GRANTED (THIRD DEPT).

The Third Department, reversing Family Court, determined the evidence indicated visitation with father would not be in the best interests of the child and his petition for visitation should not have been granted:

… [I]t is undisputed that the father has not lived with the child in over a decade and has only infrequently visited the child due to, among other things, his moving out of the area and frequently relocating around the United States. The father also made no effort to seek a formal award of visitation until 2019, more than seven years after the issuance of the 2012 custody order and over two years after he had last seen the child. This failure by the father to seek a visitation order or otherwise "avail himself . . . of opportunities for visitation over a lengthy period of time is appropriately taken into account in considering whether visitation is appropriate" … .

… [T]he mother testified as to how the father behaved in an irresponsible and harmful manner on the occasions when he did interact with the child and, although the father disputed those claims, we defer to Family Court's assessment that the father's testimony was not credible … . * * * [T]he attorney for the child confirmed to Family Court, and now advises us, that the teenage child is upset by interactions with the father for a variety of reasons and does not wish to see him. The child's preference to have no in-person contact with the father is not

dispositive, but is entitled to "considerable weight" given the child's age … . Matter of Ajmal I. v LaToya J., 2022 NY Slip Op 05912, Third Dept 10-20-22

Practice Point: Although visitation with a parent is generally considered to be in the child's best interests, here father's years-long lack of contact with the child, misbehavior during prior contact, and the child's opposition to visitation, demonstrated visitation with father was not in the child's best interests. The petition for visitation should not have been granted.

OCTOBER 20, 2022