NEW YORK APPELLATE DIGEST, LLC

2023 Family Law Year in Review

A Compilation 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 in 2023. 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 Document.

Table of Contents

Contents

Table of Contents

Table of Contents

APPEALS, DEFAULT.

NO APPEAL LIES FROM AN ORDER ISSUED ON DEFAULT, A MOTION TO VACATE IS THE ONLY REMEDY; NO APPEAL LIES FROM AN ORDER ISSUED ON CONSENT (FIRST DEPT).

The First Department, dismissing the appeal in this custody case, determined (1) no appeal lies from an order issued on mother's default, and (2) no appeal lies from an order entered with mother's consent:

Because the fact-finding order was issued on the mother's default, it is not appealable as of right and her remedy was to move to vacate (CPLR 5511 …). Although the mother appeared on the final date of the inquest after petitioner's witnesses had testified, she was not present during the majority of the fact-finding hearing, and her counsel was not authorized to proceed in her absence … . The mother also did not offer any evidence or seek to testify.

Furthermore, no appeal lies from the dispositional order, as it was entered on the mother's consent and she is therefore not an aggrieved party under CPLR 5511 … . Matter of P. A. (Joseph M.), 2023 NY Slip Op 03432, First Dept 6-27-23

Practice Point: No appeal lies from an order issued on default. The only available remedy is a motion to vacate the default.

Practice Point: No appeal lies from an order issued on consent because the consenting party is not "aggrieved."

JUNE 27, 2023

ATTORNEYS, WAIVER OF RIGHT TO COUNSEL.

FAMILY COURT DID NOT MAKE THE REQUIRED "SEARCHING INQUIRY" RE: WHETHER FATHER WAS KNOWINGLY, INTELLIGENTLY AND VOLUNTARILY WAIVING HIS RIGHT TO COUNSEL (FIRST DEPT).

The First Department, reversing Family Court, held the judge did not make the required "searching inquiry" to determine whether father was knowingly, intelligently and voluntarily waiving his right to counsel. Father had made a motion to vacate a final order of protection:

… [T]he court failed to conduct the requisite "searching inquiry" to ensure that the father's waiver of his right to counsel was "knowing, intelligent, and voluntary" … . While the court advised both parties that they had the right to be represented by counsel, could seek an adjournment to speak to one, and that one might be appointed to them, the court did not question the father about his background, such as age, education, or occupation, and any prior experience of being a pro se litigant or being exposed to legal procedures … . It also did not caution the father against self-representation, detail the dangers and disadvantages of doing so, or inform him that he would have to follow the same legal rules as if he had been represented … . Thus, the court failed to evaluate the father's competency to waive counsel and his understanding of the consequences of self-representation … . Matter of Marlene H. v Loren D.2023 NY Slip Op 05225, First Dept 10-17-23

Practice Point: The questions a judge must ask before a waiver of the right counsel will be deemed valid are concisely explained.

OCTOBER 17, 2023

ATTORNEYS.

MOTHER WAS AWARE OF THE GROUND FOR DISQUALIFYING FATHER'S ATTORNEY FOR YEARS BEFORE THE MOTION TO DISQUALIFY WAS MADE; MOTHER THEREBY WAIVED ANY OBJECTION TO FATHER'S COUNSEL (SECOND DEPT).

The Second Department, reversing (modifying) Family Court, determined mother's motion to disqualify father's attorney should not have been granted because mother was aware of the ground for the motion in 2019 and did not move to disqualify until 2022. She was deemed to have waived any objection to father's attorney:

The Family Court improvidently exercised its discretion in granting that branch of the mother's motion which was to disqualify the father's attorneys on the basis that the father's current wife, the children's stepmother, works as a paralegal in the law office that employs the father's attorneys. * * *

Where a party seeks to disqualify its adversary's counsel in the context of ongoing litigation, courts consider when the challenged interests became materially adverse to determine if the party could have moved at an earlier time … . If a party moving for disqualification was aware or should have been aware of the facts underlying an alleged conflict of interest for an extended period of time before bringing the motion, that party may be found to have waived any objection to the other party's representation … . …

Here, the mother was aware of the employment of the father's current wife at the law firm representing the father since 2019. Accordingly, the mother's failure to move to disqualify the father's attorneys until April 2022 constituted a waiver of her objection to the father's legal representation … . In any event, the mother failed to demonstrate that the children will be prejudiced by the father being represented by his current attorneys. There is no evidence that during the course of her employment, the father's current wife worked on the father's case or that she otherwise communicated with the children about the case … . Matter of Marotta v Marotta, 2023 NY Slip Op 03694, Second Dept 7-5-23

Practice Point: If a party is aware of the ground for disqualification of the opposing party's counsel but does not make a timely motion to disqualify (here years had passed), the moving party will be deemed to have waived any objection to opposing counsel.

JULY 05, 2023

CHILD VICTIMS ACT, EDUCATION-SCHOOL LAW.

IN THIS CHILD VICTIMS ACT LAWSUIT ALLEGING PLAINTIFF WAS ABUSED BY A SCHOOL JANITOR, THE SOCIAL SERVICES LAW 413 CAUSE OF ACTION SHOULD HAVE BEEN DISMISSED BECAUSE THE JANITOR WAS NOT "A PERSON LEGALLY RESPONSIBLE" FOR PLAINTIFF'S CARE; THEREFORE THE SCHOOL HAD NO DUTY TO REPORT THE ABUSE PURSUANT TO THE SOCIAL SERVICES LAW (SECOND DEPT).

The Second Department, reversing (modifying) Supreme Court, determined the Social Services Law cause of action in this Child Victims Act complaint should have been dismissed. Plaintiff alleged she was abused by a school janitor and the defendant school violated Social Services Law 413 by not reporting the abuse. Social Services Law 413 applies only to a "person legally responsible" for the plaintiff's care:

… [T]he Supreme Court should have granted that branch of the defendants' motion which was pursuant to CPLR 3211(a)(7) to dismiss the third cause of action, alleging a violation of Social Services Law § 413. Since the janitor was not a "person legally responsible" for the plaintiff's care within the meaning of Family Court Act § 1012(e), the defendants had no duty under Social Services Law § 413(1)(a) to report the alleged abuse of the plaintiff by the janitor (see Social Services Law § 412[1] …). Sullivan v Port Wash. Union Free Sch. Dist., 2023 NY Slip Op 01022, Second Dept 2-22-23

Practice Point: Pursuant to Social Services Law 413 a school is under a duty to report abuse by a person legally responsible for a student's care. That statute did not apply here in this Child Victims Act lawsuit alleging abuse by a school janitor.

FEBRUARY 22, 2023

CHILD VICTIMS ACT, EDUCATION-SCHOOL LAW.

THE EXTENDED STATUTE OF LIMITATIONS IN THE CHILD VICTIMS ACT DOES NOT APPLY TO CIVIL RIGHTS CAUSES OF ACTION PURSUANT TO 42 USC 1983; THE DUTY TO REPORT CHILD ABUSE UNDER THE SOCIAL SERVICES LAW APPLIES ONLY TO "PERSONS LEGALLY RESPONSIBLE" FOR THE CARE OF THE CHILD, WHICH DOES NOT INCLUDE TEACHERS (THIRD DEPT).

The Third Department, in a full-fledged opinion by Justice Aarons, reversing (modifying) Supreme Court, determined the negligence and civil rights causes of action against the school district in this Child Victims Act suit were properly dismissed, and the Social Services Law causes of action should have been dismissed. The complaints alleged sexual abuse by a teacher. The Third Department followed the Fourth Department holding that the extended statute of limitations in the Child Victims Act did not apply to the 42 USC 1983 civil rights causes of action. The Third Department also determined the teacher was not a "person legally responsible" for the plaintiffs such that the abuse-reporting requirement in the Social Services Law applied to the school district:

It is true that CPLR 214-g contains broad language. The statute nonetheless limits the types of causes of action — i.e., claims involving child sexual abuse — that are revived and then given a new limitations period. … 42 USC § 1983 does not create any independent, substantive rights but merely provides a vehicle to enforce such rights … . As the Fourth Department reasoned, to determine whether CPLR 214-g was a related revival statute would require a court to impermissibly consider the particular facts or particular legal theory advanced by a plaintiff in a section 1983 claim (see BL Doe 3 v Female Academy of the Sacred Heart, 199 AD3d at 1422). Accordingly, we decline plaintiffs' invitation to reject the Fourth Department's approach as articulated in BL Doe 3 v Female Academy of the Sacred Heart … . * * *

… [C]ertain individuals must report cases of suspected abuse when reasonable cause exists that a child coming before them is an abused child (see Social Services Law § 413). Civil liability may be imposed upon these individuals who knowingly and willfully fail to make the requisite report (see Social Services Law § 420 [2]). … [F]or purposes of Social Services Law § 413, an "abused child" is one who is

abused by a "parent or other person legally responsible for [a child's] care" (Family Ct Act § 1012 [e]; see Social Services Law § 412 [1]).

The School District maintains that plaintiffs' statutory claim should have been dismissed because Wales [defendant teacher] was not a "person legally responsible" for plaintiffs' care at the time of the alleged abuse. … [W]hether an individual constitutes a "person legally responsible" for a child within the meaning of Family Ct Act § 1012 (e) entails the examination of various factors … . The Court of Appeals cautioned … that "persons who assume fleeting or temporary care of a child . . . or those persons who provide extended daily care of children in institutional settings, such as teachers," should not be interpreted as a "person legally responsible" for a child's care … . … [T]he School District cannot be liable for any alleged failure to report any abuse by Wales … . Dolgas v Wales, 2023 NY Slip Op 01830, Third Dept 4-6-23

Practice Point: Here the school district was sued under the Child Victims Act alleging sexual abuse by a teacher. The civil rights causes of action pursuant to 42 USC 1983 are not subject to the extended statute of limitations in the Child Victims Act and, therefore, those causes of action were properly dismissed.

Practice Point: A teacher is not a "person legally responsible" for the care of a child within the meaning of the Family Court Act. Therefore the causes of action under the Social Services Law alleging the school district failed to report abuse by a teacher should have been dismissed.

APRIL 06, 2023

CHILD VICTIMS ACT, FOSTER CARE.

ALTHOUGH THE REQUIREMENTS FOR THE CONTENTS OF A CLAIM AGAINST THE STATE IN COURT OF CLAIMS ACT SECTION 11 ARE STRICT AND JURISDICTIONAL, THE CLAIMANT IS NOT REQUIRED TO ALLEGE EVIDENTIARY FACTS (SECOND DEPT).

The Second Department, reversing the Court of Claims, determined the claim in this Child Victims Act proceeding sufficiently stated the nature of the claim. The claimant alleged he was sexually abused in state-run foster homes every week for

two years (1994 – 1996}. The claim alleged negligent hiring, retention or supervision:

The only reason identified by the Court of Claims in the order appealed from, and by the defendant on appeal, for concluding that the claim failed to state the nature of the claim is that, while the claim included an allegation that the defendant had actual or constructive notice of the alleged sexual abuse, it did not supply any "details" as to how the defendant received notice of the alleged abuse. Although the requirements of Court of Claims Act § 11(b) are strict, and jurisdictional in nature, the fact remains that the claim is a pleading, the contents of which are merely allegations. As the defendant correctly contends, "[a] necessary element of a cause of action to recover damages for negligent hiring, retention, or supervision is that the employer knew or should have known of the employee's propensity for the conduct which caused the injury" … . Nonetheless, "[c]auses of action alleging negligence based upon negligent hiring, retention, or supervision are not statutorily required to be pleaded with specificity" ,,, . The manner in which the defendant acquired actual or constructive notice of the alleged abuse is an evidentiary fact, to be proved by the claimant at trial. In a pleading, "the plaintiff need not allege his [or her] evidence" … . Martinez v State of New York, 2023 NY Slip Op 01990, Second Dept 4-19-23

Practice Point: A claim (i.e., the pleading) against the state must meet the strict, jurisdictional "contents" requirements in Court of Claims Act section 11. But the claim is merely a pleading and need not allege evidentiary facts to survive a motion to dismiss.

APRIL 19, 2023

CHILD VICTIMS ACT, FOSTER CARE.

THE CLAIM IN THIS CHILD VICTIMS ACT ACTION SUFFICIENTLY STATED THE TIME AND NATURE OF THE SEXUAL ABUSE ALLEGEDLY OCCURRING DURING FOSTER CARE MORE THAN 40 YEARS AGO; THE PLEADING REQUIREMENTS IN THE COURT OF CLAIMS AND THE MECHANICS AND PURPOSE OF THE CHILD VICTIMS ACT CONCISELY EXPLAINED (SECOND DEPT).

The Second Department, reversing the Court of Claims, determined the claim in this Child Victims Act action, alleging abuse during foster care more than 40 years ago, sufficiently stated the time and nature of the abuse. The decision includes a clear, concise description of the pleading requirement in the Court of Claims, and the mechanics and purpose of the Child Victims Act, which extends that statute of limitations for sexual abuse occurring when the victim was under the age of 18:

Under the particular circumstances of this case, the date ranges provided in the claim indicating that the sexual abuse began when the claimant was 4 years old and "occurred between two to three times a week to three to four times a year" until she was 12 years old while she resided in a foster home, along with other information contained in the claim, including the identities of the claimant's foster parents, the address of the foster home, and names of the claimant's alleged abusers, were sufficient to satisfy the "time when" requirement of the Court of Claims Act § 11(b) … . * * *

In this case, the claim sufficiently provided the defendant with a description of the manner in which the claimant was injured, and how the defendant was negligent in allegedly failing to protect the claimant from sexual abuse while she resided in a foster home. The claimant is not required to set forth the evidentiary facts underlying the allegations of negligence in order to satisfy the section 11(b) nature of the claim requirement … . As the claim is sufficiently detailed to allow the defendant to investigate and ascertain its liability, it satisfies the nature of the claim requirement of Court of Claims Act § 11(b) … . Fletcher v State of New York, 2023 NY Slip Op 03850, Second Dept 7-19-23

Practice Point: Here the plaintiff alleged sexual abuse while in foster care more than 40 years ago. Given the purpose of the Child Victims Act, which is clearly

explained in this decision, the claim sufficiently described the time and nature of the alleged abuse.

JULY 19, 2023

CHILD VICTIMS ACT, FOSTER CARE.

THE FOURTH DEPARTMENT, NOTING A SPLIT OF AUTHORITY, DETERMINED THE PLAINTIFF DID NOT SET FORTH ALLEGATIONS WHICH DEMONSTRATED A SPECIAL RELATIONSHIP BETWEEN HER AND THE COUNTY; THEREFORE THE COUNTY COULD NOT BE HELD LIABLE FOR SEXUAL ABUSE ALLEGEDLY SUFFERED BY THE PLAINTIFF WHILE IN FOSTER CARE (FOURTH DEPT).

The Fourth Department, reversing Supreme Court and noting a split of authority, determined plaintiff in this Child Victims Act action alleging sexual abuse while in foster care did not demonstrate a "special relationship" with the county. The decision includes a concise explanation of the complex intertwined issues controlling governmental tort liability:

In Mark G. v Sabol (93 NY2d 710 [1999]), the Court of Appeals analyzed provisions in the Social Services Law designed to protect foster children and to prevent child abuse generally and concluded that a private right of action was not consistent with the legislative scheme (see id. at 720-722; see also McLean, 12 NY3d at 201). Notably, in McLean, the Court of Appeals cited Mark G. approvingly … . We therefore conclude that plaintiff cannot establish a special duty based upon the County's alleged violation of its duties under the Social Services Law. We note that, to the extent that there is case law in the First and Second Departments that would support a contrary conclusion, we decline to follow those cases … .

… [P]laintiff cannot establish the requisite special relationship between the parties based upon the County's alleged voluntary assumption of a duty that generated justifiable reliance on her part … . To establish such a special relationship, a plaintiff must show "(1) an assumption by the municipality, through promises or actions, of an affirmative duty to act on behalf of the party who was injured; (2) knowledge on the part of the municipality's agents that inaction could lead to

harm; (3) some form of direct contact between the municipality's agents and the injured party; and (4) that party's justifiable reliance on the municipality's affirmative undertaking" (Cuffy v City of New York, 69 NY2d 255, 260 [1987] …). " '[A]ll four elements must be present for a special duty to attach' " … .

… "[T]he failure to perform a statutory duty, or the negligent performance of that duty, cannot be equated with the breach of a duty voluntarily assumed" … . Even assuming, arguendo, that plaintiff sufficiently alleged the existence of a duty on the part of the County apart from its statutory obligations, we … conclude that plaintiff failed to set forth allegations that, if proven, would establish each of the four elements articulated in Cuffy … . Weisbrod-Moore v Cayuga County, 2023 NY Slip Op 02445, Fourth Dept 5-5-23

Practice Point: Here the plaintiff sued the county alleging sexual abuse while in foster care. Noting a split of authority, the Fourth Department held the plaintiff did not set forth allegations demonstrating a special relationship between her and the county, a prerequisite for governmental tort liability. The decision includes a concise explanation of the confusing, intertwined issues surrounding governmental tort liability.

MAY 05, 2023

CHILD VICTIMS ACT, FOSTER CARE.

THE NEGLIGENCE AND NEGLIGENT SUPERVISION AND HIRING CAUSES OF ACTION AGAINST THE WARREN COUNTY DEFENDANTS IN THIS CHILD VICTIMS ACT CASE ALLEGING ABUSE IN FOSTER CARE SHOULD HAVE BEEN DISMISSED; THE COMPLAINT DID NOT ADEQUATELY ALLEGE THE WARREN COUNTY DEFENDANTS WERE AWARE OF THE DANGER POSED BY PLAINTIFF'S FOSTER FATHER (THIRD DEPT).

The Third Department, reversing (modifying) Supreme Court, determined the negligence and negligent supervision causes of action against the Warren County defendants in this Child Victims Act case should have been dismissed. The complaint did not adequately allege the Warren County defendants were aware of the danger posed by plaintiff's foster father:

… [W]e agree with the Warren County defendants that Supreme Court should have dismissed the negligence and negligent hiring, retention, supervision and/or direction causes of action as they relate to the conduct in Warren County. The complaint alleged that, in approximately 1979, plaintiff was placed in a foster home in Warren County, where he was sexually abused by his foster father on numerous occasions. Although we are cognizant that pleadings alleging negligent hiring, retention and supervision need not be pleaded with specificity … , the complaint merely asserts that the Warren County defendants "knew or, in the exercise of reasonable care, should have known" that the foster father "had the propensity to engage in sexual abuse of children." Unlike in the counties of Albany and Cayuga — where plaintiff alleges that he reported the sexual abuse, thereby providing the municipal defendants with notice of the dangerous condition — the complaint fails to assert any allegations of fact that would have provided the Warren County defendants with notice that the foster father presented a foreseeable harm. Because plaintiff failed to sufficiently plead that the Warren County defendants were provided notice of a dangerous condition present in the Warren County foster home, that claim could not survive a pre-answer motion to dismiss pursuant to CPLR 3211 (a) (7) … , and Supreme Court should have dismissed those claims against the Warren County defendants. Easterbrooks v Schenectady County, 2023 NY Slip Op 03889, Third Dept 7-20-23

Practice Point: In order to adequately plead a county was negligent in placing plaintiff in a foster-care situation where plaintiff was abused, the complaint must allege facts demonstrating the county was aware of the danger posed by the foster parent.

JULY 20, 2023

CHILD VICTIMS ACT.

THE NOTICE OF CLAIM IN THIS CHILD VICTIMS ACT CASE SUFFICIENTLY ALLEGED CLAIMANT'S INJURY, DEFENDANT'S FAILURE TO PROTECT CLAIMANT WHILE IN FOSTER CARE AND THE TIME THE CLAIM AROSE (SECOND DEPT).

The Second Department, reversing the Court of Claims, determined the Notice of Claim in this Child Victims Act proceeding sufficiently described claimant's injury,

the state's failure to protect claimant while in foster care, and the time when the claim arose:

… [T]he claim sufficiently provided the defendant with a description of the manner in which the claimant was injured, and how the defendant was negligent in allegedly failing to protect the claimant from sexual abuse while a resident in a state-certified foster care facility. The claimant is not required to set forth the evidentiary facts underlying the allegations of negligence in order to satisfy the section 11(b) "nature of the claim" requirement … . As the claim is sufficiently detailed to allow the defendant to investigate and ascertain its liability, it satisfies the nature of the claim requirement of Court of Claims Act § 11(b)… .

… The claim alleges that the claimant was sexually abused repeatedly in 1992 and 1993, on numerous and regular occasions, including conduct taking place in his room three to four times a week. This Court has stated recently in the context of the CVA, that "[w]e recognize that in matters of sexual abuse involving minors, as recounted by survivors years after the fact, dates and times are sometimes approximate and incapable of calendrical exactitude" … . Thus a claimant commencing a claim pursuant to the CVA is not required to allege the exact date on which the sexual abuse occurred … . As the claim here sufficiently alleges the time when the abuse occurred, the Court of Claims properly declined to dismiss the claim on that ground … . Davila v State of New York, 2023 NY Slip Op 03451, Second Dept 6-28-23

Practice Point: In this Child Victims Act case against the state alleging the failure to protect claimant in foster care, the Notice of Claim sufficiently alleged the injury, defendant's negligence and the time the claim arose.

JUNE 28, 2023

CRIMINAL LAW, FAMILY OFFENSE.

ABSENT A STIPULATION BY THE PARTIES, FAMILY COURT SHOULD NOT HAVE WITHDRAWN THE FAMILY OFFENSE PETITION (SECOND DEPT).

The Second Department, reversing Family Court, determined the family offense petition should not have been withdrawn by the judge because the parties did not stipulate to the withdrawal:

Where, as here, the matter has been submitted to the court, "the court may not order an action discontinued except upon the stipulation of all parties appearing in the action" (CPLR 3217[b]). In this case, there was no stipulation from the parties. Thus, the court erred in directing that the petition was withdrawn … . Matter of Johnson v Lomax, 2023 NY Slip Op 01675, Second Dept 3-29-23

Practice Point: A judge cannot withdraw a family offense petition which has been submitted to the court without a stipulation by the parties.

MARCH 29, 2023

CRIMINAL LAW, FAMILY OFFENSE.

THE JUDGE FAILED TO INQUIRE FURTHER DURING THE PLEA ALLOCUTION WHEN DEFENDANT SAID HE DID NOT VIOLATE THE ORDER OF PROTECTION INTENTIONALLY; THERE IS NO NEED TO PRESERVE A DEFECTIVE-ALLOCUTION ERROR; CONVICTION REVERSED (FOURTH DEPT).

The Fourth Department, reversing defendant's conviction of an aggravated family offense by guilty plea, determined the judge should have inquired further when defendant stated he did not intend to violate the order of protection when he sent a letter to the protected person. A defective allocution will be considered on appeal in the absence of preservation:

… [A]fter acknowledging his awareness of the valid and effective order of protection directing him to have no contact with the protected person, defendant stated that he "didn't intentionally violate" the order of protection by sending the protected person a letter and instead asserted that any violation "was unintentional." Following an off-the-record discussion between defendant and defense counsel, defendant admitted that sending the letter did, in fact, violate the order of protection, but the court did not inquire, and defendant never clarified, whether his conscious objective was to disobey the order of protection … . Contrary to the People's assertion, which "conflates the culpable mental states for acts done 'intentionally' … and those done 'knowingly' … , this is not a case in which defendant's "further statements removed any doubt regarding th[e requisite]

intent" … . People v Vanwuyckhuyse, 2023 NY Slip Op 00754, Fourth Dept 2-10-23

Practice Point: The defendant said he did not intend to violate the order of protection during the plea allocution and the judge did not make the required inquiry. An allocution error need not be preserved for appeal by moving to withdraw the plea. The conviction was reversed.

FEBRUARY 10, 2023

CRIMINAL LAW, DOMESTIC VIOLENCE SURVIVORS JUSTICE ACT (DVSJA).

DEFENDANT IN THIS MANSLAUGHTER CASE WAS ENTITLED TO A REDUCED SENTENCE UNDER THE DOMESTIC VIOLENCE SURVIVORS JUSTICE ACT (DVSJA); TWO DISSENTERS ARGUED DEFENDANT'S SENTENCE WAS NOT UNDULY HARSH (THIRD DEPT).

The Third Department, reversing County Court, over a two-justice dissent, determined defendant was entitled to resentencing in this manslaughter case under the Domestic Violence Survivors Justice Act (DVSJA). The dissenters agreed that defendant met the DVSJA criteria for a reduced sentence, but argued the sentence that was imposed was not unduly harsh:

… [W]e disagree with County Court's determination that defendant's abuse was anything less than "substantial," as defendant's own account of the specific acts of violence, which is largely corroborated by various witnesses in the record, and the injuries suffered as well as the psychological abuse that came alongside such violence was sufficient to fall under the ambit of the DVSJA. Although the court accurately concluded that the relationship between defendant and the victim was mutually abusive, that does not foreclose a determination that defendant was a victim of abuse … . Moreover, such conduct is readily explained in Lesswing's [the forensic psychologist's] report as typical of those persons suffering from battered person syndrome, particularly in the case of defendant who had a lengthy history of exposure to domestic violence over the course of her life … . People v Brenda WW., 2023 NY Slip Op 06564, Third Dept 12-21-23

Practice Point: Here in this manslaughter case the defendant met the criteria for a reduced sentence under the Domestic Violence Survivors Justice Act (DVSJA).

Two dissenters agreed that defendant met the criteria but argued the imposed sentence was not unduly harsh.

DECEMBER 21, 2023

CRIMINAL LAW, FAMILY OFFENSE, INDICTMENT.

THE INDICTMENT COUNT CHARGING AGGRAVATED FAMILY OFFENSE DID NOT SPECIFY WHICH OF THE LISTED OFFENSES WAS THE BASIS OF THE CHARGE, RENDERING THE COUNT JURISDICTIONALLY DEFECTIVE (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Troutman, determined the count of the indictment charging aggravated family offense (Penal Law 240.75) was jurisdictionally defective because it did not specify which of the offenses listed in the statute was the basis of the charge:

A defendant commits the crime of aggravated family offense pursuant to Penal Law § 240.75 when the defendant "commits a misdemeanor defined in subdivision two of this section as a specified offense and [the defendant] has been convicted of one or more specified offenses within the immediately preceding five years" (Penal Law § 240.75 [1]). Subdivision two of the statute contains 54 "specified offense[s]," 36 felonies and 18 misdemeanors … . To qualify as a specified offense, the defendant and the person against whom the offense was committed must be members of the same family or household as defined in CPL 530.11 (1) (see id. § 240.75 [2]) … . Thus, to commit the crime of aggravated family offense, a defendant must have been convicted of one or more of the specified offenses in subdivision two of the statute within the previous five years, the defendant must have currently committed one of the misdemeanor offenses listed in subdivision two, and both offenses must be committed against a member of the same family or household as the defendant.

Defendant contends that the failure to specify the current misdemeanor offense in the count of the indictment charging him with aggravated family offense rendered that count jurisdictionally defective … . We agree. People v Saenger, 2023 NY Slip Op 02735, CtApp 5-18-23

Practice Point: The aggravated family offense count did not specify the current misdemeanor offense on which the count was based, rendering the count jurisdictionally defective.

MAY 18, 2023

CRIMINAL LAW, FAMILY OFFENSE.

FORMER SISTERS-IN-LAW WHO LIVED ONE MILE APART AND SAW EACH OTHER FREQUENTLY FOR 30 YEARS HAD AN "INTIMATE RELATIONSHIP" WHICH SUPPORTED THE FAMILY OFFENSE PROCEEDING (SECOND DEPT).

The Second Department, reversing Family Court, determined the long-term relationship (as sisters-in-law) qualified as an "intimate relationship" which supports a family offense proceeding:

For purposes of Family Court Act article 8, "members of the same family or household" is defined to include "persons related by consanguinity or affinity," and "persons who are not related by consanguinity or affinity and who are or have been in an intimate relationship regardless of whether such persons have lived together at any time" … …

… [T]he petitioner demonstrated that the parties had been in an "intimate relationship" within the meaning of Family Court Act § 812(1)(e), so as to confer subject matter jurisdiction upon the court. Beyond expressly excluding from the definition of "intimate relationship" a "casual acquaintance" and "ordinary fraternization between two individuals in business or social contexts" … , "the Legislature left it to the courts to determine, on a case-by-case basis, what qualifies as an 'intimate relationship' within the meaning of Family Court Act § 812(1)(e)" … . Factors to consider include "the nature or type of relationship, regardless of whether the relationship is sexual in nature; the frequency of interaction between the persons; and the duration of the relationship" … .

… [T]he petitioner demonstrated that the parties had known each other for more than 30 years, that they had a close relationship as sisters-in-law for most of this period, during which they lived within one mile of one another, frequently had dinner together, engaged in social activities in each other's homes, attended most holiday celebrations together, supported each other during times of devastating

family illnesses, and assisted each other with their respective children … . Matter of Eno v Illovsky, 2023 NY Slip Op 01506, Second Dept 3-22-23

MARCH 22, 2023

CRIMINAL LAW, FAMILY OFFENSE.

THE EVIDENCE DID NOT SUPPORT THE FINDING RESPONDENT COMMITTED THE FAMILY OFFENSE OF HARASSMENT SECOND DEGREE (FOURTH DEPT).

The Fourth Department, reversing Family Court, determined the evidence did not support the family offense of harassment second degree:

"A petitioner bears the burden of proving by a preponderance of the evidence that respondent committed a family offense" … . To establish that respondent committed acts constituting harassment in the second degree, petitioner was required to establish that respondent engaged in conduct that was intended to harass, annoy or alarm petitioner, that petitioner was alarmed or seriously annoyed by the conduct, and that the conduct served no legitimate purpose (see Penal Law § 240.26 [3]). Here, the evidence presented by petitioner at the hearing consisted primarily of petitioner's testimony that respondent posted "negative posts and stuff" on social media about him including, in particular, two posts on Facebook about an unnamed "ex" that he believed referred to him, after which respondent blocked him from viewing her posts. We conclude under the circumstances of this case that the evidence presented by petitioner failed to establish by a preponderance of the evidence that respondent engaged in acts constituting harassment in the second degree … . Matter of Geremski v Berardi, 2023 NY Slip Op 04883, Fourth Dept 9-29-23

Practice Point: Here the finding respondent committed the family offense of harassment second degree was not supported by the preponderance of the evidence.

SEPTEMBER 29, 2023

CRIMINAL LAW, FAMILY OFFENSE.

THE EVIDENCE SUPPORTED HARASSMENT AS A FAMILY OFFENSE BUT DID NOT SUPPORT AGGRAVATED HARASSMENT OR DISORDERLY CONDUCT (FOURTH DEPT).

The Fourth Department, reversing (modifying) Family Court in this family offense proceeding, determined harassment was supported by the evidence but disorderly conduct and aggravated harassment were not:

The undisputed evidence at the fact-finding hearing established that the parties had dated more than a decade earlier and that, after petitioner terminated the relationship, respondent continued to contact her, prompting petitioner to obtain at least two orders of protection against him. After years of not seeing each other, respondent went to petitioner's house uninvited on October 28, 2021 and rang the doorbell. When petitioner answered the door, respondent said that she owed him a conversation. Petitioner responded that she did not want to talk to him and repeatedly asked him to leave. Respondent refused to leave, prompting petitioner to call the police. Respondent eventually left before the police arrived. Approximately six weeks later, respondent again went to petitioner's house uninvited and demanded to speak to her. Petitioner asked him to leave at least a dozen times, but respondent ignored those requests and entered her garage where she was standing. The police arrived shortly thereafter and took respondent into custody, charging him with trespass.

In our view, Family Court properly determined that respondent committed the family offense of harassment in the second degree by engaging in a course of conduct or repeatedly committing acts that alarmed or seriously annoyed petitioner while having the intent to harass, annoy or alarm petitioner (see Penal Law § 240.26 [3] …). We agree with respondent, however, that petitioner failed to meet her burden of establishing by a fair preponderance of the evidence that respondent committed the family offenses of disorderly conduct (§ 240.20) or aggravated harassment in the second degree (§ 240.30 [1]). Matter of Ohler v Bartkovich, 2023 NY Slip Op 02256, Fourth Dept 4-29-23

Practice Point: Here the facts supported harassment as a family offense but did not support aggravated harassment or disorderly conduct.

APRIL 28, 2023

CRIMINAL LAW, FAMILY OFFENSE.

THE MAJORITY HELD THE EVIDENCE DID NOT ESTABLISH DISORDERLY CONDUCT AS A FAMILY OFFENSE, FINDING THE CONDUCT WAS NOT "PUBLIC;" THE DISSENT ARGUED THE CONDUCT WAS "PUBLIC" IN THAT IT TOOK PLACE IN THE PRESENCE OF ADULTS AND CHILDREN OUTSIDE A DAYCARE CENTER (THIRD DEPT).

The Third Department, over a dissent, determined the evidence did not establish a family offense (disorderly conduct): The majority and the dissenter disagreed on whether the conduct was "public" in nature:

"[C]ritical to a charge of disorderly conduct is a finding that [the mother's] disruptive statements and behavior were of a public rather than an individual dimension . . ., which requires proof of an intent to threaten public safety, peace or order" … . "[A] person may be guilty of disorderly conduct only when the situation extends beyond the exchange between the individual disputants to a point where it becomes a potential or immediate public problem" … .

From the dissent:

[The] disruptive behavior outside a daycare program in the direct presence of other adults and children took on a public dimension that was no doubt alarming to the grandmother, the child and the bystanders. Whether intentional or not, such conduct satisfies the reckless component for the charge. On this record, the charge of disorderly conduct within the petition was established by a preponderance of the evidence and should have been sustained (see Penal Law § 240.20 [1], [3] …). Matter of Linda UU. v Dana VV., 2023 NY Slip Op 00013, Third Dept 1-5-22

Practice Point: In order for conduct to amount to disorderly conduct it must have a "public" as opposed to an "individual" dimension. This case shows the distinction can be difficult to discern.

JANUARY 05, 2023

CRIMINAL LAW, FAMILY OFFENSE.

THIS FAMILY OFFENSE PROCEEDING WAS REMITTED TO FAMILY COURT; APPELLATE REVIEW WAS NOT POSSIBLE IN THE ABSENCE OF FINDINGS OF FACT ADDRESSING CONFLICTING EVIDENCE AND THE CREDIBILITY OF WITNESSES (SECOND DEPT).

The Second Department, remitting the matter to Family Court in this family offense proceeding, noted that appellate review was impossible without findings of fact:

The determination of whether a family offense was committed is a factual issue to be resolved by the hearing court, and that court's determination regarding the credibility of witnesses is entitled to great weight on appeal unless clearly unsupported by the record … .

Effective appellate review requires that appropriate factual findings be made by the hearing court since it is the court best able to measure the credibility of the witnesses … . In granting or denying a petition for an order of protection, the Family Court must state the facts deemed essential to its determination (see CPLR 4213[b] …). Remittal is not necessary, however, where the record is sufficient for this Court to conduct an independent review of the evidence … .

Here, the Family Court, which was presented with sharply conflicting accounts by the parties regarding their allegations, issued mutual orders of protection without setting forth any findings with respect to the credibility of the parties or the facts deemed essential to its determinations (see CPLR 4213[b]). Since the record presents factual issues, including questions of credibility, and in light of the conflicting allegations made by the parties against each other, resolution thereof is best left to the court of first instance … . Matter of Sealy v Peart, 2023 NY Slip Op 02128, Second Dept 4-26-23

Practice Point: Here in this family offense proceeding appellate review was not possible because the Family Court judge did not make any findings addressing conflicting evidence and the credibility of witnesses. The matter was remitted because the record was not sufficient for an independent review.

APRIL 26, 2023

Table of Contents

CRIMINAL LAW, JUVENILE DELINQUENCY, JUDGES.

AT THE TIME OF THE JUVENILE'S ADMISSION TO POSSESSION OF STOLEN PROPERTY THE JUDGE DID NOT INFORM HIM OR HIS MOTHER OF THE EXACT NATURE OF HIS "PLACEMENT OUTSIDE THE HOME OR ITS POSSIBLE DURATION" AS REQUIRED BY FAMILY COURT ACT SECTION 3213(1); ORDER REVERSED (THIRD DEPT).

The Third Department, reversing the juvenile's admission in this juvenile delinquency proceeding, determined the juvenile and his mother were not adequately informed of the consequences of the admission to possession of stolen property:

… [T]he allocution in which respondent admitted to [possession of stolen property] was fatally defective because Family Court … failed to comply with the requirements of Family Ct Act § 321.3 (1). At the time of his admission, Family Court commented on some possible dispositions including being "placed outside of [his] home . . . for a period of time." Neither respondent nor his mother were informed of "the exact nature of his placement outside of the home or its possible duration" … . "Inasmuch as the provisions of Family Ct Act § 321.3 (1) are mandatory and cannot be waived, the order must be reversed" … . Matter of Tashawn MM., 2023 NY Slip Op 03745, Third Dept 7-6-23

Practice Point: At the time of a juvenile's admission in a juvenile delinquency proceeding, the juvenile must be informed of the exact nature of any "placement outside of the home and its possible duration." The failure to so inform the juvenile requires reversal of the placement order.

JULY 06, 2023

Table of Contents

CRIMINAL LAW, JUVENILE DELINQUENCY.

RESPONDENT JUVENILE WAS NOT INFORMED THE FACT FINDING HEARING IN THIS JUVENILE DELINQUENCY PROCEEDING WOULD GO FORWARD IN HIS ABSENCE (THE PARKER WARNING); THEREFORE RESPONDENT DID NOT WAIVE THE RIGHT TO BE PRESENT AND THE ADJUDICATION WAS REVERSED BECAUSE OF HIS ABSENCE (FOURTH DEPT).

The Fourth Department, reversing Family Court in this juvenile delinquency proceeding, determined that the respondent juvenile was not informed that the fact finding hearing would proceed in his absence. Therefore he did not not waive his right to be present at the hearing:

Respondent contends that the court violated his constitutional and statutory right to be present at the fact-finding hearing. We agree, and we therefore reverse the order and remit the matter to Family Court for further proceedings on the petition. "[R]espondents in juvenile delinquency proceedings have a constitutional and statutory right to be present at all material stages of court proceedings, including fact-finding hearings … . Respondents "may, however, waive the right to be present at such proceedings" … . " 'In order to effect a voluntary, knowing and intelligent waiver, the [respondent] must, at a minimum, be informed in some manner of the nature of the right to be present at [the fact-finding hearing] and the consequences of failing to appear' for that hearing" … . Here, the court did not advise respondent that he had a right to be present at the fact-finding hearing and that the consequence of his failure to appear would be that the fact-finding hearing would proceed in his absence (see generally People v Parker, 57 NY2d 136, 141 [1982]). We therefore conclude on this record that there is no voluntary, knowing, and intelligent waiver of respondent's right to be present at the hearing … . Matter of Timar P. (James B.), 2023 NY Slip Op 03654, Fourth Dept 6-30-23

Practice Point: The Parker warning is required in juvenile delinquency proceedings in Family Court.

JUNE 30, 2023

CRIMINAL LAW, JUVENILE DELINQUENCY.

THE JUVENILE DELINQUENCY PETITIONS WERE TIMELY FILED; THE CORRECT APPLICATION OF THE COVID TOLL OF THE STATUTE OF LIMITATIONS EXPLAINED (FIRST DEPT).

The First Department, reversing Family Court, determined the juvenile delinquency petitions were timely fifed because of the COVOD toll imposed by the Executive Orders:

By Executive Order No. 8.202.8, issued on March 20, 2020 due to the Covid-19 pandemic, the "time limit[s] for the commencement, filing, or service of any legal action, notice, motion, or other process or proceeding, as prescribed by the procedural laws of the state" were "tolled" … . "A toll suspends the running of the applicable period of limitation for a finite time period, and the period of the toll is excluded from the calculation of the relevant time period" … . However, a suspension "simply delays expiration of the time period until the end date of the suspension" … . By its plain terms, Executive Order 8.202.8 tolled the statute of limitations … , until that order and subsequent Executive Orders extending the tolling period were rescinded by Executive Order 8.210, issued on June 24, 2021 and effective the next day … .

Since the period of the toll must be excluded from the calculation of the filing deadline … , the juvenile delinquency petitions were timely filed on July 2,2021. Respondent allegedly committed his first unlawful act on December 21, 2019. Normally, the filing deadline for the petitions would have been respondent's 18th birthday — June 7, 2021, which was 534 days after he allegedly committed the first act. When the first executive order took effect on March 20, 2020, there were 444 days remaining before respondent's 18th birthday. By adding 444 days to June 24, 2021, when the executive order's tolling provisions were terminated, the Agency's deadline for filing the petitions was August 25, 2022. Here, the Agency refiled and served the second set of petitions on July 2, 2021, only eight days after the executive orders were rescinded.

The order rescinding the prior Executive Orders meant that the statute of limitations would start running again, "picking up where it left off" … . We also note that Family Court's narrow interpretation of the Executive Order would deprive respondent of the benefits of Family Court intervention … . Matter of Isaiah H., 2023 NY Slip Op 01587, First Dept 3-23-23

Practice Point: Here the COVID toll of the statute of limitations rendered the filing of the juvenile delinquency petitions timely. The correct application of the toll was explained.

MARCH 23, 2023

CRIMINAL LAW, JUVENILE DELINQUENCY.

THE NONHEARSAY ALLEGATIONS IN THE JUVENILE DELINQUENCY PETITION DID NOT SUFFICIENTLY DEMONSTRATE THE "PHYSICAL INJURY" ELEMENT OF ASSAULT THIRD RENDERING THE PETITION JURISDICTIONALLY DEFECTIVE (SECOND DEPT).

The Second Department, reversing (modifying) Family Court in this juvenile delinquency proceeding, determined the factual part of the petition alleging an act which would constitute assault third if done by an adult was jurisdictionally defective because it did not set forth every element of the offense. Specifically the petition did not sufficiently allege "physical injury:"

"For a juvenile delinquency petition, or a count thereof, to be sufficient on its face, the factual part of the petition or of any supporting depositions must set forth sworn, nonhearsay allegations sufficient to establish, if true, every element of each crime charged and the alleged delinquent's commission thereof" … . Such allegations must be set forth in the petition or the supporting depositions (see Family Ct Act § 311.2[3] …). "The failure to comply with this requirement constitutes a nonwaivable jurisdictional defect that deprives the court of subject matter jurisdiction to entertain the petition or count" … . Here, neither the petition nor the supporting depositions provided sworn, nonhearsay allegations as to a physical injury sustained by the complainant named in count 5 (see Penal Law § 120.00[2] …). Accordingly, that count was jurisdictionally defective and must be dismissed … . Matter of Yacere D., 2023 NY Slip Op 03781, Second Dept 7-12-23

Practice Point: A petition in a juvenile delinquency must include nonhearsay allegations supporting every element of the underlying offense or it is jurisdictionally defective. Here the allegations of physical injury in the context of assault third were insufficient.

JULY 12, 2023

CRIMINAL LAW, JUVENILE DELINQUENCY.

THE SPEEDY TRIAL REQUIREMENTS FOR A JUVENILE DELINQUENCY PROCEEDING WERE VIOLATED (THIRD DEPT).

The Third Department, reversing the juvenile delinquency adjudication and dismissing the petition, determined the speedy trial requirements were violated:

"Where [a] juvenile is not detained, an adjudication on the merits of the petition's charges, known as the 'fact-finding' phase of the process, 'shall commence not more than [60] days after the conclusion of the initial appearance,' subject to adjournments for good cause and special circumstances" (…Family Ct Act § 340.1 [2]). A court may adjourn a fact-finding hearing "on its own motion or on motion of the presentment agency for good cause shown for . . . not more than [30] days if the respondent is not in detention" and "[t]he court shall state on the record the reason for any adjournment of the fact-finding hearing" … . However, "a judicial referral for adjustment under Family C[t] Act § 320.6 operates to toll the limitations period set forth in Family C[t] Act § 340.1" … . "Efforts at adjustment . . . may not extend for a period of more than three months without leave of the court, which may extend the period for an additional two months" … .

Here, the record establishes that the initial appearance on the petition was on February 1, 2021, at which time respondent appeared with counsel, was arraigned and entered a general denial to the petition (see Family Ct Act §§ 320.1; 320.4). Measured from the February 1 initial appearance date, 273 days passed before the scheduled November 1, 2021 fact-finding hearing.[FN3] Of the 273 days, tolling for the entire adjustment period of 153 days[*3], leaves 120 days before the scheduled fact-finding hearing, well-beyond the initial 60-day speedy trial period, as well as the 90-day speedy trial period, assuming without deciding that the 30-day adjournment was properly granted (see Family Ct Act § 340.1 [4], [5]). As such, the speedy trial requirements relative to juvenile delinquency proceedings were violated and the petition must be dismissed. Matter of Zachary L., 2023 NY Slip Op 03735, Third Dept 7-6-23

Practice Point: The speedy trial requirements for a juvenile delinquency proceeding, explained in this decision, were violated.

JULY 06, 2023

CRIMINAL LAW, JUVENILES.

WHEN A JUVENILE PLEADS GUILTY TO AN OFFENSE FOR WHICH HE CANNOT BE HELD CRIMINALLY RESPONSIBLE, THE CONVICTION MUST BE VACATED AND DISMISSED (FIRST DEPT).

The First Department, vacating defendant's conviction by guilty plea, determined that because defendant, a juvenile, cannot be held criminally responsible for the crime to which he pled guilty, the conviction must be vacated rather than sent to Family Court:

The People are correct that where a juvenile is charged with a crime for which he may not be criminally responsible, as well as others for which he may be criminally responsible, Supreme Court may assume jurisdiction over the case … . However, if convicted of a crime for which he cannot be criminally responsible, Supreme Court then "must order that the verdict be deemed vacated and replaced by a juvenile delinquency fact determination," and remove the matter to Family Court … .

Here … defendant was convicted, by a plea of guilty to a crime to which he cannot be criminally responsible. This was not a case where a jury returned a verdict of guilty to the charge of criminal possession of a weapon in the second degree, thus requiring Supreme Court to transfer the case to Family Court for disposition … . Rather, the People specifically requested that in addition to the charge of attempted murder in the second degree, defendant enter a plea of guilty to the fifth count charging criminal possession of a weapon in the second degree, a crime for which the People now concede that defendant cannot be held criminally responsible. Given this, defendant's conviction for criminal possession of a weapon in the second degree must be vacated and that charge dismissed. People v Raul A., 2023 NY Slip Op 01970, First Dept 4-18-23

Practice Point: If a juvenile goes to trial on offenses which include those for which a juvenile cannot be held criminally responsible, the court can assume jurisdiction over all the offenses. If convicted after trial of an offense for which a juvenile is not criminally responsible, the conviction is vacated and the matter is sent to Family Court for disposition. But if, as here, the conviction is by guilty plea it must be vacated and dismissed.

APRIL 18, 2023

CUSTODY, APPEALS.

THE JUDGE'S FAILURE TO MAKE FINDINGS OF FACT IN THIS CUSTODY CASE PRECLUDED APPELLATE REVIEW; MATTER REMITTED (FOURTH DEPT),

The Fourth Department, remitting the matter to Family Court, determined the judge's failure to make findings of fact in this custody case precluded appellate review:

The court, in the order on appeal, however, failed to make any factual findings whatsoever to support the award of primary physical custody. It is "well established that the court is obligated 'to set forth those facts essential to its decision' " … . Here, the court completely failed to follow that well-established rule when it failed to issue any factual findings to support its initial custody determination … , nor did it make any findings with respect to the relevant factors that it considered in making a best interests of the child determination … . "Effective appellate review, whatever the case but especially in child visitation, custody or neglect proceedings, requires that appropriate factual findings be made by the trial court—the court best able to measure the credibility of the witnesses" … . Matter of Ianello v Colonomos, 2023 NY Slip Op 00767, Fourth Dept 2-10-23

Practice Point: Here in this custody case the judge did not make findings of fact, which precluded appellate review. The case was sent back.

FEBRUARY 10, 2023

CUSTODY, COUNSELING.

FATHER'S PARENTAL ACCESS SHOULD NOT HAVE BEEN CONDITIONED UPON HIS PARTICIPATION IN COUNSELING OR TREATMENT (SECOND DEPT).

The Second Department, reversing (modifying) Family Court, determined father's access to the child should not have been conditioned upon his participation in counseling or treatment:

"A court deciding a custody proceeding may direct a party to submit to counseling or treatment as a component of a [parental access] or custody order" … . However, a court may not direct that a parent undergo counseling or treatment as a condition of future parental access or reapplication for parental access rights … . Here, the Family Court erred in conditioning the filing of any future parental access petitions by the father upon his completion of a parenting class, and we modify the order … , so as to eliminate that condition … . Matter of Coley v Steiz, 2023 NY Slip Op 01995, Second Dept 4-19-23

Practice Point: In a custody proceeding, father's parental access should not be conditioned upon his participation in counseling or treatment.

APRIL 19, 2023

CUSTODY, DEFAULT, JUDGES.

IT WAS AN ABUSE OF DISCRETION TO DENY FATHER'S MOTION TO VACATE HIS DEFAULT IN THIS CUSTODY CASE; THE USUAL RULES FOR VACATION OF A DEFAULT ARE RELAXED IN CHILD CUSTODY MATTERS (SECOND DEPT).

The Second Department, reversing Family Court, determined it was an abuse of discretion to deny father's motion to vacate his default in this custody proceeding. The Second Department noted that the strict rules surrounding vacation of a default are relaxed in custody matters:

Although the determination of whether to relieve a party of an order entered upon his or her default is a matter left to the sound discretion of the Family Court … , "the law favors resolution on the merits in child custody proceedings" … . Thus, the "general rule with respect to opening defaults in civil actions is not to be rigorously applied to cases involving child custody" … .

Under the circumstances presented here, including the brief period between the father's default and his motion to vacate his default, and in light of the policy favoring resolutions on the merits in child custody proceedings, the Family Court improvidently exercised its discretion in denying the father's motion to vacate the order of custody and parental access … entered upon his failure to appear …

. Matter of Orobona v Cunningham, 2023 NY Slip Op 04594, Second Dept 9-13-23

Practice Point: Because resolution on the merits is the policy favored in child custody matters, the usual rules surrounding vacation of a default are relaxed.

SEPTEMBER 13, 2023

CUSTODY, DEFAULT.

DESPITE MOTHER'S DEFAULT, CUSTODY SHOULD NOT HAVE BEEN AWARDED WITHOUT A HEARING AND FINDINGS ON THE BEST INTERESTS OF THE CHILD (SECOND DEPT).

The Second Department, reversing Supreme Court, determined that, although mother defaulted, the court should not have made a custody ruling without a hearing and findings on the best interests of the child:

Courts may generally proceed by default when a party has failed to comply with an order of the court … . "This authority, however, in no way diminishes the court's primary responsibility to ensure that an award of custody is predicated on the child's best interests, upon consideration of the totality of the circumstances, after a full and comprehensive hearing and a careful analysis of all relevant factors" … . "A custody determination, whether made upon the default of a party or not, must always have a sound and substantial basis in the record" … . "Although the determination of whether to relieve a party of an order entered upon his or her default is a matter left to the sound discretion of the Family Court, the law favors resolution on the merits in child custody proceedings" … .

Here, the Supreme Court made a custody determination without a hearing and without making any specific findings of fact regarding the best interests of the child. Under the circumstances, that branch of the mother's motion which was to vacate an order .. awarding custody to the paternal grandmother, should have been granted in the interest of justice … . Accordingly, we remit the matter … for a hearing and a new determination thereafter of the paternal grandmother's petition for custody of the child, to be held with all convenient speed … . Matter of Trammell v Gorham, 2023 NY Slip Op 03923, Second Dept 7-26-23

Practice Point; Even in the face of a parent's default, a custody award should not be made without a hearing and findings on the best interests of the child.

JULY 26, 2023

CUSTODY, DEFAUT, APPEALS.

MOTHER WAS PROPERLY FOUND TO HAVE DEFAULTED IN THIS CUSTODY MATTER; MOTHER'S ATTORNEY APPEARED BUT DECLINED TO PARTICIPATE; ALTHOUGH AN ORDER ENTERED UPON DEFAULT CANNOT BE APPEALED, CONTESTED MATTERS DETERMINED BY THE TRIAL COURT, HERE WHETHER MOTHER'S ATTORNEY'S REQUEST FOR AN ADJOURNMENT SHOULD HAVE BEEN GRANTED, CAN BE CONSIDERED UPON APPEAL FROM THE ORDER (FOURTH DEPT).

The Fourth Department determined Family Court properly found that mother had defaulted in this custody case, despite the appearance of her attorney, who declined to participate. The Fourth Department noted that, although orders issued pursuant to a default are not appealable, contested issues addressed by the court prior to the order can be appealed:

The court, concluding that the mother had adequate warning that she needed to appear visually at the hearing and ample time to ensure that she could so appear, denied the request for an adjournment and determined that it would proceed by inquest. Inasmuch as the mother's attorney, although present, thereafter declined to participate in the inquest in the mother's absence and instead elected to stand mute, we conclude that the court properly determined that the mother's failure to appear in the manner required constituted a default … .

"[N]otwithstanding the prohibition set forth in CPLR 5511 against an appeal from an order or judgment entered upon the default of the appealing party, the appeal from [such an] order [or judgment] brings up for review those 'matters which were the subject of contest' before the [trial court]" … . Thus, in this appeal, review is limited to the mother's contention that the court abused its discretion in denying her attorney's request for an adjournment … . We reject that contention. Matter of Reardon v Krause, 2023 NY Slip Op 04880, Fourth Dept 9-29-23

Practice Point: Here mother did not appear in the custody case and her attorney appeared but declined to participate. Therefore Family Court properly found mother to be in default.

Practice Point: Although an order entered upon default is not appealable, an appeal from such an order brings up contested matters decided prior to the order. Here the appellate court considered the denial of mother's attorney's request for an adjournment.

SEPTEMBER 29, 2023

CUSTODY, DOMESTIC VIOLENCE.

THE PROOF OF DOMESTIC VIOLENCE AT THE FORTHCOMING CUSTODY TRIAL SHOULD NOT HAVE BEEN LIMITED TO INCIDENTS OCCURRING AFTER THE HAGUE CONVENTION PROCEEDINGS IN CYPRUS (FIRST DEPT).

The First Department, reversing (modifying) Family Court, determined the proof of domestic violence at the upcoming custody trial should not have been limited to incidents occurring after the Hague Convention proceedings in Cyprus:

… [T]hat aspect of the order that limits the proof of domestic violence that the mother may try to introduce at the forthcoming custody trial to incidents that have occurred since conclusion of the Hague Convention proceedings, is vacated. The court correctly recognized "[a] decision under the Convention is not a determination on the merits of any custody issue, but leaves custodial decisions to the courts of the country of habitual residence" … . However, it then effectively vested the Hague Convention proceedings with preclusive effect as to claims of domestic violence, by ruling that, at the impending custody hearing, the mother could only seek to introduce evidence of domestic violence that has occurred since those proceedings' conclusion. There should have been no such temporal limitation imposed on the domestic violence evidence the mother may seek to introduce. Gould v Kontogiorge, 2023 NY Slip Op 02824, First Dept 5-25-23

Practice Point: Here Family Court should not have limited proof of domestic violence at the upcoming custody trial to incidents occurring after the Hague

Convention proceedings in Cyprus. A Hague Convention is not a determination on the merits of any custody issue.

MAY 25, 2023

CUSTODY, EVIDENCE.

THE CUSTODY RULING SHOULD NOT HAVE BEEN MADE WITHOUT A BEST INTERESTS HEARING; FATHER'S PARENTAL ACCESS SHOULD NOT HAVE BEEN CONDITIONED ON COMPLIANCE WITH TREATMENT (SECOND DEPT).

The Second Department, reversing Family Court, held the custody determination should not have been made without a best interests hearing and father's parental access should not have been conditioned on compliance with treatment:

"Custody 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" … . "Similarly, visitation determinations should generally be made after a full evidentiary hearing to ascertain the best interests of the child" … .

Here, the Supreme Court erred in making a final custody determination without a hearing and without inquiring into the best interests of the parties' child … . Moreover, the court failed to articulate the factors and evidence material to its determination … .

The Supreme Court also erred in suspending the father's parental access without determining the best interests of the child … . Furthermore, the court improperly conditioned the father's future parental access or reapplication for parental access rights upon his compliance with treatment … . Matter of Baez-Delgadillo v Moya, 2023 NY Slip Op 01994, Second Dept 4-19-23

Practice Point: Custody determinations usually should not be made absent a best interests hearing. Parental access should not be conditioned on the parent's compliance with treatment.

APRIL 19, 2023

CUSTODY, EVIDENCE.

THE JUDGE SHOULD NOT HAVE DECIDED MOTHER'S CUSTODY PETITION WITHOUT A BEST INTERESTS HEARING (SECOND DEPT).

The Second Department, reversing Supreme Court, determined a hearing was required in this custody proceeding:

"Custody determinations . . . require a careful and comprehensive evaluation of the material facts and circumstances in order to permit the court to ascertain the optimal result for the child" … . Accordingly, "custody determinations should '[g]enerally' 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" … . "[W]here . . . facts material to the best interest analysis, and the circumstances surrounding such facts, remain in dispute, a custody hearing is required" … .

Here, the Supreme Court erred in making a final custody determination without a hearing and without inquiring into the best interests of the parties' child … . Matter of Bendter v Elikwu, 2023 NY Slip Op 01670, Second Dept 3-29-23

Practice Point: Factual issues raised in a custody proceeding should not be decided without a hearing.

MARCH 29, 2023

CUSTODY, INAPPROPRIATE FORUM.

CIVIL PRFAMILY COURT PROPERLY DETERMINED NEW YORK WAS NOT THE APPROPRIATE FORUM IN THIS CUSTODY DISPUTE, BUT THE NEW YORK PROCEEDINGS SHOULD HAVE BEEN STAYED, NOT DISMISSED (SECOND DEPT).

The Second Department, reversing (modifying) Family Court, determined Family Court properly decided New York was not the appropriate forum for this custody dispute between father in New York and mother and child in Texas, but Family Court should have stayed, not dismissed, the New York proceedings:

Based on the record before us, we agree with the Family Court that Texas is the more appropriate and convenient forum. The child has not resided in New York since May of 2020. The child also has had no significant connection to New York since 2020, and the substantial, relevant evidence pertaining to the child's care, protection, education, and personal relationships is in Texas, not New York. Accordingly, the statutory factors weigh in favor of the court's determination to decline to exercise jurisdiction.

However, Domestic Relations Law § 76-f(3) specifies that "[i]f a court of this state determines that it is an inconvenient forum and that a court of another state is a more appropriate forum, it shall stay the proceedings upon condition that a child custody proceeding be promptly commenced in another designated state." Accordingly, the Family Court erred in granting that branch of the motion which was to dismiss the petition … . Matter of Waters v Yacopino, 2023 NY Slip Op 02792, Second Dept 5-24-23

Practice Point: Here Family Court properly found that New York was not the appropriate forum for the custody dispute. But the proper procedure is to stay the New York proceedings, not dismiss them.

MAY 24, 2023

CUSTODY, JURISDICTION.

THE ORIGINAL CUSTODY ORDER WAS ISSUED IN NEW JERSEY, WHERE FATHER RESIDES; THE NEW YORK CUSTODY ORDER MUST BE REVERSED BECAUSE FAMILY COURT DID NOT COMMUNICATE WITH THE NEW JERSEY COURT AND NO FINDING WAS MADE ON WHETHER NEW JERSEY HAD RELINQUISHED EXCLUSIVE JURISDICTION OR WHETHER NEW YORK WAS A MORE CONVENIENT FORUM; MATTER REMITTED (THIRD DEPT).

The Third Department, reversing Family Court, determined Family Court lacked jurisdiction to issue the custody order on appeal because the court failed to communicate with the court in New Jersey, where father resides, which issued the original custody order:

… [P]rior to modifying a custody determination from another state, a court of this state must have jurisdiction to make the initial determination pursuant to Domestic Relations Law § 76, and "[t]he court of the other state [must] determine[that] it no longer has exclusive, continuing jurisdiction under [Domestic Relations Law § 76-a] or that a court of this state would be a more convenient forum under [Domestic Relations Law § 76-f]" … . Inasmuch as the child has resided in this state since 2018, Family Court had jurisdiction to make an initial determination of custody (see Domestic Relations Law §§ 76 [1] [a]; 75-a [7]). However, the record is devoid of any indication that the New Jersey court relinquished its jurisdiction or that it determined that this state was a more convenient forum, and Family Court failed to communicate with the New Jersey court to make such inquiry. … Family Court lacked jurisdiction to issue the order on appeal … , and we must vacate said order and remit this matter to Family Court to conduct the required inquiry….
. Matter of Alda X. v Aurel X., 2023 NY Slip Op 01826, Third Dept 4-6-23

Practice Point: Here the original custody order was issued in New Jersey, where father resides. Family Court in Albany did not communicate with the New Jersey court before issuing an order modifying custody. Family Court did not have jurisdiction and the New York order was reversed.

APRIL 06, 2023

CUSTODY, MODIFICATION, ATTORNEY'S FEES.

THE AWARD OF COUNSEL FEES TO MOTHER IN THIS MODIFICATION OF CUSTODY PROCEEDING WAS AN ABUSE OF DISCRETION; FATHER WAS NOT GIVEN ADEQUATE NOTICE OF ANY FRIVOLOUS CONDUCT; THE FINANCIAL CIRCUMSTANCES OF THE PARTIES WERE NOT CONSIDERED; THE RELEVANT REGULATORY AND STATUTORY CRITERIA EXPLAINED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the court should not have awarded counsel fees to mother. Mother brought an action for modification of a custody order on the ground father had lied about the method of transportation he used to go to Alabama with the child. Apparently father told mother they were going to drive, when in fact they flew. Mother was awarded $25,000 in counsel fees:

… Supreme Court permitted the mother to make a written application for counsel fees, [but] the court did not state whether the application should be made under 22 NYCRR 130-1.1….[T]he court did not … make a finding that the father's conduct was "frivolous" within the meaning of 22 NYCRR 130-1.1. … [T]o the extent the court granted the mother's application for an award of counsel fees pursuant to 22 NYCRR 130-1.1, the father did not receive sufficient notice of the alleged frivolous conduct, and, therefore, was not given "a reasonable opportunity to be heard" … .

… [T]o the extent that the Supreme Court granted the mother's application for an award of counsel fees under 22 NYCRR 130-1.1, the court improperly based its determination to grant the application, in part, on the father's act of lying to the mother about flying to Alabama with the parties' child, since this conduct occurred outside of the proceeding before the court … . * * *

… [T]o the extent that the Supreme Court granted the mother's application for an award of counsel fees pursuant to Domestic Relations Law § 237(b), the court did not adequately consider the disparate financial circumstances of the parties … . LeBoeuf v Greene, 2023 NY Slip Op 02870, Second Dept 5-31-23

Practice Point: Here the award of counsel fees was not appropriate under "frivolous conduct" or "financial circumstances" criteria. The relevant regulatory and statutory requirements for a counsel-fees award are explained in some depth.

Table of Contents

MAY 31, 2023

CUSTODY, MODIFICATION, DEFAULT, APPEALS.

MOTHER'S PETITION FOR SOLE CUSTODY SHOULD NOT HAVE BEEN GRANTED UPON FATHER'S FAILURE TO APPEAR; FATHER'S ATTORNEY EXPLAINED FATHER'S ABSENCE AND REQUESTED AN INQUEST; AN APPEAL FROM AN ORDER ENTERED UPON A PARTY'S DEFAULT BRINGS UP FOR REVIEW ONLY THE CONTESTED MATTERS BEFORE THE TRIAL COURT (SECOND DEPT).

The Second Department, reversing Family Court, determined mother's petition for sole custody should not have been granted upon father's failure to appear. Father's attorney explained father's absence and asked that the matter be set down for an inquest. The Second Department noted that, upon appeal from an order made upon a party's default, only the contested matters before the trial court can be heard:

"A custody determination, whether made upon the default of a party or not, must always have a sound and substantial basis in the record" … . Generally, the court's determination should be made only after "a full and plenary hearing and inquiry" … or, where a party failed to appear, after an inquest … .

Here, the Family Court granted the mother's petition to modify the prior order, upon the father's default, without receiving any testimony or other evidence, despite the fact that the father's attorney proffered a reasonable explanation for the father's absence and that the father did not have a history of missing court dates … . Under the circumstances, the court improvidently exercised its discretion in denying the application of the father's attorney to set the matter down for an inquest … . Matter of Otero v Walker, 2023 NY Slip Op 05607, Second Dept 11-8-23

Practice Point: Generally where a party defaults in a custody matter, an inquest should be held before any ruling.

Practice Point: Upon appeal from an order made upon a party's default, only the contested matters before the trial court come up for review.

NOVEMBER 08, 2023

CUSTODY, MODIFICATION, EVIDENCE.

EAMILY COURT SHOULD HAVE HELD A LINCOLN HEARING TO DETERMINE THE WISHES OF THE CHILD, WHO WAS ABOUT TO TURN 16, IN THIS CUSTODY MODFICATION PROCEEDING (THIRD DEPT).

The Third Department, reversing Family Court, determined the court should have held a Lincoln hearing in this modification of custody proceeding:

We find that Family Court abused its discretion in denying the attorney for the child's request for a Lincoln hearing to aid in the court's determination of whether a change in circumstances had occurred. While the determination of whether to conduct a Lincoln hearing lies within Family Court's discretion, it is indeed the preferred method for ascertaining the child's wishes … . At the time of the hearing, the child was six days shy of being 16 years old and the mother's primary argument in support of her petition was that the child preferred to reside with her in Florida. "[A] Lincoln hearing would have provided the court with significant pieces of information it needed to make the soundest possible decision" … . The wishes of this soon-to-be 16-year-old child, although not determinative, should have been considered, including any insight he may have provided as to the current status of his relationship with each parent … . It was improper for Family Court to simply presume the child preferred to reside with his mother, as the fundamental purpose of a Lincoln hearing "is to ascertain a child's preferences and concerns" … . Matter of Samantha WW. v Malek XX., 2023 NY Slip Op 03052, Third Dept 6-8-23

Practice Point: Here it was an abuse of discretion to fail to hold a Lincoln hearing to determine the wishes of the child, who was nearly 16, in this custody modification proceeding.

JUNE 08, 2023

CUSTODY, MODIFICATION, GRANDPARENTS.

THE CHILD HAD LIVED WITH HIS GRANDPARENTS FOR HIS ENTIRE LIFE; THE GRANDPARENTS DEMONSTRATED EXTRAORDINARY CIRCUMSTANCES NECESSITATING A BEST INTERESTS OF THE CHILD HEARING PRIOR TO RULING ON MOTHER'S PETITION FOR A MODIFICATION OF CUSTODY; TWO-JUSTICE DISSENT; MATTER REMITTED FOR A HEARING (FOURTH DEPT).

The Fourth Department, reversing Family Court, over a two-justice dissent, determined the grandparents established extraordinary circumstances necessitating a best interests hearing before a ruling on mother's request for a modification of custody. Mother sought to regain custody of the child who was eight years old and had resided with the grandparents for his entire life:

It is undisputed that the child, who was eight years old at the time of the hearing, had lived with the grandparents for his entire life in the only home he has ever known; the child expressed a strong desire to continue residing with his grandparents and the AFC adheres to that position on appeal; the mother and the father both suffered from severe substance abuse problems for years and were unable to care for the child on their own; the mother failed to contact the child for a period of 18 months before resuming visitation in January 2018; the child's half-sister also resided with the grandparents and the child developed a sibling relationship with her; and "the grand[parents] ha[ve] taken care of the child for most of his life and provided him with stability" … Additionally, according to the AFC, the child had "developed a strong emotional bond with the grand[parents]" … .

… [W]e conclude that, "even if the prolonged separation alone is entitled to little significance here, the combination of that factor along with others present on this record sufficiently establish the existence of extraordinary circumstances" … , and that the court's contrary determination is not supported by a sound and substantial basis in the record.

… [W]e remit the matter to Family Court for a new hearing to determine whether the modifications of the prior order sought by the mother are in the best interests of the child … . Matter of Tuttle v Worthington, 2023 NY Slip Op 04282, Fourth Dept 8-11-23

Practice Point: The child's grandparents made a showing of extraordinary circumstances requiring a best interests of the child hearing before ruling on mother's petition for a modification of custody. The child, eight years old, had lived his entire life with his grandparents.

AUGUST 11, 2023

CUSTODY, MODIFICATION, HABEAS CORPUS, STANDING.

THE MAJORITY HELD THE APPELLATE DIVISION SHOULD HAVE CONSIDERED MOTHER'S APPEAL OF FAMILY COURT'S FINDING MOTHER DID NOT HAVE STANDING TO BRING HER CUSTODY/HABEAS CORPUS PETITION STEMMING FROM THE OUT-OF-STATE FATHER'S FAILURE TO RETURN THE CHILDREN; THE MAJORITY SENT THE CASE BACK TO THE APPELLATE DIVISION FOR CONSIDERATION OF THE STANDING ISSUE; THREE DISSENTERS ARGUED FAMILY COURT ERRED WHEN IT DISMISSED THE HABEAS CORPUS PETITION BECAUSE NO CUSTODY ORDER WAS IN PLACE (CT APP).

The Court of Appeals, reversing the Appellate Division, over a three-judge comprehensive dissent, determined the Appellate Division erred when it refused to consider mother's appeal of the denial of her habeas corpus petition seeking the return of her children. The children visited father out-of-state and one of them was not allowed to return. The Appellate Division erred when it found it did not have subject matter jurisdiction for the appeal. The matter was sent back for consideration of mother's standing to bring the habeas corpus petition. The dissenters argued the habeas corpus petition was erroneously dismissed by Family Court on the ground that mother did not have standing because there was no custody order in place for the children. But the majority wanted the development of a record on the standing issue:

… Family Court denied the mother's applications both for sole custody and habeas corpus relief. As the parties who have appeared before us agree, the Appellate Division erred in dismissing the mother's ensuing appeal for lack of subject matter jurisdiction. By dismissing the appeal upon a motion, and upon an undeveloped record, without full briefing and without providing all parties the opportunity to

appear, the Appellate Division has rendered impossible meaningful appellate review of the weighty issues raised in this case. To the extent that the Appellate Division's order on the motion to dismiss could be read, as the dissenters read it, to be a determination that the mother lacked standing to seek habeas corpus relief without an order of custody in place, the issue of standing did not impact the subject matter jurisdiction of the Appellate Division … . Regardless of whether that Court had the "power to reach the merits," an issue on which we express no opinion, the Court did not lack the "competence to entertain" the appeal … . Therefore, we remit to the Appellate Division for an expeditious determination on the merits of the standing question presented herein and, if warranted, disposition of any other issues that the parties may raise. Matter of Celinette H.H. v Michelle R., 2023 NY Slip Op 05303, CtApp 10-19-23

Practice Point: The majority held the Appellate Division should not have refused to consider mother's appeal on the ground she did not have standing to bring her custody/habeas corpus petition. The Appellate Division did not lack subject matter jurisdiction. The matter was sent back for a ruling on the standing question.

OCTOBER 19, 2023

CUSTODY, MODIFICATION, RELOCATE, COVID.

IN A PROCEEDING INTERRUPTED BY COVID THE JUDGE RULED ON FATHER'S PETITION TO RELOCATE WITH THE CHILD AND MOTHER'S CROSS-PETITION FOR SOLE CUSTODY WITHOUT COMPLETING THE HEARING; REVERSED (SECOND DEPT).

The Second Department, reversing Family Court in this custody proceeding, determined the judge should not have ruled on father's petition to locate with the child to New Jersey and mother's cross-petition for sole custody without completing the hearing:

"Custody determinations . . . require a careful and comprehensive evaluation of the material facts and circumstances in order to permit the court to ascertain the optimal result for the child" … . Accordingly, "custody determinations should '[g]enerally' 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" … . "[W]here . . . facts material to the best interest analysis, and the circumstances surrounding such facts, remain in dispute, a custody hearing is required" … . Here, the Family Court erred in making a final custody determination without completing the hearing on the father's petition and the mother's cross-petition in order to determine what arrangement was in the best interests of the child … . Matter of Janvier v Santana-Jackson, 2023 NY Slip Op 05732 Second Dept 11-15-23

Practice Point: In the midst of COVID the judge ruled on father's petition to relocate with the child and mother's cross-petition for sole custody without completing the related hearing. Reversed.

NOVEMBER 15, 2023

CUSTODY, MODIFICATION, RELOCATE, EVIDENCE, APPEALS.

IN ORDERING A NEW HEARING ON MOTHER'S PETITION TO RELOCATE, THE FIRST DEPARTMENT NOTED THE INADEQUACY OF THE PROOF PRESENTED BY ASSIGNED COUNSEL AT THE FIRST HEARING AND CONSIDERED "NEW" FACTS WHICH WERE NOT PART OF THE RECORD ON APPEAL (FIRST DEPT).

The First Department, reversing Family Court over a detailed and comprehensive dissent, determined mother was entitled to a new hearing on her petition to relocate to North Carolina because her assigned counsel did not adequately present evidence of the financial necessity of the move. The dissent would grant the petition to relocate based on the existing record:

… [A]s the attorney for the child argues on this appeal, the mother's motion to this Court for a stay pending appeal (a motion this Court granted by order entered November 15, 2022 and continued by order entered April 20, 2023), raised legitimate concerns about the adequacy of representation by her assigned counsel at the fact-finding hearing on her relocation petition. Specifically, … the mother attests that counsel failed to adequately present evidence of the financial necessity that supports her decision to relocate. On account of these omissions, as well as the passage of time and intervening events that have occurred since the court's September 6, 2022 order, we reverse the court's denial of the mother's petition and

remand for a new hearing to determine what is in the child's best interests … . Although the facts warranting a new hearing are outside the record on appeal, given that changed circumstances have particular significance in child custody matters, we take notice of the new facts to the extent they indicate that the record is no longer sufficient to determine the mother's relocation petition … . Matter of Emily F. v Victor P., 2023 NY Slip Op 04634, First Dept 9-14-23

Practice Point: Here the First Department considered "new" facts which were not part of the record on appeal in determining there should be a new hearing on mother's petition to relocate.

SEPTEMBER 14, 2023

CUSTODY, MODIFICATION, RELOCATE.

MOTHER'S DECLINING HEALTH WAS A FACTOR IN THE COURT'S GRANTING MOTHER'S PETITION TO RECOCATE WITH THE CHILDREN NEAR HER MOTHER IN TENNESSEE; THE DISSENT ARGUED THE REFEREE DID NOT ADEQUATELY CONSIDER THE EFFECT ON VISITATION WITH FATHER AND MOTHER DID NOT MEET HER BURDEN TO SHOW THE CHILDREN WOULD BE BETTER CARED FOR OR BETTER EDUCATED IN TENNESSEE (FOURTH DEPT).

The Fourth Department, over a dissent, determined mother's petition for sole custody and permission to relocate to Tennessee was properly granted:

... [M]other testified at the hearing that she has been the primary caregiver of the children and that her health has been steadily declining. She further established that the maternal grandmother, who moved to Tennessee in 2021, has provided her with extensive financial assistance, as well as assistance in caring for herself and the children, and that the maternal grandmother would continue to do so if the mother were to relocate closer to the maternal grandmother … . Further, the record establishes that the father has no "accustomed close involvement in the children's everyday life" … and thus we conclude that the need to "give appropriate weight to . . . the feasibility of preserving the relationship between the noncustodial parent and [the] child[ren] through suitable visitation arrangements" does not take

precedence over the need to give appropriate weight to the necessity for the relocation … .

From the dissent:

… [T]he Referee gave disproportionate weight to certain factors and largely ignored the impact of the move on the children's future contact with the father despite that factor weighing heavily against relocation, given the distance between Clinton County, New York, where the father resides, and Tennessee … . …

… [M]other did not establish that the children's lives will be enhanced economically, emotionally, or educationally by the move, even if the move would not diminish them … . The mother offered no testimony that the children would receive a better education in Tennessee, and there was no testimony comparing schools in each location … .

The mother also offered no explanation as to why she and the children would be better cared for in Tennessee by the maternal grandmother—who testified that she works approximately 45 to 50 hours per week at multiple jobs in addition to caring for her son's newborn child—than in New York by the certified caregiver the mother was approved for but has never utilized … . Matter of Martin v Martin, 2023 NY Slip Op 05893, Fourth Dept 11-17-23

Practice Point: Here mother's declining health was a factor granting mother's petition to relocate near her mother in Tennessee. The dissent argued the referee ignored the impact of the move on the children's contact with father and mother did not demonstrate the children would be better cared for or better educated in Tennessee.

NOVEMBER 17, 2023

CUSTODY, MODIFICATION, RELOCATE.

MOTHER'S PETITION FOR PERMISSION TO RELOCATE TO FLORIDA WITH THE CHILDREN SHOULD HAVE BEEN GRANTED (THIRD DEPT).

The Third Department, reversing Family Court, determined mother's petition for permission to relocate to Florida with the children should have been granted:

"Taken as a whole, the mother's testimony demonstrated . . . that the mother's reasons for wanting to relocate were familial and economic and that the proposed relocation would likely enhance the lives of the mother and the child[ren] economically and emotionally" … . * * *

Although we recognize the importance of an ongoing relationship between the father and the children, the … proof reflects that the mother is, by far, the more involved parent and the primary caregiver, that the lives of the mother and the children would be enhanced by the relocation to Florida, that the children want to make that move, and that the mother is willing to facilitate significant visitation between the children and the father if it occurs. As such, Family Court's determination denying the mother's relocation request is not supported by a sound and substantial basis in the record … . Matter of Amber GG. v Eric HH., 2023 NY Slip Op 03059, Third Dept 6-8-23

Practice Point: Mother demonstrated she was the more involved parent and that she and her children would be better off financially and emotionally if she moved near her relatives in Florida. She further demonstrated she is willing to facilitate significant visitation with father. Her petition to relocate should have been granted.

JUNE 08, 2023

CUSTODY, MODIFICATION, STIPULATION.

A MOTION TO MODIFY THE CUSTODY PROVISIONS IN A SETTLEMENT AGREEMENT, WHERE THERE ARE CONTESTED FACTS, SHOULD NOT BE GRANTED WITHOUT A FULL HEARING (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the motion for a modification of custody allowing mother the relocate should not have have been granted without a hearing:

"Since a court has an obligation to make an objective and independent evaluation of the circumstances, a custody determination should be made only after a full and fair hearing at which the record is fully developed" … . "This allows the court to fulfill its duty to make an enlightened, objective and independent evaluation of the circumstances" … . "[A]s a general rule, it is error to make an order respecting

custody based upon controverted allegations without the benefit of a full hearing" … . Rizea v Rizea, 2023 NY Slip Op 03935, Second Dept 7-26-23

Practice Point: Any modification of custody, where there are contested facts, requires a full hearing.

JULY 26, 2023

CUSTODY, MODIFICATION, VISITATION.

ALLEGATIONS FATHER DID NOT ABIDE BY THE VISITATION TERMS AND USED DRUGS DURING VISITATION SUPPORTED MOTHER'S PETITION FOR A MODIFICATION OF CUSTODY BASED UPON CHANGED CIRCUMSTANCES (THIRD DEPT).

The Third Department, reversing Family Court, determined mother's custody modification petition should not have been dismissed. Mother's allegations that father had not abided by the visitation terms (visits must be in a public place) and father used drugs during visitation adequately alleged a change in circumstances:

To establish a change in circumstances, the party must demonstrate "new developments or changes that have occurred since the previous custody order was entered" … . Testimony at the fact-finding hearing established, by a preponderance of the evidence … that the father was not abiding by the visitation terms as set forth in the prior order…. . Specifically, although the prior order required that the father's visitation occur in a public place, the preponderance of the proof demonstrated that much of it was occurring in private residences or hotels. Moreover, there was also testimony that the father was using drugs during the child's visits. Given the circumstances of this case, the father's failure to comply with the visitation terms as set forth in the prior order constitute a change in circumstances … . Matter of Harvey P. v Contrena Q., 2023 NY Slip Op 00257, Third Dept 1-19-23

Practice Point: Failure to abide by visitation terms can constitute a change in circumstances which will support a modification of custody.

JANUARY 19, 2023

CUSTODY, MODIFICATION.

FATHER'S PETITION FOR MODIFICATION OF CUSTODY BASED PRIMARILY UPON INCREASED TRAVEL TIME BECAUSE OF MOTHER'S MOVE SHOULD NOT HAVE BEEN DISMISSED; THE MAJORITY NOTED MANY REASONING ERRORS AND ORDERED A NEW HEARING IN FRONT OF A DIFFERENT JUDGE; TWO-JUSTICE DISSENT (THIRD DEPT)

The Third Department, reversing Family Court, over a two-justice dissent, determined father's petition for a modification of the custody arrangement based upon mother's move and the consequent increase in travel times should not have been dismissed. The matter was sent back for a new fact-finding hearing before a different judge:

Applying the correct standard at this procedural stage — providing the father the benefit of every reasonable inference and resolving all credibility questions in his favor … — the father's proof sufficiently established that, since the entry of the 2012 order, the mother had moved to a different county, which move significantly increased the time and distance required to effectuate custodial exchanges, and that, in the nine years since said order, the mother routinely refused to agree to holiday parenting time for the father. Consequently, the father demonstrated a change in circumstances sufficient to overcome a motion to dismiss … . Matter of Shayne FF. v Julie GG., 2023 NY Slip Op 05767, Third Dept 11-16-23

Practice Point: Increased travel time because of mother's move supported father's petition for a modification of custody. The majority found many reasoning errors and ordered a new hearing before a different judge. A two-justice dissent argued the petition was properly dismissed.

NOVEMBER 16, 2023

CUSTODY, MODIFICATION.

MOTHER'S PETITION ALLEGED FACTS SUFFICIENT TO WARRANT A MODIFICATION-OF-CUSTODY HEARING; LEGAL CRITERIA EXPLAINED (SECOND DEPT).

The Second Department, reversing Family Court, determined mother's petition alleged facts sufficient to warrant a hearing on whether the custody arrangement should be modified:

… [M]other's petition contained allegations that were sufficiently specific to warrant a hearing, including the allegations that the parties' ability to cooperate with each other with respect to the children had deteriorated and that the parties were no longer capable of communicating with each other in a civil and cooperative manner … .. Those allegations were not before the Family Court on a prior occasion, and were not merely conclusory or nonspecific allegations … . Because facts material to the best interest analysis, and the circumstances surrounding such facts, remain in dispute, a hearing is required … . Matter of Liang v O'Brien, 2023 NY Slip Op 02789, Second Dept 5-24-23

Practice Point: Here mother's petition alleged facts sufficient to warrant a modification-of-custody hearing. Although the facts are not described, the legal criteria are laid out in detail.

MAY 24, 2023

CUSTODY, MODIFICATION.

FAMILY COURT SHOULD NOT HAVE DISMISSED FATHER'S MODIFICATION OF CUSTODY PETITION WITHOUT HOLDING A BEST INTERESTS HEARING, SHOULD HAVE ACCEPTED THE FACTS ALLEGED IN THE PETITION AS TRUE, AND SHOULD NOT HAVE RELIED ON UNSWORN INFORMATION FROM THE ATTORNEYS (THIRD DEPT).

The Third Department, reversing Family Court, determined father's petition for a modification of custody should not have been dismissed without holding a best interests hearing. The Third Department noted that Family Court should have

accepted the facts alleged in the petition as true and should not have relied on unsworn information provided by the attorneys:

… [F]ather's petition sufficiently alleged … changed circumstances that, if established at a hearing, would entitle him to a best interests review, including that the mother had thwarted the electronic communication to which he was entitled … , failed to keep him informed of certain health information pertaining to the child and, upon information and belief, was found to have neglected the child … . Even if such circumstances do not ultimately result in an award of joint legal custody as sought by the father, his petition also sought increased visitation and unsupervised parenting time. These changed circumstances, if established, would support a best interests review to determine whether such relief is warranted based upon the totality of the evidence. Matter of Ryan Z. v Adrianne AA., 2023 NY Slip Op 01032, Third Dept 2-23-23

Practice Point: In determining whether a best interests hearing is required when a petition for modification of custody is filed, the facts alleged must be accepted as true. The judge here should not have relied on unsworn information from the attorneys.

FEBRUARY 23, 2023

CUSTODY, PARENTAL ACCESS, EVIDENCE.

THE JUDGE SHOULD HAVE HELD A HEARING IN THIS PARENTAL-ACCESS PROCEEDING AND SHOULD NOT HAVE RELIED ON A REPORT BY A FORENSIC EVALUATOR WHICH WAS NOT ADMITTED IN EVIDENCE (SECOND DEPT).

he Second Department, reversing Family Court, determined a hearing should have been held in this parental-access proceeding:

Custody and parental access determinations should "[g]enerally be made only after a full and plenary hearing and inquiry" … . "While the general right to a hearing in [parental access] cases is not absolute, where 'facts material to the best interest analysis, and the circumstances surrounding such facts, remain in dispute,' a hearing is required" … .

Here, the record demonstrates disputed factual issues so as to require a hearing on the issue of the mother's parental access … . Further, the Family Court, in making its determination without a hearing, relied upon the report of the forensic evaluator, which had not been admitted into evidence, and the evaluator's opinions and credibility were untested by the parties … . Matter of McCabe v Truglio, 2023 NY Slip Op 01299, Second Dept 3-15-23

Practice Point: Custody and parental-access determinations generally require hearings. Family Court should not rely on reports which have not been admitted in evidence.

MARCH 15, 2023

CUSTODY, PARENTAL ACCESS.

THE JUDGE IN THIS CUSTODY PROCEEDING SHOULD NOT HAVE SUSPENDED FATHER'S PARENTAL ACCESS WITHOUT HOLDING A "BEST INTERESTS" HEARING (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the judge in this custody proceeding should not have suspended father's parental access without holding a "best interests of the child" hearing:

"Custody determinations . . . require a careful and comprehensive evaluation of the material facts and circumstances in order to permit the court to ascertain the optimal result for the child" … . Accordingly, "custody determinations should '[g]enerally' 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" … . "[W]here . . . facts material to the best interest analysis, and the circumstances surrounding such facts, remain in dispute, a custody hearing is required"… .

Here, the Supreme Court erred in making a final custody determination without a hearing and without inquiring into the best interests of the parties' children … . Moreover, the court's mere reliance upon "adequate relevant information," as opposed to admissible evidence, was improper … . Matter of Dysko v Dysko, 2023 NY Slip Op 00863, Second Dept 2-15-23

Practice Point: Here in this custody action the judge should not have suspended father's parental access without holding a "best interests of the child" hearing.

FEBRUARY 15, 2023

CUSTODY, RIGHT TO COUNSEL.

FAMILY COURT SHOULD NOT HAVE PROCEEDED WITH THE CUSTODY HEARING WITHOUT A SEARCHING INQUIRY INTO WHETHER RESPONDENT FATHER WAS KNOWINGLY, INTELLIGENTLY AND VOLUNTARILY WAIVING HIS RIGHT TO COUNSEL (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the judge in this custody proceeding should not have proceeded without a searching inquiry into whether father was making an intelligent waiver of his right to counsel:

At an appearance before the Family Court on the mother's petition, the court advised the father of his right to counsel, and the father requested an adjournment to obtain an attorney. The court stated that it would email the father contact information for Legal Aid and scheduled a date for a virtual hearing on the petition. On the scheduled hearing date, the father appeared without counsel and the court did not inquire whether the father was waiving his right to counsel. The court commenced the hearing with the father proceeding pro se. By order … , the court, after the hearing, among other things, awarded the mother primary physical custody of the child, with parental access to the father. The father appeals.

The father, as a respondent in a proceeding pursuant to Family Court Act article 6, had the right to be represented by counsel … . "A party may waive that right and proceed without counsel provided he or she makes a knowing, voluntary, and intelligent waiver of the right to counsel" … . "[T]o determine whether a party has validly waived the right to counsel, a court must conduct a searching inquiry to ensure that the waiver has been made knowingly, voluntarily, and intelligently" … .

Here, the Family Court failed to conduct a searching inquiry to ensure that the father's waiver of his right to counsel was knowingly, voluntarily, and intelligently made … . Matter of Mercado v Arzola, 2023 NY Slip Op 00321, Second Dept 1-25-23

Practice Point: Here father, the respondent in a custody proceeding, had a right to counsel. The judge should not have proceeded with the hearing without making a searching inquiry into whether father was knowingly, intelligently and voluntarily waiving his right to counsel.

JANUARY 25, 2023

CUSTODY, STANDING.

THE BIOLOGICAL MOTHER OF THE CHILD DIED BEFORE SHE AND PETITIONER WERE TO BE MARRIED; THE BIOLOGICAL FATHER ARGUED PETITIONER DID NOT HAVE STANDING TO SEEK CUSTODY AND FAMILY COURT AGREED; HOWEVER STANDING CAN BE DEMONSTRATED BY EXTRAORDINAY CIRCUMSTANCES WHICH MAY BE PRESENT; MATTER REMITTED FOR A RULING (FIRST DEPT).

The First Department, reversing Family Court, determined standing in a custody matter can be proven by extraordinary circumstances and sent the matter back for a ruling. The child's mother died unexpectedly before she and petitioner were to be married. The petition was denied for lack of standing. However, standing can be proven by extraordinary circumstance which may be demonstrated here:

As a prerequisite to seeking custody or visitation with a child, a party must establish standing. The party may establish standing (1) as a parent pursuant to Domestic Relations Law § 70; (2) as a sibling for visitation pursuant to Domestic Relations Law § 71; (3) as a grandparent for visitation or custody pursuant to Domestic Relations Law § 72; or (4) by showing extraordinary circumstances pursuant to Matter of Bennett v Jeffreys (40 NY2d 543 [1976]) … . * * *

Family Court erred in dismissing petitioner's custody and visitation petitions without permitting petitioner the opportunity to present evidence supporting her argument that she had standing based on extraordinary circumstances. Indeed, the Referee stated on the record during the hearing that she agreed with the biological father's position that petitioner could only present extraordinary circumstances evidence after she established that she had standing. This is an error of law, as extraordinary circumstances is one of several bases for standing to seek custody and visitation.

Extraordinary circumstances may be found where there has been "a judicial finding of surrender, abandonment, unfitness, persistent neglect, unfortunate or involuntary extended disruption of custody, or other equivalent but rare extraordinary circumstance which would drastically affect the welfare of the child" … . Matter of Lashawn K. v Administration for Children's Servs., 2023 NY Slip Op 05662, First Dept 11-9-23

Practice Point: Standing to bring a custody petition may be demonstrated by extraordinary circumstances. Here the biological mother died unexpectedly before she and petitioner were to be married. The biological father successfully argued petitioner did not have standing. The matter was sent back for Family Court for a ruling on whether petitioner demonstrated standing based upon extraordinary circumstances.

NOVEMBER 09, 2023

DEPARTMENT OF SOCIAL SERVICES, ATTORNEY FOR THE CHILD, ACCESS TO CHILD.

A JUDGE MAY NOT ORDER THAT ONLY THE ATTORNEY FOR THE CHILD (AFC), AND NOT THE DEPARTMENT OF SOCIAL SERVICES, IS ALLOWED TO DISCUSS MATTERS OF SURRENDER OR ADOPTION WITH THE CHILD; SUCH AN ORDER INTERFERES WITH THE DEPARTMENT'S STATUTORY DUTIES (THIRD DEPT).

The Third Department, reversing Family Court in a matter of first impression in this neglect proceeding, in a full-fledged opinion by Justice Clark, determined Family Court could not order the petitioner (Delaware County Department of Social Services) to refrain from discussing matters of surrender or adoption with the child. The attorney for the child (AFC) requested the order which allowed only the AFC to discuss surrender or adoption with the child. The Third Department heard the case as an exception to the mootness doctrine (the order had been vacated, but the issue is likely to recur). The Third Department concluded the order could not stand because it interfered with the petitioner's statutory duties:

Although we recognize that circumstances may arise where it may be appropriate to allow an attorney for children reasonable time to discuss sensitive matters of

importance, such as adoption or surrender, with their child-client before anyone else does, Family Court's order was not a temporal arrangement to allow the AFC an opportunity to broach the issue with the child. Instead, the order was an outright ban on anyone, including petitioner's caseworkers, having a discussion with the child regarding issues that are central to the child's permanency (see Family Ct Act § 1089 [c] [1] [ii]).

Although Family Court attempted to differentiate the issues of surrender and adoption as "a legal issue distinguishable from the assessment of the child's well-being," the court construed the issues pertaining to the child's well-being too narrowly, leaving petitioner in an untenable situation…. According to petitioner, for over a year, it was prevented "from speaking with the child to reassess its understanding of the child's wishes" relative to respondent's possible conditional surrender and a subsequent adoption of the child — issues that fall squarely into the category of permanency decisions. Although the child has a right to meaningful representation and to learn about legal issues from the AFC (see Family Ct Act § 241 …), attorneys for children cannot transform such responsibility into a roadblock, as occurred here, preventing petitioner from fulfilling its mandates and planning for the child's permanency and well-being … . Matter of Michael H. (Catherine I.), 2023 NY Slip Op 01119, Third Dept 3-2-23

Practice Point: Family Court can not order the Department of Social Services to refrain from discussing matters of surrender or adoption with the child. Here the attorney for the child (AFC) asked Family Court for the order allowing only the AFC to discuss surrender or adoption with the child and the request was granted.

MARCH 02, 2023

DIVORCE, ATTORNEYS, DEFAMATION, PRIVILEGE.

AN ATTORNEY'S REFERENCE IN AN EMAIL TO A NONPARTY AS A "WIFE BEATER" WAS ABSOLUTELY PRIVILEGED AS PERTINENT TO THE DIVORCE ACTION (SECOND DEPT).

The Second Department, reversing Supreme Court, determined a statement in an email written by an attorney in a divorce action, referring to plaintiff as a wife beater, was pertinent to the divorce action and was absolutely privileged:

The defendant Dina S. Kaplan is an attorney who represented the defendant Eric Dorfman in a divorce action (hereinafter the divorce action). Kaplan allegedly represented to the court in the divorce action, including court personnel, that the plaintiff, an attorney and a nonparty to the divorce action, was the boyfriend of Dorfman's wife. In an email exchange between Kaplan and Herbert Adler, an attorney representing Dorfman's wife in the divorce action, Kaplan allegedly made a defamatory statement about the plaintiff, referring to him as a "wife beater . . . who is in criminal prosecution." In addition to Adler, the email was sent to court personnel and other attorneys. * * *

… [U]nder the extremely liberal test of pertinency, Kaplan's statement allegedly referring to the plaintiff as a "wife beater . . . who is in criminal prosecution" was pertinent to the divorce action and, thus, is absolutely privileged. The email exchange between Kaplan and Adler was initially focused on a dispute over Dorfman's financial ability to pay his wife maintenance and child support. The conversation turned, however, to the behavior of the parties to the divorce action while caring for their children, and Kaplan's statement that the plaintiff is a "wife beater . . . who is in criminal prosecution" was responsive and therefore relevant to the issue of the parties' behavior … . Under the circumstances, it cannot be said that the statement was "so outrageously out of context as to permit one to conclude, from the mere fact that the statement was uttered, that it was motivated by no other desire than to defame" the plaintiff, who was not among the participants in the conversation, was not otherwise mentioned in the email exchange, and was not even directly identified in the statement … . Davidoff v Kaplan, 2023 NY Slip Op 03450, Second Dept 6-28-23

Practice Point: If a defamatory statement made by a divorce attorney is pertinent to the divorce action, the statement is absolutely privileged.

JUNE 28, 2023

DIVORCE, COVID STIMULUS PAYMENT, EQUITABLE DISTRIBUTION.

COVID STIMULUS PAYMENTS WERE ADVANCE TAX REFUNDS MEASURED BY THE NUMBER OF CHILDREN, NOT PAYMENTS FOR THE BENEFIT OF THE CHILDREN; THEREFORE THE PAYMENTS WERE SUBJECT TO EQUITABLE DISTRIBUTION IN THIS DIVORCE PROCEEDING AND SHOULD NOT HAVE BEEN AWARDED TO MOTHER AS CHILD SUPPORT (THIRD DEPT).

The Third Department, reversing Family Court, determined the COVID stimulus payments were advance tax refunds constituting marital property subject to equitable distribution in this divorce/family offense proceeding. Family Court had ordered father to turn over the stimulus payments to mother as temporary child support:

… [F]ather argues that the federal stimulus payments are subject to equitable distribution and, therefore, Family Court did not have jurisdiction to direct him to remit them to the mother. We agree. "Family Court is a court of limited jurisdiction that cannot exercise powers beyond those granted to it by statute" … . In response to the global pandemic, Congress enacted several economic stimulus payments which created advance refunds of tax credits. As relevant here, the Coronavirus Aid, Relief, and Economic Security Act (the CARES Act) … provided eligible individuals an "advance refund amount" of the applicable tax credit of $500 for each qualifying child … . Thereafter, eligible individuals were entitled to an additional "advance refund" of the applicable tax credit of $600 for each qualifying child under the Tax Relief Act of 2020 … .

… [T]hese federal stimulus payments were not paid "for the benefit of the minor children," but they were the parties' advance refund for a tax credit earned pursuant to their last tax return, which was jointly filed, and which was partially measured by the number of children the tax filers had listed as dependents … . Generally, a tax refund is marital property and subject to equitable distribution by Supreme Court … . Although, within the context of a family offense petition, Family Court may issue an order for temporary child support (see Family Ct Act § 828 [4]), and there could be appropriate circumstances where a party's tax refund may be seized to satisfy child support obligations … , those circumstances are not present here. Matter of Josefina O. v Francisco P., 2023 NY Slip Op 01031, Third Dept 2-23-23

Practice Point: COVID stimulus payments were advance tax refunds subject to equitable distribution in a divorce proceeding which should not have been awarded to mother as child support.

FEBRUARY 23, 2023

DIVORCE, CUSTODY.

JOINT LEGAL CUSTODY TO MOTHER AND FATHER AND PRIMARY CUSTODY TO FATHER WERE NOT SUPPORTED BY THE EVIDENCE (FOURTH DEPT).

The Fourth Department, reversing (modifying) Supreme Court in this divorce proceeding, determined the award of joint legal custody and the award of primary custody to father were not supported by the evidence. The hostility between father and mother and father's violent behavior were not given proper consideration:

"Entrusting the custody of young children to their parents jointly, especially where the shared responsibility and control includes alternating physical custody, is insupportable when parents are severely antagonistic and embattled" … . In determining whether joint legal custody is appropriate, "the question of fault is beside the point" … . …

… [T]he court failed to give adequate weight to the father's extensive history of domestic violence or his continued minimization of his actions and denial of the nature and extent of his mental illness. The evidence established that the father engaged in multiple acts of domestic violence against the mother in the presence of the children. Despite having been convicted of and serving a jail sentence for one of those acts, the father continued to deny that he had ever engaged in domestic violence. Further, although the father has been diagnosed, by more than one provider, with a bipolar disorder, he testified at trial that he could not recall ever having been given such a diagnosis. Both the mother and the father testified that the father had discontinued the use of his prescribed medications without discussing it with his treatment providers. The father had also threatened to commit suicide on more than one occasion, prompting calls to the police that resulted in brief hospitalizations for which the father blamed the mother. At the time of the trial, the evidence established that the father's current medication regimen was inappropriate for Bipolar Disorder treatment and that the father was not currently

engaged in any regular mental health counseling. Crofoot v Crofoot, 2023 NY Slip Op 02205, Fourth Dept 4-28-23

Practice Point: The hostility between mother and father and father's violent behavior and mental illness were not given appropriate weight when the court awarded joint legal custody to mother and father and primary custody to father.

APRIL 28, 2023

DIVORCE, JUDGES, COURTROOM CLOSURE.

IN THIS DIVORCE PROCEEDING (1) THE HUSBAND'S REQUEST FOR CLOSURE OF THE COURTROOM SHOULD HAVE BEEN PUBLIC, NOT CONCEALED FROM THE PUBLIC IN EMAILS, AND (2), THE COURTROOM CLOSURE WAS IMPROPERLY BASED ON AN EXCEPTION TO THE PUBLIC-TRIAL REQUIREMENT WHICH IS NOT INCLUDED IN JUDICIARY LAW SECTION 4 (FIRST DEPT).

The First Department, reversing Supreme Court, determined the judge should not have ordered closure of the courtroom pursuant to Judiciary Law section 4 in this divorce proceeding. The criteria for closure of a courtroom are discussed in some detail. Here the judge ordered some documents to be submitted under seal and then based the closure on the existence of sealed documents as evidence. That justification for closure is not one of the exceptions in Judiciary Law section 4:

The motion court did not provide the public and the press adequate notice of the husband's courtroom closure request. Because it directed the parties to file their submissions on the application for courtroom closure by email, the submissions were not reflected on "the publicly maintained docket entries," as required … .

We also reverse on substantive grounds. "Public access to court proceedings is strongly favored, both as a matter of constitutional law . . . and as statutory imperative …" … . In the order appealed here, the motion court improperly read an exception into the "statutory imperative" of NY Judiciary Law §4 that does not exist. The first part of that statute, entitled "Sittings of courts to be public," states: "The sittings of every court within this state shall be public, and every citizen may freely attend the same . . ." The only exceptions to this rule are set forth in the statute's next sentence: "except that in all proceedings and trials in cases for

divorce, seduction, rape, assault with intent to commit rape, criminal sexual act, bastardy or filiation, the court may, in its discretion, exclude therefrom all persons who are not directly interested therein, excepting jurors, witnesses, and officers of the court" … .

Here, the motion court used its discretion to insert another, unwritten category of cases into the statutory exception: proceedings that could entail arguments that implicate documents filed under seal. We find its decision to do so to have been improper … . Paulson v Paulson, 2023 NY Slip Op 03310, First Dept 6-20-23

Practice Point: A request for courtroom closure must be accessible by the public, not concealed in email exchanges.

Practice Point: Courtroom closure based on a reason not included in the public-trial exceptions in Judiciary Law section 4 is an abuse of discretion.

JUNE 20, 2023

DIVORCE, ORAL STIPULATION.

AN ORAL STIPULATION IS INVALID PURSUANT TO DOMESTIC RELATIONS LAW SECION 236(B)(3) AND CANNOT BE RATIFIED; THERE IS NOW AN EVEN SPLIT AMONG THE APPELLATE DIVISION DEPARTMENTS ON THIS ISSUE (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, noting a split among the appellate-division departments, determined an oral stipulation was invalid pursuant to Domestic Relations Law 236(B)(3):

… [T]he parties' oral stipulation is not enforceable because, although it was entered in open court, it was not reduced to writing, subscribed, or acknowledged by the parties, as required by Domestic Relations Law § 236 (B) (3). Although plaintiff's attorney stated at the time of the oral stipulation that she "would prefer just to do the oral stipulation," the statute unambiguously provides that, in order for an agreement regarding maintenance or a distributive award "made before or during the marriage" to be valid and enforceable in a matrimonial action, the agreement must be "in writing, subscribed by the parties, and acknowledged or proven in the manner required to entitle a deed to be recorded" … . We have repeatedly held that oral stipulations do not comply with the statute … . …

… Supreme Court erred in denying the motion on the ground that plaintiff ratified the oral stipulation. The proposition that an agreement that fails to comply with Domestic Relations Law § 236 (B) (3) could be upheld if ratified by the parties was implicitly rejected by the Court of Appeals in Matisoff.[90 NY2d 135-136] … . Cole v Hoover, 2023 NY Slip Op 03103, Fourth Dept 6-9-23

Practice Point: An oral stipulation is invalid pursuant to Domestic Relations Law 236(B)(3) and cannot be ratified. There is now an even split among the appellate division departments on this issue.

JUNE 09, 2023

DIVORCE, POSTNUPTIAL AGREEMENT.

A CONFLICT BETWEEN TWO PROVISIONS OF THE POSTNUPTIAL AGREEMENT REQUIRED A TRIAL TO RESOLVE (FIRST DEPT).

The First Department, reversing (modifying) Supreme Court, determined there was a conflict between two provisions of the postnuptial agreement which could only be resolved by a trial:

"When parties set down their agreement in a clear, complete document, their writing should as a rule be enforced according to its terms" … . If a contract's provisions are subject to more than one or conflicting reasonable interpretations, the agreement will be considered ambiguous, requiring a trial on the parties' intent … . Here, the language of the agreement allows for more than one reasonable interpretation of the parties' intentions when they entered into the agreement. The language regarding distribution of the parties' assets is specifically contingent on the occurrence of the operative event otherwise without force or effect. This conflicts with further language that requires the wife to assume certain debt within 30 days of the execution of the agreement. These interrelated provisions are ambiguous as they are "reasonably or fairly susceptible of different interpretations or may have two or more different meanings" (id. [internal quotation marks omitted]). Accordingly, the parties' intent underpinning these conflicting provisions must be addressed at trial. Bich v Bich, 2023 NY Slip Op 04918. First De[t 10-3-23

Practice Practice: Conflicting provisions in an agreement render the agreement ambiguous requiring a trial.

OCTOBER 03, 2023

DIVORCE, STIPULATION, ATTORNEY'S FEES.

THE STIPULATION OF SETTLEMENT INCORPORATED BUT NOT MERGED IN THE JUDGMENT OF DIVORCE WAS UNAMBIGUOUS AND PROVIDED EACH PARTY WAS RESPONSIBLE FOR THEIR OWN ATTORNEY'S FEES; IT WAS THEREFORE ERROR TO AWARD FATHER ATTORNEY'S FEES (THIRD DEPT).

The Third Department, reversing (modifying) Supreme Court, determined that the stipulation incorporated but not merged in to the judgment of divorce, which provided that each party was responsible for their own attorney's fees, controlled. Therefore the award of attorney's fees to father was error:

… [T]he parties executed a written stipulation of settlement containing the provision, "as and for a global resolution, each party shall be responsible for the payment of his and her respective attorney fees."

"A stipulation of settlement that is incorporated but not merged into a judgment of divorce is a contract subject to principles of contract construction and interpretation" … . "Generally, where the parties have agreed to provisions in a settlement agreement which govern the award of attorney's fees, the agreement's provisions, rather than statutory provisions, control" … . If the contract is clear and unambiguous, it is to be interpreted so as to give effect to the parties' intent and the intent is to be gleaned from within the four corners of the document … . Here, the fees awarded were as a result of the initial custody determination, and a review of the stipulation of settlement reveals no ambiguity as the agreement clearly provides that each party is to be responsible for his and her respective counsel fees and we must give its terms their plain meaning … . Moreover, in rendering its determination, Supreme Court did not reference the stipulation's express provision that each parent shall be responsible for his and her counsel fees, thus, it erred in awarding the father counsel fees … . Daryl N. v Amy O., 2023 NY Slip Op 06286, Third Dept 12-7-23

Practice Point: A stipulation of settlement incorporated but not merged into a judgment of divorce is a contract which supersedes statutory provisions. The unambiguous provision in the stipulation that each party is responsible for their

own attorney's fees controls. Attorney's fees should not have been awarded to father.

DECEMBER 07, 2023

DIVORCE, STIPULATION, CHILD SUPPORT.

THE PARTIES' SEPARATION AGREEMENT DID NOT MAKE IT CLEAR THE PARTIES KNOWINGLY OPTED OUT OF THE LEVEL OF CHILD SUPPORT REQUIRED BY THE CHILD SUPPORT STANDARDS ACT (CSSA); THEREFORE THE SUPPORT PROVISIONS IN THE AGREEMENT ARE NOT ENFORCEABLE (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the separation agreement did not include the required language indication the parties agree to opt out of the level of child support required by the Child Support Standards Act (CSSA):

"Parties to a separation agreement are free to 'opt out' of the provisions of the CSSA so long as their decision is made knowingly" … . "To ensure that waivers of the statutory provisions of the CSSA are truly knowingly made, Domestic Relations Law § 240(1-b)(h) requires that, in order to be valid, a stipulation must recite that the parties have been made aware of the CSSA, and that the basic child support obligation provided for therein would presumptively result in the correct amount. Where the stipulation deviates from the basic child support obligation, it must specify what the presumptive amount would have been and the reason for the deviation" … .

Here … the provisions in the parties' separation agreement relating to the child support obligations with respect to one child did not contain the specific recitals mandated by the CSSA, and the record does not demonstrate that the plaintiff's agreement to said provisions was made knowingly. … [T]he provisions are not enforceable … . Sayles v Sayles, 2023 NY Slip Op 04968, Second Dept 9-4-23

Practice Point: Parties to a separation agreement can "opt out" of the level of child support required by the Child Support Standards Act (CSAA). But if the agreement doesn't include recitals which make it clear the parties knowingly opted out, the agreement is not enforceable.

OCTOBER 04, 2023

DIVORCE, STIPULATION, MEDICAL INSURANCE.

UNDER THE "AGE 29 LAW" MEDICAL-INSURANCE COVERAGE FOR PLAINTIFF'S CHILD WAS AVAILABLE THROUGH PLAINTIFF'S EMPLOYER'S PLAN UNTIL THE CHILD TURNED 29; THEREFORE THE STIPULATED ORDER IN THE DIVORCE PROCEEDING REQUIRING PLAINTIFF TO COVER THE CHILD UNDER THE PLAN FOR AS LONG AS THE LAW ALLOWS REQUIRED COVERAGE TO AGE 29; THE ARGUMENT THAT THE PARTIES CONTEMPLATED A CUT-OFF AT AGE 26 PURSUANT TO THE AFFORDABLE CARE ACT WAS REJECTED (FIRST DEPT).

The First Department, reversing Supreme Court, in a full-fledged opinion by Justice Higgitt, determined the provisions of a stipulated order in a divorce proceeding (section 6.3) providing that plaintiff would pay for medical insurance for a child (T.D.) for as long as coverage was available under the employer's family plan were unambiguous and must be enforced. Because the "Age 29" law allowed the child to remain covered by plaintiff's employer's plan until age 29. plaintiff was obligated to pay for that coverage. The argument that the provision was ambiguous allowing extrinsic evidence that the parties contemplated only the Affordable Care Act's cut-off at age 26 was rejected: The "Age 29" act was passed before the issuance of the stipulated order:

… [T]he practical and reasonable interpretation of § 6.3 is that, to the extent plaintiff can maintain health insurance for T.D. through his employer, he is required to do so as long as any relevant law permits coverage for T.D. As he acknowledges in his brief (and as the evidence he submitted in opposition to the motion establishes), T.D. has coverage under the same health insurance plan provided by plaintiff's employer to its employees. Thus, by virtue of the fact that plaintiff has health insurance through his employer, Age 29 Law coverage is available to T.D. B.D. v E.D., 2023 NY Slip Op 03971, First Dept 7-27-23

Practice Point: Here the stipulated order entered in the divorce proceedings required plaintiff to provide medical insurance to the child as long as the child could be covered by law under the employer's plan. The Age 29 Law allowed coverage until age 29. The argument that the stipulated order was ambiguous

allowing extrinsic proof that the parties contemplated only the age 26 cut-off under the Affordable Care Act was rejected.

JULY 27, 2023

DIVORCE, STIPULATION, PENSION.

THE STIPULATION RE: SHARING HUSBAND'S PENSION AT A FUTURE DATE WAS NOT AMBIGUOUS AND NEED NOT BE REFORMED; THE STIPULATION WHICH WAS INCORPORATED BUT NOT MERGED INTO THE DIVORCE JUDGMENT CANNOT BE REFORMED PURSUANT TO A MOTION, A PLENARY ACTION IS REQUIRED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the stipulation that was incorporated but not merged into the divorce judgment was not ambiguous and should not have reformed the stipulation based upon a mutual mistake. The stipulation was not ambiguous and required the husband to share his pension when he turned 62. In addition, reformation of the stipulation was not appropriate pursuant to a motion. A plenary action is required to reform stipulation which is incorporated but not merged into the judgment of divorce:

… Supreme Court should have rejected the plaintiff's contention that the stipulation of settlement was ambiguous. The interpretation of the stipulation advanced by the plaintiff would render meaningless the terms of the stipulation providing that distribution of pension benefits to the plaintiff would commence in the future, when the defendant reached the age of 62 … . Inasmuch as the language of the stipulation disclosed the parties' intent to defer the plaintiff's pension distribution until the defendant reached age 62, at a time he would have been eligible for regular service retirement benefits, and is not subject to more than one reasonable interpretation, the agreement is not ambiguous … .

… [T]o the extent that the Supreme Court determined that the stipulation of settlement was affected by a mutual mistake, reformation was not appropriate. A motion is not the proper vehicle for challenging a separation agreement incorporated but not merged into a judgment of divorce. Rather, the plaintiff was required to commence a plenary action to reform the stipulation … . In any event, reformation of the stipulation was unwarranted, as the parties' mistake regarding

the category of benefits the defendant would receive did not "involve a fundamental assumption of the contract" … . Anderson v Anderson, 2023 NY Slip Op 06108, Second Dept 11-29-23

Practice Point: Here the judge should not have determined the stipulation incorporated but not merged into the judgment of divorce was ambiguous because it was subject to only one interpretation.

Practice Point: A stipulation which is incorporated but not merged into the judgment of divorce cannot be reformed pursuant to a motion. A plenary proceeding must be commenced.

NOVEMBER 29, 2023

DIVORCE, STIPULATION, SUPPORT.

IN THIS DIVORCE ACTION, THE SETTLEMENT AGREEMENT STATED THE WIFE'S INCOME WAS WELL BELOW THE FEDERAL POVERTY LEVEL YET SHE WAIVED SPOUSAL SUPPORT; GENERAL MUNICIPAL LAW 5-311 MAY, THEREFORE, HAVE BEEN VIOLATED; ALTHOUGH THE AGREEMENT AS A WHOLE WAS NOT UNCONSCIONABLE, THE MATTER WAS SENT BACK TO ALLOW THE JUDGE TO ENQUIRE ABOUT THE WAIVER (THIRD DEPT).

The Third Department, reversing (modifying) Supreme Court in this divorce action, determined a portion of the settlement agreement may violate the General Municipal Law and sent the matter back for further inquiry by the judge. The wife's income is well below the federal poverty guidelines yet she waived spousal support:

General Obligations Law § 5-311 prohibits spouses from contracting to dissolve a marriage and "relieve either of his or her liability to support the other in such a manner that he or she will become incapable of self-support and therefore is likely to become a public charge …". * * *

… [A]rticle four of the settlement agreement, concerning spousal support, sets forth the wife's income as $11,446, which is well below the applicable federal 2020 poverty guidelines … . As such, there is a question as to whether this provision is in violation of General Obligations Law § 5-311 in that the wife "is

likely to become a public charge." Because of this, we find that Supreme Court erred when it failed to make an inquiry into the circumstances surrounding the wife's waiver of spousal support … .Majid v Hasson, 2023 NY Slip Op 01035, Third Dept 2-23-23

FEBRUARY 23, 2023

FOSTER CARE, ATTORNEYS.

LAWYERS FOR CHILDREN, WHICH IS CONTRACTUALLY OBLIGATED TO PROVIDE ATTORNEYS IN CHILD WELFARE MATTERS, HAS STANDING TO CHALLENGE THE HOST FAMILY HOMES PROGRAM WHICH PLACES CHILDREN WITHOUT THE PARTICIPATION OF ATTORNEYS (THIRD DEPT).

The Third Department reversing Supreme Court, determined Lawyers for Children, which provides attorneys for child welfare matters, had standing to bring a petition challenging the Host Family Homes program which facilitates temporary placement of children in foster care without an attorney.

… [P]ursuant to Social Services Law § 358-a (6), Family Court is tasked with appointing an attorney for the children should there be a hearing before it. Petitioner Lawyers for Children had initially contracted with the Office of Court Administration (hereinafter OCA) respecting voluntary foster care placements and, since the legislative changes in 1999, has consistently represented children in New York City who have been voluntarily placed outside of the home. Similarly, petitioner Legal Aid Society contracted with OCA and receives assignments through New York City Family Court. Petitioner Legal Aid Bureau of Buffalo, Inc., likewise, has contracted with OCA and receives funding to represent children in child welfare matters.

In December 2021, respondent Office of Children and Family Services (hereinafter OCFS) promulgated regulations creating the Host Family Homes program, a system for the temporary care of children by pre-vetted volunteers without resorting to the voluntary placement process in the Social Services Law … . * * * Children cared for by a host family under this program were not entitled to assigned counsel, although they could communicate with an attorney … . * * *

… [P]etitioners sufficiently alleged an injury in fact that is not merely conjectural, as implementation of the program would, in essence, place children outside their home without the right to legal representation to which they would be entitled by Social Services Law § 358-a and that petitioners have a contractual obligation to provide … . Matter of Lawyers for Children v New York State Off. of Children & Family Servs., 2023 NY Slip Op 03747, Third Dept 7-6-23

Practice Point: Lawyers for Children is contractually obligated to provide attorneys in child welfare matters. Lawyer for Children has standing to challenge the Host Family Homes program which places children in foster care without the participation of attorneys.

JULY 06, 2023

FREE SPEECH, SOCIAL MEDIA.

FAMILY COURT PROPERLY PROHIBITED FATHER FROM POSTING BLOGS DISPARAGING THE CHILD'S RELATIVES ON SOCIAL MEDIA, BUT THE RESTRICTIONS WERE TOO BROAD IN THAT THEY WENT BEYOND THE NEEDS OF THE CASE (SECOND DEPT).

The Second Department determined Family Court had properly prohibited father from posting blogs disparaging the child's relatives on social media, but that the restrictions on future speech should have been more narrowly tailored to the needs of the case:

"A prior restraint on speech is a law, regulation or judicial order that suppresses speech on the basis of the speech's content and in advance of its actual expression" … . A party seeking to impose such a restraint bears a "heavy burden of demonstrating justification for its imposition" … . Such party must demonstrate that the speech sought to be restrained is "'likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest'" … . An order imposing a prior restraint on speech "must be tailored as precisely as possible to the exact needs of the case" … .

Here, that portion of the order which directed the father to erase, deactivate, and delete "any existing blogs and likenesses" was "not tailored as precisely as possible to the exact needs of the case" … . Specifically, this restriction required

the father to delete "any existing blogs and likenesses," regardless of whether the blogs or likenesses relate to the child, the mother, the mother's family, or the instant proceedings…. . Matter of Walsh v Russell, 2023 NY Slip Op 01522, Second Dept 3-22-23

Practice Point: As long as the restrictions on future speech relate to the family court case the constitution is not violated. Here father could be prohibited from posting blogs disparaging the child's relatives and likenesses of the child. The order to delete past posts was also proper. But the restrictions on future speech were too broad in that they went beyond the needs of the case.

MARCH 22, 2023

HAGUE CONVENTION, SEXUAL ABUSE.

FATHER'S OBJECTIONS (EXCEPTIONS) TO THE IMMEDIATE RETURN OF HIS SON TO ITALY PURSUANT TO THE HAGUE CONVENTION SHOULD NOT HAVE BEEN REJECTED; THE EXCEPTIONS RELATED TO ALLEGATIONS THE SON WAS SUBJECTED TO SEXUAL ABUSE BY A MINOR IN MOTHER'S HOME IN ITALY (THIRD DEPT).

The Third Department, reversing Supreme Court, remitting the matter for a hearing, determined father, pursuant to the Hague Convention, had demonstrated the child should not be returned to his mother in Italy based on his allegations he was being sexually abused by a minor who was living with mother and her boyfriend. Therefore, Supreme Court should not have rejected father's objections (exceptions) to his son's immediate return to Italy for further proceedings:

… [T]he father's affidavit reflects that the child made prompt, detailed disclosures of extended sexual abuse experienced in Italy. According to that affidavit, the child also reported that abuse to the mother, who did nothing to intervene or prevent it and instead "forced" the child to continue sleeping in the same bed as the offending minor. As a result, the child has developed a fear of returning to the mother's custody in Italy. Supreme Court was also provided with a State Police incident report, which reflects that the child made consistent allegations regarding the abuse about a week following his disclosure to the father while interviewed by a child advocate. The submissions further included confirmation of the Italian criminal

proceedings against the mother and the boyfriend for not only their alleged failure to prevent the abuse but their facilitation thereof, and there is no information in the record regarding the current status of those proceedings. Accepting these serious allegations as true … , it was an abuse of discretion to summarily reject the father's first exception. * * *

The affidavit also makes clear the child's particularized fear of returning to the mother's custody given that failure and her alleged facilitation of the sexual abuse that he suffered. The record also contained an email exchange regarding the child's lack of communication with the mother following his disclosure to the father, in which the father describes the child as "a mature smart boy" who was thus being permitted to determine his own communication preferences. Also before the court was the transcript of a telephone call between the child and the mother, in which the child, then nearly 10½ years old, articulately opposed the mother's efforts to secure his return, citing the mother's "lies" as to why he is in New York. Although the parties debate the influence each of them has had over the child's position, any undue influence also presents an issue of fact … . Matter of Luisa JJ. v Joseph II, 2023 NY Slip Op 04699, Third Dept 9-21-23

Practice Point: Here mother demonstrated her son should be returned to her in Italy pursuant to the procedures in the Hague Convention. However father's objections (exceptions) to his son's immediate return to Italy based on allegations of sexual abuse by a minor in mother's home should not have been rejected by Supreme Court. An immediate hearing in Supreme Court was ordered.

SEPTEMBER 21, 2023

IMMIGRATION LAW.

FAMILY COURT SHOULD HAVE APPOINTED MOTHER GUARDIAN OF THE JUVENILE, DISPENSED WITH SERVICE ON FATHER, AND MADE FINDINGS TO ALLOW THE JUVENILE TO APPLY FOR SPECIAL JUVENILE IMMIGRATION STATUS (SJIS); ALL OF THE COMPLICATED, INTERTWINED STATUTORY LAW EXPLAINED (SECOND DEPT).

The Second Department, reversing Family Court, determined mother should have been appointed guardian of the juvenile and the court should have made findings to

allow the juvenile to apply for special immigration juvenile status (SIJS). Family Court should not have required a birth certificate to prove the juvenile's age:

Family Court Act § 661(a) permits the Family Court to appoint a guardian for a youth between the ages of 18 and 21 in order to establish that the youth is "dependent on a juvenile court" (8 USC § 1101[a][27][J][i]) for purposes of an application for SIJS … . The provisions of the Surrogate's Court Procedure Act (hereinafter SCPA) apply to the extent they are applicable to guardianship of the person of a minor or infant and do not conflict with the provisions of the Family Court Act … . …

… [T]here is no express requirement to submit certified copies of birth certificates in a proceeding such as this pursuant to Family Court Act § 661(a) … . … [T]he Family Court is only required to ascertain the juvenile's age, and there is no statutory requirement that a petitioner submit any particular evidence to establish the juvenile's age (see id.; SCPA 1706[1]). Here, for purposes of this proceeding pursuant to Family Court Act § 661(a), the record supports a finding that the child is under the age of 21 … . …

Family Court should have granted the guardianship petition and the mother's motions to dispense with service on the father and for the issuance of an order making the requisite declaration and specific findings so as to enable the child to petition for SIJS. Matter of Joel A. A. R. (Eddy A. A. G.), 2023 NY Slip Op 02881, Second Dept 5-31-23

Practice Point: Here the complicated, intertwined statutory law controlling special juvenile immigration status (SJIS), as well as the related evidentiary requirements in Family Court, are explained in some depth.

MAY 31, 2023

IMMIGRATION LAW.

FAMILY COURT SHOULD HAVE GRANTED THE GUARDIANSHIP PETITIONS AND MADE FINDINGS ENABLING THE CHILDREN TO APPLY FOR SPECIAL IMMIGRANT JUVENILE STATE (SIJS) (SECOND DEPT).

The Second Department, reversing Family Court, determined the guardianship petitions should have been granted and findings enabling the children to apply for special immigrant juvenile status should have been made:

… [T]he record supports a finding that the children are under the age of 21 and unmarried, and, since we have appointed the petitioner as the children's guardian, the children are dependent on a juvenile court within the meaning of 8 USC § 1101(a)(27)(J)(i) … . Further, based upon our independent factual review, the record supports a finding that the children's father is deceased, and therefore, reunification is not possible … . Lastly, the record supports a finding that it would not be in the best interests of the children to return to El Salvador, their previous country of nationality or country of last habitual residence … . Matter of Jose S. S. G. (Norma C. G. C.), 2023 NY Slip Op 03350, Second Dept 6-21-23

Practice Point: The criteria for enabling children's applications for special immigrant juvenile status (SIJS) explained in some depth.

JUNE 21, 2023

IMMIGRATION LAW.

IN A PROCEEDING SEEKING FINDINGS TO ENABLE A CHILD TO APPLY FOR SPECIAL IMMIGRANT JUVENILE STATUS (SIJS) THE SUBMISSION OF CERTIFIED COPIES OF BIRTH CERTIFICATES OR DEATH CERTIFICATES IS NOT REQUIRED; THE PROCEEDING SHOULD NOT HAVE BEEN DISMISSED ON THAT GROUND (SECOND DEPT).

The Second Department, reversing Family Court, determined this proceeding seeking findings to enable the child to apply for special immigrant juvenile status (SIJS) should not have been dismissed on the ground that certified copies of birth certificates and/or death certificates were not submitted:

… [P]etitioner … commenced this proceeding pursuant to Family Court Act article 6 to be appointed as the guardian of the child. Thereafter, the petitioner moved for the issuance of an order … making specific findings so as to enable the child to petition the United States Citizenship and Immigration Services for special immigrant juvenile status (hereinafter SIJS) pursuant to 8 USC § 1101(a)(27)(J). … Family Court dismissed the petition and denied the petitioner's motion. …

… [T]here is no express requirement to submit certified copies of birth certificates or death certificates in a proceeding such as this pursuant to Family Court Act § 661(a) … . …[S]ince the court dismissed the petition without conducting a hearing or considering the child's best interests, we remit the matter to the Family Court … . Matter of Anuar S. A. O. (Yari C. B. M. Lizeth O. M.), 2023 NY Slip Op 03353, Second Dept 6-21-23

Practice Point: Certified copies of birth certificates or death certificates need not be submitted in a proceeding for findings enabling a child to apply for special immigrant juvenile status (SIJS). Here the proceeding should not have been dismissed on that ground and the matter was remitted for a determination on the merits.

JUNE 21, 2023

JUDGES, SANCTIONS, ATTORNEY'S FEES.

THE JUDGE GRANTED FATHER'S MOTION FOR SANCTIONS (ATTORNEY'S FEES) WITHOUT AFFORDING MOTHER AN OPPORTUNITY TO BE HEARD; THE JUDGE RULED ON FATHER'S MOTION AFTER DECIDING TO GRANT MOTHER'S MOTION FOR RECUSAL; REVERSED (SECOND DEPT).

The Second Department, reversing Family Court in this custody proceeding, determined the judge should not have awarded attorneys fees to father as sanctions for mother's actions without affording mother an opportunity to be heard. In addition, the judge should not have ruled on father's motion for sanctions after deciding to grant mother's motion for recusal:

… [T]he mother contends that the Family Court improvidently exercised its discretion in awarding the father reasonable attorneys' fees without affording her a reasonable opportunity to be heard. We agree. Notably, the court never set a

briefing schedule for the sanctions motion, and the court, in effect, denied the mother's new counsel's request to file opposition papers thereto. Under these circumstances, the mother did not receive a "reasonable opportunity to be heard" on the allegations in the sanctions motion … .

Additionally, the Family Court improvidently exercised its discretion by deciding the sanctions motion after indicating to the parties … that it intended to grant the mother's motion for recusal. Matter of Hunte v Jones, 2023 NY Slip Op 05731, Second Dept 11-15-23

Practice Point: Here, after deciding to grant mother's motion for recusal, the judge granted father's motion for sanctions (attorney's fees) without affording mother an opportunity to be heard. Reversed.

NOVEMBER 15, 2023

MARRIAGE EQUALITY ACT.

THE RELIGIOUS CEREMONY IN THIS SAME-SEX MARRIAGE TOOK PLACE IN 2005 BEFORE NEW YORK R ECOGNIZED SAME SEX MARRIAGE; THE CIVIL MARRIAGE TOOK PLACE IN 2011 JUST AFTER ENACTMENT OF THE MARRIAGE EQUALITY ACT (MEA); DEFENDANT SHOULD HAVE BEEN ALLOWED TO AMEND HER ANSWER TO ALLEGE THE MARRIAGE TOOK PLACE IN 2005 (SECOND DEPT).

The Second Department, in a full-fledged opinion by Justice Ford, reversing Supreme Court, determined defendant's motion amend the answer in this divorce proceeding to allege the date of this same-sex marriage to have been when the religious ceremony took place in 2005, as opposed the date of the subsequent civil marriage in 2011, should have been granted. In 2005 same sex marriage was not recognized in New York. The Marriage Equality Act (MEA) recognizing same sex marriage was enacted in 2011 and the parties civil marriage took place shortly after the enactment. There has been no determination the MEA cannot apply retroactively. So defendant's motion to amend is not palpably improper and does not prejudice the plaintiff:

At this stage in the litigation, we are tasked only with determining whether the defendant should be permitted to amend her answer to make the claim that the date

of the parties' marriage was July 21, 2005, not July 28, 2011. "In the absence of prejudice or surprise to the opposing party, a motion for leave to amend the [pleadings] pursuant to CPLR 3025(b) should be freely granted unless the proposed amendment is 'palpably insufficient' to state a cause of action or is patently devoid of merit" … . * * *

… [T]he plaintiff failed to establish that the defendant's proposed amendment was prejudicial to her in such a way that the defendant's motion for leave to amend her answer should be denied. Neither the length of time between the defendant's original answer and her motion for leave to amend, nor the fact that the amendment may affect the plaintiff's maintenance and equitable distribution obligations, are sufficient to establish prejudice to the plaintiff … . Mackoff v Bluemke-Mackoff, 2023 NY Slip Op 05721, Second Dept 11-15-23

Practice Point: In this divorce case, the same-sex couple was married in a 2005 religious ceremony before the Marriage Equality Act (MEA). The couple was married again in a civil ceremony in 2011 shortly after the MEA was enacted. Defendant should have been allowed to amend her answer to state the marriage took place in 2005, not 2011.

NOVEMBER 15, 2023

NEGLECT, APPEALS.

THE THIRD DEPARTMENT, REVERSING THE NEGLECT FINDINGS AGAINST MOTHER, DETERMINED THE SYSTEM FAILED MOTHER WHO WAS DEALING WITH EXTREMELY DIFFICULT CIRCUMSTANCES AND WHO WAS UNSUCCESSFULLY SEEKING HELP FROM PETITIONER FROM THE OUTSET; EVEN THE APPEALS PROCESS FAILED HER BECAUSE IT TOOK TOO LONG (THIRD DEPT).

The Third Department, reversing Family Court's neglect findings, noted that mother was dealing with extremely difficult circumstances, including an abusive and violent father, and, from the outset, was desperately seeking assistance from the petitioner (the county department of social services) which was not provided. The Third Department noted that the appeal should have been brought much sooner, and the failure to do so may have resulted in the unjustified separation of

mother from her children for years. In the words of the court: "it … appears that we have failed to address the pressing needs of this family, and the children, at each step:"

An adjudication of neglect based upon emotional impairment must include a determination "that the actual or threatened harm to the child is a consequence of the failure of the parent . . . to exercise a minimum degree of care" … . As the oldest child's emotional difficulties are, at least to some great extent, properly attributed to the trauma he experienced [father beating mother], rather than any failing of the mother, his condition does not support the neglect finding. Family Court further concluded that the other two children were neglected because the oldest child's behaviors presented a risk to his siblings' physical well-being. However, at no point did petitioner proffer evidence that either of the younger siblings had been injured by the oldest child, nor is there any evidence that such physical harm was imminent; at most, this conclusion is premised upon possible future harm, which is insufficient to support an adjudication of neglect … .

… [W]hile leaving children unattended, even for a brief period, can constitute a failure to exercise a minimum degree of parental care under certain circumstances … , it does not amount to neglect in all cases, even in certain circumstances where the unattended child is accidentally injured … . Here, considering the surrounding circumstances, we do not find that the evidence revealed such a failure. Nor will we fault the mother for her inability to control all three young children while attending to their various needs — as was the case in the incidents where the youngest child was left in a foam infant seat on a table and where the two older children ran outside of the shelter — or while taking care of necessary chores — as was the case in the incident where the youngest child fell out of a baby carriage. In our view, the mother's conduct during these alleged incidents of neglect did not fall below a minimum degree of parental [*4]care; nor were the children physically impaired, and it was not demonstrated that any sort of impairment was imminent … . Matter of Alachi I. (Shelby J.), 2023 NY Slip Op 01822, Third Dept 4-6-23

Practice Point: Here mother was dealing with an abusive, violent father and an older child who was difficult to control. She unsuccessfully sought assistance from the social services department from the outset. The Third Department determined the neglect findings based upon the behavior of the older child were baseless and the instances where children were briefly unattended did not amount to neglect.

Even the appeals process failed mother because it took years, which necessarily affected her ability to stay connected with her children.

APRIL 06, 2023

NEGLECT, CRIMINAL LAW.

A FACTUAL NEXUS BETWEEN THE ENDANGERING THE WELFARE OF A CHILD CONVICTION AND THE ALLEGATIONS IN THE NEGLECT PETITION WAS NOT DEMONSTRATED; FAMILY COURT SHOULD NOT HAVE GRANTED SUMMARY JUDGMENT ON THE NEGLECT ALLEGATIONS BASED ON THE CRIMINAL CONVICTION (FOURTH DEPT).

The Fourth Department, reversing Family Court, determined the record was not sufficient to support summary judgment on the neglect allegations based upon respondent's plea to endangering the welfare of a child:

… [A] criminal conviction may be given collateral estoppel effect in a Family Court proceeding where (1) the identical issue has been resolved, and (2) the defendant in the criminal action had a full and fair opportunity to litigate the issue of his or her criminal conduct" … . "It is well settled that [t]he party seeking the benefit of collateral estoppel has the burden of demonstrating the identity of the issues in the present litigation and the prior determination" … . * * *

"[I]t is not enough to merely establish the existence of the criminal conviction; the petitioner must prove a factual nexus between the conviction and the allegations made in the neglect petition" … . Matter of Clarissa F. (Rex O.), 2023 NY Slip Op 06680, Fourth Dept 12-22-23

Practice Point: Here a factual nexus between the endangering the welfare of a child conviction and the allegations of neglect was not demonstrated. Summary judgment on the neglect allegations based solely on the criminal conviction should not have been granted.

DECEMBER 22, 2023

NEGLECT, JURISDICTION.

FAMILY COURT SHOULD NOT HAVE RELINQUISHED TEMPORARY EMERGENCY JURISDICTION OVER THE NEGLECT PROCEEDING UPON LEARNING FATHER HAD COMMENCED A CUSTODY PROCEEDING IN TEXAS; THERE WAS NO ASSURANCE FROM THE TEXAS COURT RE: SAFEGUARDING THE CHILD (FIRST DEPT).

The First Department, reversing Family Court in this neglect proceeding, determined the judge should not have relinquished temporary emergency jurisdiction under the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) when father commenced custody proceedings in Texas:

Family Court improperly relinquished emergency jurisdiction for three reasons. First, there is no evidence in this record, and Family Court's order fails to state any basis for finding, that the Texas court had "home state" jurisdiction, since the child had not resided there for six months immediately preceding commencement of the father's Texas custody proceeding (Domestic Relations Law §§ 75-a[7]; 76[1][a]). Second, the record and Family Court's order are also devoid of any factual basis for finding that any of the alternative jurisdictional bases applied to Texas. There is no evidence that the child at that time had a "significant connection" with Texas or that "substantial evidence . . . concerning the child's care, protection, training and personal relationships" was available in Texas (Domestic Relations Law § 76[1][b]). Finally, given the allegations in the neglect petition and the fact that Family Court had been informed … that the Texas Department of Family and Protective Services would not investigate whether the father was a danger to the child because the mother and child resided in New York, Family Court should not have relinquished emergency jurisdiction "in the absence of any orders from the Texas court safeguarding the child[]" … .

Moreover, it is not clear whether New York might have had jurisdiction to make an initial custody determination under Domestic Relations Law § 76(1)(b), given that the child had not lived in Texas for the preceding six months, had lived in New York with his mother when the father filed his Texas custody petition, and was receiving medical care, attending daycare, and receiving services through ACS here. Accordingly, Family Court should not have denied the mother's motion without first holding a hearing. Matter of Nathaniel H. (Nathaniel H.–Dayalyn G.), 2023 NY Slip Op 00927, First Dept 2-16-23

Practice Point: The judge in this neglect proceeding should not have relinquished temporary emergency jurisdiction upon learning of father's custody proceeding in Texas. Findings of fact required by the Domestic Relations Law were not made and there was no assurance the Texas court would safeguard the child.

FEBRUARY 16, 2023

NEGLECT, MENTAL HEALTH.

THE RECORD DID NOT SUPPORT THE FINDING THAT FATHER, DUE TO UNTREATED MENTAL ILLNESS, NEGLECTED ONE CHILD AND DERIVATIVELY NEGLECTED THE OTHER CHILDREN; THE CRITERIA FOR A NEGLECT FINDING IN THIS CONTEXT ARE LAID OUT IN DETAIL (SECOND DEPT).

The Second Department, reversing Family Court, determined the finding that father, due to untreated mental illness, neglected one child, Fyre, and derivatively neglected the other children was not supported by the record:

… [T]he record fails to support a finding of derivative neglect as to the subject children based on the purported neglect of Fyre. In that regard, the petitioner failed to establish that the father suffered from an untreated mental illness that placed Fyre at imminent risk of harm … . Inasmuch as the evidence failed to support a finding that Fyre was endangered by the father's untreated mental illness, it failed to support a finding of derivative neglect as to the subject children (see Family Ct Act § 1046[a][i] …). Matter of Sonja R. (Victor R.), 2023 NY Slip Op 02787, Second Dept 5-24-23

Practice Point: Here the record did not support the finding that father, based upon his allegedly untreated mental illness, neglected one child and derivatively neglected the other children. Although the facts are not described, the legal criteria for neglect in this context are explained in detail.

MAY 24, 2023

NEGLECT, SEXUAL ABUSE.

PETITIONER WAS NOT REQUIRED TO PROVE THE SON ACTUALLY SEXUALLY ABUSED THE DAUGHTER TO MAKE A NEGLECT FINDING BASED UPON MOTHER'S LEAVING THE DAUGHTER UNDER THE SON'S SUPERVISION; THE DAUGHTER'S ALLEGATIONS SHE WAS SEXUALLY ABUSED WERE DEEMED SUFFICIENTLY CORROBORATED BY HER KNOWLEDGE ABOUT SEX AND PORNOGRAPHY; STRONG DISSENT (SECOND DEPT).

The Second Department, reversing Family Court, over a detailed and comprehensive dissent, determined the neglect petition was supported by the evidence. It was alleged that mother left her young daughter in the care of her 15-year-old son despite concerns about the son's sexual behavior. Family Court held the Administration for Children's Services (ACS) was required to, but did not, prove the son sexually abused his sister. Family Court also held that the sister's claims her brother sexually abused her were not corroborated. The dissent agreed with Family Court. The majority held ACS was not required to prove the alleged sexual abuse took place and the sister's claims of sexual abuse were corroborated by her knowledge about sex:

A finding of neglect is warranted when a parent allows the child to be harmed or placed in substantial risk of harm … . A parent, who, by willful omission, fails to protect a child, and as a consequence places the child at imminent risk of harm, demonstrates a fundamental defect in understanding the duties and obligations of parenthood and creates an atmosphere detrimental to the physical, mental, and emotion well-being of the child … . Here, ACS contended that the mother neglected the child because, despite her knowledge of the son's sexually inappropriate behavior, the mother failed to provide proper care and supervision for the child by leaving the child alone with the son. * * *

This Court has found that evidence of a change in the demeanor of a child, sexual references by a child which are not age appropriate, and detailed, consistent out-of-court statements of sexual abuse can be sufficient to corroborate a child's out-of-court statements of sexual abuse … . For example, in Matter of Osher W. (Moshe W.) (198 AD3d 904), this Court determined that, "'[a]lthough the mere repetition of an accusation does not, by itself, provide sufficient corroboration, some degree of corroboration can be found in the consistency of the out-of-court repetitions'" …

. Here, the child's statements to school personnel, her godmother, and the caseworkers were consistent and detailed about the sexual activity that the son had engaged in with her. In addition, both the mother's acknowledgment at the hearing that the son admitted to her that he watched pornography in the child's presence and the son's admission to the first caseworker that he had his own pornography account directly corroborated the child's statements that the son watched pornography in her presence. The child's knowledge of sexual behavior despite her age—her depiction to school personnel of the son's pumping motion with his penis and her discussion of sex, which she called "polo" to the first caseworker, describing it as where "a man and a woman they don't have any clothes on and they put their private parts into each other," was further corroboration of her out-of-court statements about the son's sexual abuse of her. Moreover, the records submitted into evidence demonstrate that the child, who had been happy and talkative at the hospital, became withdrawn and quiet when asked about the sexual abuse. Matter of Jada W. (Fanatay W.), 2023 NY Slip Op 04318, Second Dept 8-16-23

Practice Point: This decision discusses in depth the proof requirements for neglect based upon a mother's leaving her daughter under the supervision of her son, despite concerns about the son's sexual behavior (here it was not necessary to prove the sexual abuse actually occurred).

Practice Point: In addition, the decision discusses in depth the nature of proof sufficient for corroboration of a child's allegations of sexual abuse (here the child's knowledge about sex was deemed sufficient corroboration).

AUGUST 16, 2023

NEGLECT.

EVIDENCE OF NEGLECT BASED UPON ALCOHOL USE WAS INSUFFICIENT; THE BASIS WAS OUT-OF-COURT STATEMENTS OF THE CHILD WHICH WERE NOT CORROBORATED (FIRST DEPT).

The First Department, reversing (modifying) Family Court, determined the evidence of father's neglect based upon alcohol use was insufficient:

… [A] preponderance of the evidence does not support a finding of neglect based on the father's alcohol use or on any prior incidents of domestic abuse, as those findings were based on out-of-court statements of the child that were not sufficiently corroborated by any other evidence. Matter of Kaylee S. (Kyle L. S.), 2023 NY Slip Op 01150, First Dept 3-2-23

Practice Point: A neglect finding based upon uncorroborated out-of-court statements by a child is not supported by a preponderance of the evidence.

MARCH 02, 2023

NEGLECT.

THE CHILDREN'S HEARSAY EVIDENCE AND KNOWLEDGE FATHER LEGALLY POSSESSED A FIREARM DID NOT SUPPORT THE NEGLECT FINDING; THE EVIDENTIARY CRITERIA FOR NEGLECT ARE EXPLAINED IN DETAIL (SECOND DEPT).

The Second Department, reversing Family Court, determined the hearsay statements of the children and the children's knowledge father legally possessed a firearm were not sufficient to support the neglect finding against father. The proof requirements for neglect and the proper role of hearsay is discussed in some depth:

… [T]he hearsay evidence presented by the petitioner at the fact-finding hearing was insufficient to permit a finding of neglect (see Family Ct Act § 1046[a][vi] …). The hearsay statement of one child that she witnessed the father "attacking her mother in the bedroom" failed to provide any detail as to the alleged domestic violence and was not corroborated by any other evidence of domestic violence in the record (see Family Ct Act § 1046[a][vi] …). The hearsay statements of the children describing an incident in which the father yelled outside the children's home and "reached for" or "grabbed at" one of the children on their way inside, which the children described as "uncomfortable," "weird," and "confus[ing]," causing one of them to be "a little anxious" and the other to "start[ ] to cry," without more, was insufficient to establish that the children's physical, mental, or emotional condition was impaired or in imminent danger of becoming impaired … . Furthermore, the children's knowledge that the father legally possessed a firearm in another state was insufficient to establish that the children's physical, mental, or emotional condition was impaired or in imminent danger of becoming impaired

where there was no evidence that the father had threatened anyone with his firearm or otherwise connecting the firearm to the alleged incidents of neglect … . Matter of Kashai E. (Kashif R.E.), 2023 NY Slip Op 03784, Second Dept 7-17-23

Practice Point: Here the children's hearsay evidence did not support the neglect finding against father. The proper use of hearsay in a neglect proceeding is clearly explained in some depth.

JULY 12, 2023

NEGLECT.

THE EVIDENCE FATHER NEGLECTED THE DAUGHTER (EXCESSIVE CORPORAL PUNISHMENT) WAS SUFFICIENT; BUT THE EVIDENCE FATHER DERIVATIVELY NEGLECTED THE SON WAS NOT (FIRST DEPT).

The First Department, reversing (modifying Family Court) determined the evidence father derivatively neglected the son was insufficient:

Family Court's determination that respondent derivatively neglected his son J.L. was not supported by a preponderance of the evidence. The finding was based entirely on the excessive corporal punishment of the daughter, which took place outside the home. There was no evidence that respondent's excessive corporal punishment was ever directed at the older child, who was 14 years old at the time, or that he was even aware of the abuse. Furthermore, there was no evidence that the son was at risk of becoming impaired, as he continued to reside with respondent after the petitions were filed … . Matter of C.L. (Edward L.), 2023 NY Slip Op 01260, First Dept 3-14-23

Practice Point: There was no evidence the son was even aware of father's excessive corporal punishment of the daughter, which took place outside the home. The evidence father derivatively neglected the son was insufficient.

MARCH 14, 2023

NEGLECT.

THE PROOF FATHER NEGLECTED THE CHILD WAS PRIMARILY BASED UPON HIS INCARCERATION, WHICH WAS NOT SUFFICIENT (THIRD DEPT).

The Third Department, reversing Family Court, over a concurrence, determined the proof respondent father neglected the child was insufficient. The neglect finding appeared to be primarily based upon father's incarceration:

We note that a determination of whether respondent neglected the child was complicated by the fact that no DNA analysis was performed to establish paternity until late 2020, over a year after the child's birth. * * *

At the fact-finding hearing, … most of the proof upon which petitioner relied was … hearsay. Although no objections were raised, the caseworker testified to the mother's statements regarding paternity and to respondent's mother's statements. In the end, petitioner's proof failed to establish how respondent's plan to have his mother care for the child fell below the "minimum degree of care" or how it impaired the child or placed him in imminent danger of becoming impaired … . Petitioner's proof seemed to be predicated solely on respondent's incarceration, which cannot alone form the basis for a neglect finding … . Due to the accumulation of errors by petitioner, and the insufficiency of its proof, we find that petitioner failed to establish that respondent neglected the subject child … . Matter of Elijah AA. (Alexander AA.), 2023 NY Slip Op 02812, Third Dept 5-25-23

Practice Point: Here the proof father neglected the child was insufficient. Despite father's request, a paternity test was not performed for more than a year after the child's birth. Once father was incarcerated two months before the child's birth, his mother refused to help out with care for the child, but father was not so informed. Neglect cannot be based solely on father's incarceration.

MAY 25, 2023

NEGLECT.

THE RECORD DID NOT SUPPORT THE FINDING THAT FATHER NEGLECTED THE CHILD BASED ON MOTHER'S DRUG USE WHEN SHE WAS PREGNANT; ALTHOUGH FATHER DID NOT REPORT MOTHER'S DRUG USE TO HER PROBATON OFFICER, FATHER MADE EFFORTS TO INTERVENE RE: MOTHER'S DRUG USE DURING THE PREGNANCY (THIRD DEPT).

The Third Department, reversing Family Court, determined the record did not support a finding that father (respondent) neglected the child based on mother's drug use when she was pregnant:

Respondent argues that Family Court erred when it found that, knowing that the mother was abusing drugs while pregnant with the daughter, respondent failed to exercise a minimum degree of care when he failed to report the mother's drug use to her probation officer In its decision, Family Court found that respondent made "some efforts to intervene as to the mother's drug use," by enrolling her in an inpatient drug treatment facility, attending drug treatment sessions and drug court proceedings with the mother and preventing her from residing with the son and limiting her contact with him. Indeed, the court stated that respondent had "failed to do the one thing that would have ensured that [the mother did] not have access to drugs while pregnant, reporting her to her probation officer," and it found that this single failure constituted neglect. Under the circumstances of this case, we disagree.

Respondent testified that … he … learned that the mother had a warrant for her arrest due to her issues with probation. … [H]e and the mother agreed that the mother would engage in an inpatient treatment program to address her addiction and that she would then turn herself in to probation. … [F]our days after entering inpatient treatment, the mother signed herself out and absconded. … [P]etitioner failed to prove by a preponderance of the evidence that respondent failed to exercise a minimum degree of care required of a reasonable and prudent parent … . While respondent could have contacted the mother's probation officer and reported her drug use, a warrant for the mother's arrest was already in place, and respondent seemingly lacked any information to assist probation in locating her. Matter of Leo RR. (Joshua RR.), 2023 NY Slip Op 01041, second Dept 2-23-23

Practice Point: Father made efforts to intervene re: mother's drug use during pregnancy. The record did not support a finding that father neglected the child because he did not report mother's drug use to her probation officer.

FEBRUARY 23, 2023

NELGECT.

THE JUDGE SHOULD HAVE ALLOWED TIME FOR OBJECTIONS TO PETITIONER'S APPLICATION TO WITHDRAW THE NEGLECT PETITION AND CANCEL THE FACT-FINDING HEARING (THIRD DEPT).

The Third Department, reversing Family Court, determined Family Court should not have granted petitioner's request to withdraw the neglect petition and cancel the fact-finding hearing without allowing time for objections to be raised:

We agree with the AFC that Family Court erred in granting petitioner's application to dismiss the neglect petition without allowing any time for objections to be raised. We are cognizant that, "ordinarily[,] a party cannot be compelled to litigate and, absent special circumstances, discontinuance should be granted" … . However, one should be given an opportunity to present any such special circumstances or any other arguments concerning the application, such as the effect upon a subject child's welfare … , whether prejudice should attach to the discontinuance … or whether another party should be permitted, in the court's discretion, to commence a neglect proceeding (see Family Ct Act § 1032 [b] …). Because Family Court dismissed the petition without allowing the parties — including the father as a nonrespondent parent — to present any arguments regarding petitioner's application for a discontinuance, we remit this matter to allow them the opportunity to do so. Matter of Lauren X. (Daughn X.), 2023 NY Slip Op 03732, Third Dept 7-6-23

Practice Point: Although a party's application to discontinue an action, here a neglect petition, should ordinarily be granted, here the judge should have allowed time for objections before granting the application.

JULY 06, 2023

NEW YORK STATE ADMINISTRATION OF CHILDREN'S SERVICES, UNFOUNDED REPORTS.

FATHER MADE A PRIMA FACIE SHOWING THE NYC ADMINISTRATION OF CHILDREN'S SERVICES (ACS) SHOULD BE HELD IN CONTEMPT FOR FAILING TO PROVIDE UNREDACTED REPORTS OF CHILD ABUSE OR NEGLECT WHICH WERE DEEMED UNFOUNDED; MATTER REMITTED (FIRST DEPT).

The First Department, reversing (modifying) Family Court and remitting the matter, determined father made a prima facie showing that the NYC Administration of Children's Services (ACS) should be held in contempt for failing to provide unredacted reports of child abuse or neglect which were deemed unfounded. Father's request for the unredacted documents should not have been denied absent a finding by Family Court the safety of the person(s) who made the report or cooperated with the investigation would be jeopardized by revealing the name(s):

As the subject of the unfounded reports, the father is a person entitled to receive access to the otherwise sealed reports (Social Services Law § 422 [5][a][iv]). * * *

… [F]ather made a prima facie showing of the elements necessary to hold ACS in contempt for its failure to fully comply with a lawful judicial subpoena … The subpoena was a valid order expressing an unequivocal mandate, requiring ACS to produce "complete" investigation and unfounded reports of suspected child abuse concerning the children. ACS does not deny that it was aware of the order. Further, ACS did not comply with the subpoena, as it produced reports that redacted the names of sources, not complete reports. Finally, the father suffered prejudice, because his modification petition alleges that the mother was causing false abuse reports to be filed with the authorities, and the unredacted unfounded reports may be admissible in such a proceeding … .

Once the father met his prima facie burden, it was incumbent on ACS to refute the showing or to offer evidence of a defense … . ACS asserted that Social Services Law §422(7) permits the commissioner "to prohibit the release of data that would identify the person who made the report or who cooperated in a subsequent investigation . . . which he reasonably finds will be detrimental to the safety or interests of such person." However, there was no indication that any such

determination had actually been made. Matter of Michael Y. v Dawn S., 2023 NY Slip Op 00193, First Dept 1-17-23

Practice Point: Under the Social Services Law, the NYC Administration of Children's Services (ACS), in response to a judicial subpoena, must provide unredacted reports of child abuse or neglect which were deemed unfounded, unless ACS can demonstrate revealing the names of the sources of the reports jeopardizes the safety of those sources.

JANUARY 17, 2023

NEW YORK STATE OFFICE OF CHILDREN AND FAMILY SERVICES, UNFOUNED REPORT.

SETTING A RETURN DATE LESS THAN 20 DAYS FROM THE DATE OF SERVICE OF THE ARTICLE 78 PETITION WAS NOT, UNDER THE FACTS, A JURISDICTIONAL DEFECT; THE PETITION SHOULD NOT HAVE BEEN DISMISSED (THIRD DEPT).

The Third Department, reversing Supreme Court, determined the failure to provide the requisite 20-day notice in an Article 78 petition, under the facts, was not a jurisdictional defect and the dismissal of the petition was an abuse of discretion. Petitioners sought to contest a ruling of the NYS Office of Children and Family Services which refused to find a maltreatment report unfounded re: one of the petitioners:

Pursuant to CPLR 7804 (c), "a notice of petition, together with the petition and affidavits specified in the notice, shall be served . . . at least [20] days before the time at which the petition is noticed to be heard." However, CPLR 2001, which has been held to apply to service defects … , authorizes a court to "permit a mistake, omission, defect or irregularity . . . to be corrected, upon such terms as may be just, or, if a substantial right of a party is not prejudiced, the mistake, omission, defect or irregularity shall be disregarded." In deciding whether a defect in service is a "technical infirmity" within the scope of CPLR 2001, "courts must be guided by the principle of notice to the [respondent] — notice that must be reasonably calculated, under all the circumstances, to apprise interested parties of the

pendency of the action and afford them an opportunity to present their objections" … .

… [I]t is … wholly undisputed that the subject application was not heard on the return date proposed by petitioners, nor was there any appearance before Supreme Court, either held or calendared, prior to respondents' motion. It is further undisputed that, apart from failing to strictly comply with CPLR 7804 (c), petitioners properly served respondents. Thus, this case is functionally no different than those in which a return date has been omitted from a notice of petition, and such failures have been held to be technical infirmities within the scope of CPLR 2001 … . Given these facts, although the return date on the notice of petition was defective at the time of service, we find that the service effectuated by petitioners was reasonably calculated to apprise respondents of this proceeding and afford them the opportunity to defend against it … . Matter of Naomi R. v New York State Off. of Children & Family Servs., 2023 NY Slip Op 02362, Third Dept 5-4-23

Practice Point: Here, under the facts, the failure to provide the required 20-day notice (service at least 20 days before the return date) for an Article 78 petition did not prejudice the respondent and was not a jurisdictional defect. The petition should not have been dismissed.

MAY 04, 2023

PARENTAL ACCESS, EVIDENCE.

FAMILY COURT ABUSED ITS DISCRETION IN FAILING TO CONDUCT AN IN CAMERA INTERVIEW WITH THE CHILD BEFORE DENYING MOTHER'S PETITION FOR IN-PERSON PARENTAL ACCESS (SECOND DEPT).

The Second Department, reversing Family Court, determined the denial of mother's petition for in-person parental access was not supported by the record, in part because the judge did not conduct an in camera interview with the child:

The Family Court's determination, in effect, denying that branch of the mother's petition which was for in-person parental access lacked a sound and substantial basis in the record. "The decision to conduct an in camera interview to determine the best interests of the child is within the discretion of the hearing court" … .

Here, the court improvidently exercised its discretion in failing to conduct an in camera interview of the child, particularly given the mother's testimony that the child's fear of visiting her in person was due to outside influence … . The child is of such an age and maturity that his preferences are necessary to create a sufficient record to determine his best interests … . Matter of Badal v Wilkinson, 2023 NY Slip Op 00997, Second Dept 2-22-23

FEBRUARY 22, 2023

PARENTAL RIGHTS, ABANDONMENT.

THE ABANDONMENT PETITION SHOULD NOT HAVE BEEN GRANTED; PETITIONER DID NOT DEMONSTRATE RESPONDENT FATHER INTENDED TO FOREGO HIS PARENTAL RIGHTS AND, IN FACT, PETITIONER AFFIRMATIVELY INTERFERED WITH FATHER'S ATTEMPTS TO MAINTAIN CONTACT WITH THE CHILDREN (THIRD DEPT).

The Third Department, reversing Family Court, determined the petitioner (Schenectady County Department of Social Services) did not demonstrate father (respondent) had abandoned the children and, in fact, had improperly prevented father from visiting the children. The abandonment petition should have been dismissed:

… [P]etitioner failed to establish by clear and convincing evidence that respondent evinced an intent to forego his parental rights … . The record demonstrates that respondent filed numerous motions to resume visitation, return his children, intervene in the neglect proceeding against the mother and terminate the children's placement. During at least one appearance, respondent remarked that he would continue to "battle" for the return of his children, even prompting Family Court to candidly admit that respondent has been an active participant during the entire proceeding … . Respondent had several visits with the children where he inquired if he could obtain their school records and asked what clothing or supplies they needed. The record further reflects that respondent made several inquiries to the caseworker and the mother, including during the delay caused by the pandemic.

… There are several troubling instances in the record where the caseworker or the coordinator cancelled respondent's scheduled visitation with [*3]the children due

to his late confirmation of the scheduled visit or arrival — including one egregious incident where respondent was three minutes late to confirm an appointment for later that day. * * *

Notwithstanding the fact that respondent cancelled one visit due to illness, attended five visits and had seven visits cancelled on him in the foregoing manner, the caseworker then reported to Family Court that respondent had only attended 4 out of 20 scheduled visits. Based on the incorrect information presented by the caseworker — who relied on text messages from the coordinator, who did not testify at the hearing — petitioner was successful in obtaining an order suspending respondent's visitation with the children in December 2019, thereby making it more difficult for respondent to visit and communicate with the children. Matter of Syri'annah PP. (Sayyid PP.), 2023 NY Slip Op 00252, Third Dept 1-19-23

Practice Point: Here the caseworkers took steps to affirmatively prevent father from seeing his children. The abandonment petition should have been dismissed for failure to demonstrate father's intent to forego his parental rights.

JANUARY 19, 2023

PARENTAL RIGHTS, CHILDREN PLACED WITH DEPARTMENT OF FAMILY AND CHILDREN'S SERVICES.

NON-RESPONDENT FATHER'S APPEAL OF THE PLACEMENT OF HIS CHILDREN WITH THE DEPARTMENT OF FAMILY AND CHILDREN'S SERVICES WAS NOT MOOT; THE CHILDREN HAD BEEN PLACED WITH RELATIVES; PLACEMENT WITH THE DEPARTMENT, AS OPPOSED TO WITH RELATIVES, TRIGGERS THE POSSIBLE FUTURE TERMINATION OF FATHER'S PARENTAL RIGHTS (FOURTH DEPT).

The Fourth Department determined non-respondent father's appeal of the placement of his children with the department of family and children's services was not moot. The children had been placed with relatives. Placement with the department of family and children's services, as opposed to with relatives, triggers the possible termination of father's parental rights:

… [T]he Social Services Law provides that, whenever a child "shall have been in foster care for [15] months of the most recent [22] months . . . the authorized agency having care of the child shall file a petition" to terminate parental rights unless, as relevant here, "the child is being cared for by a relative" … . Thus, we agree with the father that his appeal from the order moving his children from relative placement to foster care is not moot because that change in placement "may, in future proceedings, affect [his] status or parental rights" … by altering the obligations of petitioner with respect to a future petition to terminate the father's parental rights…. . Matter of Shdaya B. (Rahdasha B.–Carlton M.), 2023 NY Slip Op 01599, Fourth Dept 3-23-23

Practice Point: Here the non-respondent father's appeal of the placement of his children with the department of family and children's services was not moot. The children had been placed with relatives. Placement with the department, as opposed to with relatives, triggers the possible future termination of father's parental rights.

MARCH 23, 2023

PARENTAL RIGHTS, TERMINATION OF, MENTAL HEALTH.

IN THIS TERMINATION OF PARENTAL RIGHTS PROCEEDING, PETITIONER DID NOT MEET ITS BURDEN TO PROVE IT MADE DILIGENT EFFORTS TO ASSIST RESPONDENT MOTHER IN ADDRESSING HER MENTAL HEALTH; MOTHER'S PARENTAL RIGHTS SHOULD NOT HAVE BEEN TERMINANTED (THIRD DEPT).

The Third Department, reversing Family Court, determined the petitioner did not prove it made diligent efforts toward reunification of mother and child, given mother's mental health and the incomplete measures to address her mental health needs. Therefore mother's parental rights should not have been terminated. The facts are far too complex to summarize here:

The petitioning agency "bears the burden of proving . . . that such diligent efforts were made," and must do so by clear and convincing evidence … . To satisfy that burden, the agency "must develop a plan that is realistic and tailored to fit [the] respondent's individual situation" … , and "make affirmative, repeated, and

meaningful efforts to assist the parent in overcoming these handicaps" … . The petitioning agency "should mold its diligent efforts to fit the individual circumstances so as to allow the parent to provide for the child's future' " … .

… [The] "terms and conditions" placed upon respondent required … that she "undergo a complete mental health evaluation by a licensed professional approved by [petitioner]"; engage in a domestic violence program; attend all of the child's medical appointments and all scheduled visitation; and "successfully complete Family Services of Chemung County's Protective Parenting Program." We agree with respondent and the AFC that petitioner did not prove, by clear and convincing evidence, that it made diligent efforts to assist respondent in satisfying these conditions. Matter of Willow K. (Victoria L.), 2023 NY Slip Op 03730, Third Dept 7-6-23

Practice Point: Here mother had serious mental health issues and the "terms and conditions" imposed upon mother required those issues to be addressed in specific ways. Petitioner did not prove it diligently provided sufficient assistance to mother in her attempts to meet those terms and conditions. Therefore mother's parental rights should not have been terminated.

JULY 06, 2023

PARENTAL RIGHTS, TERMINATION OF, NEGLECT.

ALTHOUGH THE RECORD SUPPORTED FATHER'S PERMANENT NEGLECT AND THE TERMINATION OF FATHER'S PARENTAL RIGHTS, FAMILY COURT SHOULD NOT HAVE DISPENSED WITH THE DISPOSITIONAL HEARING ABSENT FATHER'S CONSENT; MATTER REMITTED (THIRD DEPT).

The Third Department determined that although the record supported terminating father's parental rights based upon permanent neglect, Family Court should not have dispensed with the dispositional hearing absent the consent of the parties:

Both petitioner and the attorney for the child share the position that Family Court properly dispensed of the matter without a separate dispositional hearing and, alternatively, that there is sufficient evidence in the record for this Court to render a disposition. However, Family Ct Act § 625 (a) expressly provides that, "[u]pon completion of [a] fact-finding hearing, [a] dispositional hearing may commence

immediately after the required findings are made; provided, however, that if all parties consent the court may, upon motion of any party or upon its own motion, dispense with the dispositional hearing and make an order of disposition on the basis of competent evidence admitted at the fact-finding hearing" … . Here, the court stated that there was "no need for a further or separate dispositional hearing" before rendering its determination that respondent had permanently neglected the child and terminating his parental rights. However, there is no indication that respondent affirmatively consented to dispense with the hearing and, "absent consent, the requirement of a dispositional hearing may not be circumvented" … . Matter of Harmony F. (William F.), 2023 NY Slip Op 00259, Third Dept 1-19-23

Practice Point: Here, even though the record supported Family Court's termination of father's parental rights, in the absence of father's consent, Family Court should not have dispensed with the dispositional hearing.

JANUARY 19, 2023

PARENTAL RIGHTS, TERMINATION OF.

THE MAJORITY DETERMINED MOTHER'S PARENTAL RIGHTS WERE PROPERLY TERMINATED; MOTHER AND THE DISSENT ARGUED THE DEPARTMENT OF SOCIAL SERVICES DISCOURAGED HER FROM COMMUNICATING WITH IT WELL BEFORE THE ABANDONMENT PERIOD (SIX MONTHS BEFORE THE FILING OF THE TERMINATION PETITION) AND THE JUDGE ERRONEOUSLY PROHIBITED HER FROM PRESENTING EVIDENCE FROM BEFORE THE ABANDONMENT PERIOD (SECOND DEPT).

The Second Department, over an extensive and comprehensive dissent, determined Family Court properly terminated mother's parental rights. The question whether a parent has abandoned a child focuses on the six months immediately prior to the filing of the petition to terminate parental rights. Mother argued that the Department of Social Services had discouraged her from communicating with the department and the court had cut off her parental access well before the statutory abandonment period. The dissent agreed with mother's arguments and supported a new fact-finding hearing:

… [T]he mother failed to demonstrate that the petitioner prevented or discouraged her from communicating with it or with the child, or that she was otherwise unable to do so … . The mother's contention that the petitioner prevented her from communicating with the child by suspending her parental access is without merit, as it was the Family Court that suspended the mother's parental access with the child, not the petitioner. Further, the mother was still obligated to maintain contact with the petitioner, which had legal custody of the child, even though the court had suspended her parental access … . * * *

From the dissent:

In this proceeding to terminate the mother's parental rights on the ground of abandonment, the mother, who had been precluded from visiting with the subject child, asserted that her conduct during the statutory abandonment period did not evince an intent to abandon the child because the petitioner had prevented and discouraged her from maintaining contact with the child and with the petitioner. The Family Court erroneously ruled that the mother could not present evidence regarding events that occurred prior to the statutory abandonment period and erroneously precluded the mother from eliciting such evidence on cross-examination of the petitioner's witnesses and during her own testimony. The court's incorrect ruling infringed upon the mother's right to present evidence regarding the central issue in the proceeding. Matter of Abel J.R. (Estilia R.), 2023 NY Slip Op 05139, Second Dept 10-11-23

Practice Point: To demonstrate abandonment of a child, the proof focuses on the six months before the petition to terminate parental rights was filed. Here mother and the dissent argued the Department of Social Services discouraged her from communicating with it about the child well before the six-month abandonment period. Mother and the dissent argued the Family Court judge erred by limiting proof from prior to the abandonment period. The majority noted mother was allowed to present pre-abandonment-period evidence and that evidence did not negate the proof of abandonment.

OCTOBER 11, 2023

PERSON LEGALLY RESPONSIBLE FOR THE CHILD, ABUSE.

ALTHOUGH FATHER'S GIRLFRIEND HAD ONLY SEEN THE ABUSED CHILD TWO OR THREE TIMES SHE WAS DEEMED A PERSON LEGALLY RESPONSIBLE FOR THE CHILD; THERE WAS A STRONG DISSENT (SECOND DEPT).

The Second Department, over an extensive dissent, determined father's girlfriend, Aisha, who only seen the abused child, Erica, two or three times, was correctly deemed a person legally responsible for Erica. The decision and the dissent are too fact-specific to fairly summarize here:

"Determining whether a particular person has acted as the functional equivalent of a parent is a discretionary, fact-intensive inquiry which will vary according to the particular circumstances of each case. Factors such as the frequency and nature of the contact between the child and respondent, the nature and extent of the control exercised by the respondent over the child's environment, the duration of the respondent's contact with the child, and the respondent's relationship to the child's parent(s) are some of the variables which should be considered and weighed by a court" … . "The factors listed here are not meant to be exhaustive, but merely illustrate some of the salient considerations in making an appropriate determination" … . Although "article 10 should not be construed to include persons who assume fleeting or temporary care of a child such as a supervisor of a play-date or an overnight visitor" … , the definition "expressly encompasses paramours who regularly participate in the family setting and who therefore share to some degree in the supervisory responsibility for the children" … .

Aisha's relationship to the father, as well as Erica, weighs in favor of a finding that she was a person legally responsible for Erica during the relevant time period … . In January 2016, when Erica was injured, Aisha was the father's girlfriend and the mother of their child Eric Jr., Erica's half-sibling. Aisha began a romantic relationship with the father in 2013 and met Erica for the first time in August 2014, when Erica was approximately six months old. Aisha testified that in January 2016, she "treated [Erica] like if she was my child" … . Aisha further testified that she brought Erica to her niece's birthday party because Erica was going to be her stepdaughter and that "any child of [the father's] is mine[ ], so any children that [the father] has is a part of me as well." The father testified that the interaction between Aisha and Erica was "as of a parent to a child," and further testified that

Aisha "treated Erica no different than she treated Eric [Jr.]." Matter of Erica H.-J. (Tarel H.), 2023 NY Slip Op 02662, Second Dept 5-17-23

Practice Point: Here father's girlfriend was deemed a person legally responsible for the abused child, despite the fact she had seen the child only two or three times. There was a strong dissent.

MAY 17, 2023

SEXUAL ABUSE, FUNCTIONAL EQUIVALENT OF A PARENT.

RESPONDENT, THE CHILDREN'S UNCLE WHO LIVED WITH THE CHILDREN'S FAMILY, WAS A FUNCTIONAL EQUIVALENT OF A PARENT AND SHOULD HAVE BEEN DEEMED A PERSON LEGALLY RESPONSIBLE FOR THE CHILDREN IN THIS SEXUAL ABUSE PROCEEDING (SECOND DEPT).

The Second Department, reversing Family Court, determined respondent, the children's uncle who lived with the children's family, was a person legally responsible for the children who had sexually abused the children:

"Determining whether a particular person has acted as the functional equivalent of a parent is a discretionary, fact-intensive inquiry which will vary according to the particular circumstances of each case. Factors such as the frequency and nature of the contact between the child and respondent, the nature and extent of the control exercised by the respondent over the child's environment, the duration of the respondent's contact with the child, and the respondent's relationship to the child's parent(s) are some of the variables which should be considered and weighed by a court" … . These factors are not exhaustive, "but merely illustrate some of the salient considerations in making an appropriate determination" … . * * *

… [T]he respondent, the paternal uncle of Yasmin P. and Hilary P., continually resided in the same apartment with Yasmin P. and Hilary P. for approximately five years. In addition, the respondent's brother testified during the fact-finding hearing that the respondent told him that the respondent considered both the respondent's family and the respondent's brother's family, including Yasmin P. and Hilary P., to be one big family (see Family Ct Act § 1012[g] …). The respondent also exercised control over Yasmin P.'s and Hilary P.'s environment during the relevant period by freely accessing their bedroom and the common areas of the apartment, including

when Yasmin P. and Hilary P. were home and their parents were away at work or running errands, and by controlling Yasmin P. with commands or the promise of gifts. Accordingly, the evidence adduced at the fact-finding hearing established that the respondent was a person legally responsible for Yasmin P. and Hilary P. Matter of Marjorie P. (Gerardo M. P.), 2023 NY Slip Op 05734, Second Dept 11-15-23

Practice Point: Here the children's uncle, who lived with the children's family, should have been deemed a person legally responsible for the children in this sexual abuse proceeding.

NOVEMBER 15, 2023

SUPPORT, CHILD SUPPORT STANDARDS ACT.

FAMILY COURT DID NOT ARTICULATE ITS REASONS FOR DETERMINING CHILD SUPPORT BASED ON PARENTAL INCOME IN EXCESS OF THE STATUTORY CAP; THE ORIGINAL SUPPORT LEVEL BASED ON THE STATUTORY CAP REINSTATED (SECOND DEPT).

The Second Department, reversing Supreme Court, determined father's objections to the level of mother's child support obligation should not have been granted. Family Court had more than doubled the support obligations based on the couple's income level, which was above the statutory cap. But Family Court did not sufficiently articulate the reasoning underlying the discretionary increase:

The Child Support Standards Act "'sets forth a formula for calculating child support by applying a designated statutory percentage, based upon the number of children to be supported, to combined parental income up to a particular ceiling'" … . "Where . . . the combined parental income exceeds the statutory cap, in fixing the basic child support obligation on income over the cap, the court has the discretion to apply the factors set forth in Family Court Act § 413(1)(f), or to apply the statutory percentages, or to apply both" … . "However, the Family Court must articulate an explanation of the basis for its calculation of child support based on parental income in excess of the statutory cap" … . "This articulation should reflect 'a careful consideration of the stated basis for its exercise of discretion, the parties' circumstances, and its reasoning why there [should or] should not be a departure from the prescribed percentage'" … .

Here, the Family Court did not set forth a sufficient basis for its determination to calculate child support based on combined parental income exceeding the statutory cap. Further, the record shows that based on certain factors, including the parties' disparity in income and the child's standard of living, the child support obligation should be calculated based only on combined parental income up to the statutory cap … . Matter of Butta v Realbuto, 2023 NY Slip Op 01671, Second Dept 3-29-23

Practice Point: The court must articulate its reasons for determining child support based upon parental income exceeding the statutory cap. Here the court's failure to do so resulted in reinstating the child support level which was based on the statutory cap.

MARCH 29, 2023

SUPPORT, COMPULSORY DISCOVERY.

FATHER IGNORED COMPULSORY DISCOVERY OF HIS FINANCIAL ABILITY TO PAY SUPPORT; FATHER IS PRECLUDED FROM OFFERING SUCH EVIDENCE IN THE SUPPORT PROCEEDINGS (SECOND DEPT).

The Second Department, reversing Family Court, determined father should be precluded from presenting any evidence of his financial ability to pay support because he submitted no financial evidence in the discovery phase:

Family Court Act § 424-a "mandates the compulsory disclosure by both parties to a support proceeding of 'their respective financial states,' through the provision of tax returns, pay stubs, and sworn statements of net worth" … . "Where a respondent in a child support proceeding fails, without good cause, to comply with the compulsory financial disclosure mandated by Family Court Act § 424-a, 'the court on its own motion or on application shall grant the relief demanded in the petition or shall order that, for purposes of the support proceeding, the respondent shall be precluded from offering evidence as to [the] respondent's financial ability to pay support'" … .

Here, the father failed to provide a sworn statement of net worth, a tax return, or a pay stub, and he did not offer an explanation for his failure to do so. Since the father failed, without good cause, to comply with the compulsory financial

disclosure mandated by Family Court Act [*2]§ 424-a, the Family Court was required to either grant the relief demanded in the petition or preclude the father from offering evidence as to his financial ability to pay support … . Under the circumstances of this case, the court should have precluded the father from offering evidence regarding his financial ability to pay support, and should have determined the amount of child support based on the needs of the child, as requested by the mother … . Matter of Grant v Seraphin, 2023 NY Slip Op 06044, Second Dept 11-22-23

Practice Point: In support proceedings, discovery of a party's financial ability to pay support is compulsory. A party who fails to provide such discovery may be precluded from presenting any financial evidence.

NOVEMBER 22, 2023

SUPPORT, CONSTRUCTIVE EMANCIPATION.

FATHER DID NOT DEMONSTRATE THE CHILD WAS CONSTRUCTIVELY EMANCIPATED; THEREFORE FATHER'S SUPPORT OBLIGATION SHOULD NOT HAVE BEEN TERMINATED (SECOND DEPT).

The Second Department, reversing Family Court, determined father did not meet his burden of proof in his attempt to demonstrate the constructive emancipation of the child such that his support obligation should be terminated:

"It is fundamental public policy in New York that parents are responsible for their children's support until age 21" … . "However, under the doctrine of constructive emancipation, a child of employable age who actively abandons the noncustodial parent by refusing all contact and [parental access] may forfeit any entitlement to support. A child's mere reluctance to see a parent is not abandonment" … . "[W]here it is the parent who causes a breakdown in communication with his or her child, or has made no serious effort to contact the child and exercise his or her parental access rights, the child will not be deemed to have abandoned the parent" … . "The burden of proof as to emancipation is on the party asserting it" … .

Here, contrary to the father's contention, the evidence adduced at the hearing failed to demonstrate that he made serious efforts to maintain a relationship with the child during the relevant time period, or that the child actively abandoned her

relationship with him … . Matter of Rosenkrantz v Rosenkrantz, 2023 NY Slip Op 05609, Second Dept 11-8-23

Practice Point: The proof requirements for constructive emancipation of a child were not met; criteria explained.

NOVEMBER 08, 2023

SUPPORT, CONTEMPT, RIGHT TO COUNSEL.

DEFENDANT HAD THE RIGHT TO ASSIGNED COUNSEL IN THIS CIVIL CONTEMPT PROCEEDING STEMMING FROM DEFENDANT'S FAILURE TO PAY CHILD SUPPORT; THE JUDGE SHOULD HAVE CONDUCTED AN INQUIRY TO SEE IF DEFENDANT QUALIFIED FOR ASSIGNED COUNSEL PRIOR TO ISSUING THE ORDER OF COMMITMENT (SECOND DEPT).

The Second Department, reversing the order of commitment in this matrimonial case, noted that defendant faced possible jail time for civil contempt stemming from a failure to pay child support. Therefore defendant had a right to assigned counsel if found indigent. The judge should have have ascertained defendant's financial condition:

"In general, the respondent in a civil contempt proceeding who faces the possibility of the imposition of a term of imprisonment, however short, has the right to the assignment of counsel upon a finding of indigence" … . "Moreover, a parent has the statutory right to counsel in a proceeding in which it is alleged that he or she has willfully failed to comply with a prior child support order" … .

Here, the defendant informed the Supreme Court on multiple occasions that he could not afford to retain an attorney. Therefore, prior to issuing an order of commitment, the court should have inquired into the defendant's current financial circumstances to determine whether he had become eligible for assigned counsel … . Hoffman v Hoffman, 2023 NY Slip Op 04959, Second Dept 10-4-23

Practice Point: Here defendant was found in civil contempt for failure to pay child support. Because the judge was going to order jail-time, defendant had the right to assigned counsel if he could not afford an attorney. The judge should have

conducted an inquest to determine defendant's financial condition before issuing the order of commitment.

OCTOBER 04, 2023

SUPPORT, JUDGES.

FATHER'S PETITION TO SUSPEND CHILD SUPPORT WAS PROPERLY DISMISSED BUT THE DISMISSAL SHOULD NOT HAVE BEEN "WITH PREJUDICE" BECAUSE FAMILY COURT HAS CONTINUING JURISDICTION OVER SUPPORT MATTERS (SECOND DEPT).

The Second Department, modifying Family Court, determined that although father's petition to suspend child support was properly dismissed, it should not have been dismissed "with prejudice:"

Family Court properly dismissed that branch of the father's petition which was to suspend his basic child support obligation on the ground of parental alienation without a hearing … .

However, the Family Court should not have provided that the dismissal was "with prejudice." The court has continuing jurisdiction to modify, set aside, or vacate a prior order of child support pursuant to Family Court Act § 451 … . Matter of Lew v Lew, 2023 NY Slip Op 01192, Second Dept 3-8-23

Practice Point: Family Court has continuing jurisdiction over support matters. Therefore father's petition to suspend child support, although properly dismissed, should not have been dismissed "with prejudice."

MARCH 08, 2023

SUPPORT, RIGHT TO COUNSEL, JUDGES.

THE RECORD DOES NOT REFLECT THAT MOTHER IN THIS CHILD-SUPPORT PROCEEDING WAS INFORMED OF HER RIGHT TO COUNSEL, HER RIGHT TO AN ADJOURNMENT TO RETAIN COUNSEL, OR HER WAIVER OF THAT RIGHT; NEW HEARING ORDERED (SECOND DEPT).

The Second Department, reversing Family Court, determined the Support Magistrate erred by not, on the record, informing mother of her right to counsel in this proceeding brought by father seeking child support from mother:

The Support Magistrate erred in failing to advise the mother that she had "an absolute right to be represented by counsel at the hearing at [her] own expense, and that [s]he was entitled to an adjournment for the purpose of retaining the services of an attorney" … . The Support Magistrate further erred in proceeding with the hearing without an explicit waiver of the right to counsel from the mother as there is no word or act in the record upon which the Family Court could have concluded that the mother explicitly waived that right … . Matter of Moor v Moor, 2023 NY Slip Op 03918, Second Dept 7-26-23

Practice Point: Mother appeared pro se in this proceeding before a Support Magistrate brought by father for child support from mother. There is nothing on the record indicating mother was informed of her right to counsel, her right to an adjournment to retain counsel, or her waiver of her right to counsel. New hearing ordered.

JULY 26, 2023

SUPPORT, STIPULATION, EVIDENCE.

THE PARTIES' STIPULATION REQUIRED PLAINTIFF TO FURNISH PAY STUBS AS A PREREQUISITE FOR HER RECEIVING CHILD SUPPORT; SUPREME COURT SHOULD NOT HAVE HELD THAT INFORMAL TIMESHEETS WERE THE FUNCTIONAL EQUIVALENT OF PAY STUBS (FIRST DEPT).

The First Department, reversing Supreme Court, determined the requirement in the parties' stipulation that, in order to receive child support, defendant must

demonstrate her employment by furnishing pay stubs was not met by furnishing time sheets:

The parties' stipulation of August 24, 2021, provides in pertinent part that plaintiff will pay defendant $2,000 per month "as a contribution towards [defendant's] childcare expenses." Plaintiff's obligation to make the payment is conditioned upon defendant being "employed by a nonrelative" and upon her periodic furnishing to plaintiff of "paystub[s]" documenting such employment. The stipulation requires defendant to provide plaintiff with her first paystub from a given employer, the first and last paystub of each calendar year, and the paystub covering July 1 of each year. Defendant moved for an order directing plaintiff to make a childcare payment based on her provision of timesheets purporting to document childcare services that she performed for Matthew Kleban. Kleban is the father of two girls, one of whom is a friend of the parties' daughter.

… [T]he parties, both represented by counsel, entered into a stipulation that expressly conditioned plaintiff's obligation to make childcare payments upon defendant's production of "paystub[s]" to document her employment by a nonrelative. The term "paystub" is defined as "a record that is given to an employee with each paycheck and that shows the amount of money earned and the amount that was removed for taxes, insurance costs, etc." (https://merriam-webster.com/dictionary/paystub); accord Black's Law Dictionary 1364 [11th ed 2019]). Under this definition, and based upon the circumstances herein, the informal timesheets produced by defendant plainly do not qualify as "paystubs." In holding that plaintiff's childcare payment obligation was nonetheless triggered under the stipulation because the timesheets were the "functional equivalent" of paystubs, the motion court impermissibly changed the meaning of the parties' agreement by adding or excising terms under the guise of construction …
. Franklin v Franklin, 2023 NY Slip Op 04925, First De[t 10-3-23

Practice Point: Here the judge's finding that informal timesheets were the functional equivalent of pay stubs impermissibly changed the meaning of the parties' stipulation. The stipulation required plaintiff to prove she was employed as a prerequisite for her receipt of child support.

OCTOBER 03, 2023

TAX LAW, DEPENDENTS.

FATHER, AS THE NONCUSTODIAL PARENT PROVIDING MOST OF THE FINANCIAL SUPPORT FOR THE CHILDREN, WAS ENTITLED TO DECLARE THE CHILDREN DEPENDENTS FOR INCOME TAX PURPOSES (SECOND DEPT).

The Second Department, reversing (modifying) Supreme Court, determined father, as the noncustodial parent contributing most of the financial support for the children, was entitled to declare the children dependents for income-tax purposes:

Where, as here, the noncustodial parent is contributing the majority of the financial support of the parties' children, "the court may determine that the noncustodial parent is entitled to declare the children as dependents on his or her income tax returns" … . Accordingly, under the circumstances here, the plaintiff is entitled to declare all of the parties' unemancipated children as his dependents for income tax purposes … . Miller v Miller, 2023 NY Slip Op 02872, Second Dept 5-31-23

Practice Point: Here father, as the noncustodial parent providing most of the financial support for the children, was entitled to declare the children dependents for income tax purposes.

MAY 31, 2023

VISITATION, COUNSELING, DRUG TESTS.

ALTHOUGH FAMILY COURT CAN DIRECT MOTHER TO ENGAGE IN COUNSELING, SUBMIT TO DRUG TESTS AND TAKE MEDICATION, FAMILY COURT CAN NOT MAKE THE DIRECTIVES A PREREQUISITE FOR VISITATION (FOURTH DEPT).

The Fourth Department determined Family Court did not have the authority to make mother's compliance with drug-test, medication and counseling directives a prerequisite for visitation:

… [T]he court erred in requiring the mother to participate in counseling, take her medications as prescribed, and provide proof of a negative hair follicle test prior to having therapeutic visitation with the children. Although the court may include

such directives as a component of visitation, it does not have the authority to make them a prerequisite to visitation … . We therefore modify the orders accordingly, and we remit the matters to Family Court to fashion schedules for the mother's therapeutic visitation with each child. Matter of Sharlow v Hughes, 2023 NY Slip Op 00518, Fourth Dept 2-3-23

Practice Point: Family Court can direct mother to submit to drug tests, engage in counseling and take medication but it cannot make the directives a prerequisite for visitation.

FEBRUARY 03, 2023

VISITATION, COUNSELING.

THE JUDGE SHOULD NOT HAVE LEFT IT TO THE AGENCY TO DETERMINE FATHER'S VISITATION AND SHOULD NOT HAVE MADE THERAPEUTIC COUNSELING A PREREQUISITE FOR VISITATION (FOURTH DEPT).

The Fourth Department, reversing (modifying) Family Court determined (1) the judge should not have left it to the agency to decide whether father should receive visitation, and (2) father's participation in therapeutic counseling should not have been made a prerequisite to unsupervised overnight weekend visitation:

… [T]he court erred in failing to set an appropriate supervised visitation schedule by implicitly leaving it to the agency to determine whether the father would receive any such visitation … .

… "Although a court may include a directive to obtain counseling as a component of a custody or visitation order, the court does not have the authority to order such counseling as a prerequisite to custody or visitation" … . Matter of Bonilla-Wright v Wright, 2023 NY Slip Op 00756, Fourth Dept 2-10-23

Practice Point: Family Court cannot delegate its authority to determine whether father will receive visitation or its authority to set up a visitation schedule. Therapeutic counseling can not be made a prerequisite for visitation or custody.

FEBRUARY 10, 2023

VISITATION, GRANDPARENTS.

THE GRANDPARENTS' PETITION FOR VISITATION SHOULD NOT HAVE BEEN DENIED ABSENT A FULL BEST INTERESTS OF THE CHILD HEARING (FOURTH DEPT).

The Fourth Department, reversing Family Court, determined the court should not have dismissed the grandparents' petition for visitation before holding a best interests of the child hearing:

… [T]he court erred in granting respondents' motion and in terminating the hearing before petitioners had completed the presentation of their case … . "[E]ven where . . . a grandparent has established standing to seek visitation, 'a grandparent must then establish that visitation is in the best interests of the grandchild . . . Among the factors to be considered are whether the grandparent and grandchild have a preexisting relationship, whether the grandparent supports or undermines the grandchild's relationship with his or her parents, and whether there is any animosity between the parents and the grandparent' " … . 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 child['s] best interests" … . Upon our review of the record, we conclude that, "[a]bsent a[full] evidentiary hearing, . . . the court here lacked sufficient evidence . . . to enable it to undertake a comprehensive independent review of the [children]'s best interests" … . We therefore reverse the order, deny the motion, reinstate the petitions, and remit the matter to Supreme Court for a full evidentiary hearing on the petitions. DeMarco v Severance, 2023 NY Slip Op 04284, Fourth Dept 8-11-23

Practice Point: The grandparents' petition for visitation should not have been dismissed absent a full best interests of the child hearing.

AUGUST 11, 2023

VISITATION, JUDGES.

THE JUDGE SHOULD NOT HAVE DELEGATED THE COURT'S AUTHORITY TO SCHEDULE VISITATION (THIRD DEPT).

The Third Department, reversing (modifying) Family Court, determined the judge should not have delegated the court's authority to schedule visitation:

… Family Court improperly granted the grandfather and the father of the older child sole authority to determine the dates for at least four consecutive days of visitation in the months of July and August. Allowing the grandfather and the father of the older child to determine periods of summer visitation for the children without the agreement of the mother, the custodial parent, constitutes "an improper delegation of authority" … . In view of the sparse state of the record, as well as the passage of time since the entry of the orders on appeal, we remit solely for the purpose of Family Court setting a schedule for the summer visitation. Matter of Daniel RR. v Heather RR., 2023 NY Slip Op 06011, Third Dept 11-22-23

Practice Point: Here the court should not have delegated the authority to schedule visitation to grandfather and father without the agreement of mother, the custodial parent.

NOVEMBER 22, 2023