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ADMINISTRATIVE LAW, CIVIL PROCEDURE, CONSTITUTIONAL LAW, EMPLOYMENT LAW, PUBLIC HEALTH LAW.

PLAINTIFF, AN EMERGENCY MEDICAL TECHNICIAN (EMT), AFTER A COMPLAINT MADE BY A PATIENT TO THE DEFENDANT DEPARTMENT OF HEALTH, WAS SERVED WITH A NOTICE OF HEARING AND A STATEMENT OF CHARGES INDICATING HIS EMT LICENSE COULD BE REVOKED; PLAINTIFF SOUGHT A DECLARATION HE WAS ENTITLED TO A JURY TRIAL PURSUANT TO THE US AND NY CONSTITUTIONS; SUPREME COURT AGREED BUT THE THIRD DEPARTMENT REVERSED (THIRD DEPT).

The Third Department, reversing Supreme Court, in a full-fledged opinion by Justice Mcshan, rejected plaintiff's argument that he was entitled to a jury trial pursuant to the Seventh Amendment of the US Constitution, or, alternatively pursuant to Article I, section 2 of the NY Constitution. Plaintiff is an Emergency Medical Technician (EMT) who responded to a call that a man (the patient) had fallen and could not get up. According to a witness, plaintiff thought the patient was faking, ridiculed him and offered only minimal assistance. The patient

submitted a complaint to the defendant (the Department of Health). The defendant served plaintiff with a notice of hearing and statement of charges indicating plaintiff may be subject fines and revocation of the EMT license. Plaintiff then sued defendant seeking a declaration that he was entitled to a jury trial:

The Seventh Amendment to the US Constitution preserves the right of trial by jury in suits at common law where the value of the controversy exceeds $20 (see US Const, 7th Amend). Longstanding precedent from the Supreme Court of the United States holds that the Seventh Amendment "applies only to proceedings in courts of the United States, and does not in any manner whatever govern or regulate trials by jury in state courts, or the standards which must be applied concerning the same" … . * * *

The NY Constitution provides that "[t]rial by jury in all cases in which it has heretofore been guaranteed by constitutional provision shall remain inviolate forever" (NY Const, art I, § 2). * * *

… [P]laintiff asserts that defendant, in essence, seeks to punish him for tortious conduct through the imposition of a civil penalty, which traditionally entailed a jury trial … . What plaintiff fails to directly confront, however, is that the nature of this proceeding is predicated on a violation of the statutory scheme that regulates plaintiff's professional license and that the remedies sought are tethered thereto. … Specifically, Public Health Law article 30 places the responsibility on defendant to regulate the provision of emergency medical services in the state (see Public Health Law §§ 3000-3034) and, in furtherance of that responsibility, defendant has promulgated regulations governing the training, examination and licensing of EMTs … .Ball v New York State Dept. of Health, 2026 NY Slip Op 02494, Third Dept 4-23-26

Practice Point: Plaintiff, an EMT, after a complaint from a patient, was facing a Department of Health hearing at which his EMT license could be revoked. Plaintiff unsuccessfully sought a declaration that he was entitled to a jury trial pursuant to the Seventh Amendment of the US Constitution and Article I, section 2 of the NY Constitution.

April 23, 2026

CIVIL PROCEDURE, CORRECTION LAW.

THE RESPONDENT CORRECTION OFFICER PARTICIPATED IN A GANG ASSAULT ON AN INMATE WHICH RESULTED IN THE INMATE'S DEATH; THE CORRECTION OFFICER WAS ACQUITTED OF CRIMINAL CHARGES; THE NY STATE POLICE BROUGHT THIS PROCEEDING SEEKING AN "EXTREME RISK PROTECTION ORDER" (ERPO) WHICH PROHIBITS RESPONDENT FROM POSSESSING FIREARMS; SUPREME COURT DENIED THE PETITION; THE FOURTH DEPARTMENT GRANTED IT (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined Supreme Court should have issued an "extreme risk protection order" (ERPO) which preclude the respondent correction officer from possessing firearms. The respondent was involved in a gang assault on an inmate which caused the inmates death. The respondent had been acquitted of the related criminal charges:

… [T]he burden was on petitioner [the New York State Police] under the circumstances here to establish, by clear and convincing evidence, that respondent posed "a substantial risk of physical harm to other persons as manifested by homicidal or other violent behavior by which others are placed in reasonable fear of serious physical harm" (Mental Hygiene Law § 9.39 [a] [2]; see CPLR 6343 [2]). Petitioner met that burden by establishing that respondent actively participated in the assault of a restrained incarcerated individual by grabbing the victim by the chest and holding him down while other officers kicked the victim in the abdomen and groin (see CPLR 6342 [2] [a]). Indeed, that conduct is particularly egregious in this case because "DOCCS regulations require correction officers to exercise '[t]he greatest caution and conservative judgment' in determining whether physical force against an inmate is necessary" (… 7 NYCRR 251-1.2 [a]), inasmuch as "[c]orrection officers are tasked with the formidable and critical responsibility of protecting the safety of inmates and coworkers while maintaining order in correctional facilities" (id. at 385). Respondent adduced no evidence to the contrary at the hearing. * * *

We therefore reverse the order, reinstate the application, grant the application insofar as it seeks the issuance of a final ERPO, and remit the matter to Supreme Court for further proceedings pursuant to CPLR 6343 (3). Matter of New York State Police v Galliher, 2026 NY Slip Op 02510, Fourth Dept 4-24-26

Practice Point: The "Extreme Risk Protection Act" (CPLR 6343) provides a mechanism to prohibit the possession of firearms. Here a correction officer participated in a gang assault on an inmate which resulted in the inmate's death. The correction officer was acquitted of criminal charges and could therefore possess firearms. The NY State Police brought this proceeding for a "final extreme risk protection order" (ERPO) prohibiting the correction officer from possessing firearms.

April 24, 2026

CONSTITUTIONAL LAW, JUDGES.

ONLY THE CHIEF ADMINISTRATOR OF THE COURTS HAS THE POWER TO APPOINT CHIEF CLERKS AND DEPUTY CHIEF CLERKS OF THE SURROGATE'S COURTS (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined the Chief Administrator of the Courts, not the Surrogate's Courts, has the power to appoint Chief Clerks and Deputy Chief Clerks of the Surrogate's Courts:

Although the Chief Clerks and Deputy Chief Clerks of the Surrogates' Courts possess significant authority, we agree with defendant that they are, nevertheless, nonjudicial officers. The Chief Clerks, for example, have the authority to sign papers or records of the courts, to adjourn matters, to administer oaths, to supervise disclosure and, in certain circumstances, to hear and report matters to the Surrogates (see SCPA 506 [6] [a]; 2609). Such responsibilities, however, are akin to those of referees (see SCPA 506; CPLR 4201), which are themselves "nonjudicial officers of the court appointed to assist it in the performance of its judicial functions" (… see generally CPLR 4312 [5] …). Thus, given the "nature of the position[s]," we agree with defendant that the Chief Clerks and Deputy Chief Clerks of the Surrogates' Courts are nonjudicial positions and, "[a]s such,

they are subject to the constitutional appointment power of the Chief Administrator, notwithstanding [article 26 of the Surrogate's Court Procedure Act]. Since the appointment powers of the Chief Administrator flow from the State Constitution, they cannot be abrogated by statute" … . Mosey v Office of Ct. Admin., 2026 NY Slip Op 02538, Fourth Dept 4-24-24

April 24, 2026

CRIMINAL LAW, APPEALS.

THE NEGOTIATED PLEA TO A MISDEMEANOR INFORMATION WAS VACATED AND THE DISMISSAL OF THE FELONY CHARGES WAS REVERSED; THE INFORMATION WAS JURISDICTIONALLY DEFECTIVE BECAUSE IT DID NOT ALLEGE EVERY ELEMENT OF THE CHARGED OFFENSE, HERE THE OPERABILITY OF THE FIREARM; THE FELONY CHARGES WERE REINSTATED (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Halligan, reversing the Appellate Term, over a two-judge dissent, determined the misdemeanor information to which defendant pled guilty was jurisdictionally defective in that it did not allege every element of the offense, here the operability of the firearm:

At arraignment, the People stated that while there had not yet been grand jury action, the parties had agreed to a pre-indictment plea bargain whereby the defendant would plead guilty to the misdemeanor count in satisfaction of all charges in exchange for a sentence of two years' probation. With the People's consent, Criminal Court purported to dismiss the two felony counts by crossing them off the felony complaint. The court did not adhere to the procedure set forth in CPL 180.50 for reducing felony charges, the People did not file a superseding accusatory instrument, and the defendant did not waive prosecution by information. He nonetheless pleaded guilty to the remaining misdemeanor count, and the court later imposed the bargained-for sentence. The defendant subsequently appealed the judgment of conviction, arguing that the felony complaint was jurisdictionally defective as to the count to which he pleaded due to the absence of any allegation that the firearm was operable. * * *

We agree with the defendant that the instrument to which he pleaded guilty did not meet the prima facie case requirement because it lacked any allegations of operability. As such, it was jurisdictionally defective and could not serve as the basis for his plea. Consequently, the case should be "restored to its pre-pleading status" (CPL 470.55 [2] …). The record reflects that the felony counts were dismissed when the parties informed the court of their agreed-upon disposition, and thus the purported dismissal is best understood as an integral component of the defendant's plea. The pre-pleading posture therefore restores the felony complaint … . The defendant fails to identify a sufficient basis for dismissal of the original, pre-pleading felony complaint, and we therefore remit for further proceedings. People v Burgess, 2026 NY Slip Op 02438, CtApp 4-23-26

Practice Point: Consult this opinion for insight into the consequences of failing to follow the proper procedure for reducing felony charges as part of a negotiated plea to an information. Here the information was deemed jurisdictionally defective on appeal, the plea was vacated, and the felony charges were reinstated.

April 23, 2026

CRIMINAL LAW, ATTORNEYS, CONSTITUTIONAL LAW.

DEFENDANT'S 30.30 ("SPEEDY TRIAL") MOTION WAS MADE ON THE DAY TRIAL WAS TO BEGIN; THE ARGUMENT THAT THE MOTION WAS UNTIMELY BECAUSE THE PEOPLE WERE STATUTORILY ENTITLED TO "REASONABLE NOTICE" WAS REJECTED; THE TRIAL JUDGE IS FREE TO ADJOURN THE TRIAL, OR PROCEED WITH THE TRIAL AND HEAR THE SPEEDY TRIAL MOTION SUBSEQUENTLY (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Garcia, reversing the Appellate Division, determined defendant's 30.30 ("speedy trial") motion was timely made right before trial. The argument that bringing the motion right before trial violated the statutory provision that the motion be made upon "reasonable notice" to the People was rejected. Once the motion is made, the trial court can opt to proceed with the trial and determine the motion subsequently:

… [A] defendant seeking a dismissal based on a speedy trial violation may wish to accumulate as many chargeable days as possible. The facts here reinforce the wisdom of this approach. Defendant made his motion on the date trial was set to begin, eleven months after his arraignment, and alleged 326 days chargeable to the People. That motion contained 9 pages of detailed calculations of days and arguments about why each period should be charged to the People, including the days immediately leading up to the July 23 court date. The People for their part now claim that only 54 of those days were chargeable to them. In other words, every day counts—and many may be contested—in the speedy trial context, and the statute affords a defendant flexibility to decide when best in the time leading up to the start of trial to make a CPL 30.30 (1) (b) motion.

… [T]he People are entitled to a fair opportunity to prepare a response. * * * A court in receipt of such motion has discretion whether to proceed with trial and when to resolve the motion. While proceeding in this way may lead to inefficiencies … , such a result may in certain cases be necessary. The trial court is in the best position to determine when proceeding to trial is warranted to avoid inconvenience to witnesses and unnecessary delay. People v Roper, 2026 NY Slip Op 02365, CtApp 4-21-26

Practice Point: Here a 30.30 (speedy trial) motion was timely despite being made on the day of the trial. The argument that the motion was untimely because the "reasonable notice" provision in the statute was violated was rejected. The court can proceed with the trial and hear the motion later.

April 21, 2026

CRIMINAL LAW, CONSTITUTIONAL LAW.

THE FOURTH TRIAL, AT WHICH DEFENDANT WAS CONVICTED OF MURDER AND WEAPON POSSESSION, TOOK PLACE THREE YEARS AFTER THE LAST OF THREE MISTRIALS; DEFENDANT WAS DENIED HIS CONSTITUTIONAL RIGHT TO A SPEEDY TRIAL; CHARGES DISMISSED (CT APP).

The Court of Appeals, dismissing defendant's murder and weapon possession charges, in a full-fledged opinion by Judge Rivera, over the three-judge dissent, determined that the three-year delay between the third mistrial and the fourth trial violated defendant's right to a speedy trial:

… [W]e conclude that the three-year delay to retry defendant a fourth time was unjustified and violated his constitutional right to a speedy trial. … "[W]hile the greater the delay, the more likely the harm to the defendant, there is no specific length of time that automatically results in a due process violation … . Here, the delay was lengthy—more than three years and one month between the third and fourth trials, and 36 months between the third trial and when the prosecution declared readiness for the fourth trial. … The delay is even more stark when compared to the dramatically shorter time between the prior trials: six months between the first and second trials and eleven months between the second and third trials.

The "reason for the delay" factor is critical. Thus, in cases involving post-indictment delays, the prosecution's "good faith will not insulate their decision to delay trial from judicial review on constitutional speedy trial grounds" … . "[O]nce having instituted the prosecution . . ., [the prosecution has] the obligation of advancing it unless there is a reasonable ground for delay" … . By the time of the delay preceding the fourth trial, defendant had already been indicted and tried three times. That indictment remained pending throughout the three-year delay. Accordingly, the prosecution had the obligation of advancing its case in the absence of a reasonable justification … .

A lengthy delay "demands close scrutiny of the other factors, especially the question of why the delay occurred" … . Here, the prosecution's justifications for

the delay lack record support and in any case are not persuasive. The prosecution's claim that the delay was attributable to its consideration of defense counsel's request for dismissal after three mistrials cannot, without more, account for the three-year delay. The prosecution did not provide any particular reasons for why its deliberations of whether to retry defendant took so long given its failure to obtain a conviction three times in a row on the murder and weapon possession charges. Nor did the prosecution assert that an internal "changing of the guard" impacted its ability to render a decision on whether to retry the case. People v Woods, 2026 NY Slip Op 02364, CtApp 4-22-26

Practice Point: Here defendant was convicted of murder and weapon possession at his fourth trial, There was a three-year delay between the last mistrial and the fourth trial. The delay violated defendant's speedy trial rights. The charges were dismissed by the Court of Appeals.

April 21, 2026

CRIMINAL LAW, ATTORNEYS, EVIDENCE.

HERE THE TRIAL TESTIMONY ABOUT THE IDENTIFICATION OF THE DEFENDANT'S VOICE WAS MUCH LESS DEFINITIVE AND UNEQUIVOCAL THAN THE TESTIMONY AT THE SUPPRESSION HEARING, RAISING A QUESTION WHETHER THERE WAS PROBABLE CAUSE FOR DEFENDANT'S ARREST; DEFENSE COUNSEL WAS INEFFECTIVE FOR FAILING TO MOVE TO REOPEN THE SUPPRESSION HEARING; MATTER REMITTED FOR A REOPENED HEARING (SECOND DEPT).

The Second Department, remitting the matter for a reopened suppression hearing, determined defense counsel was ineffective for failing to move to reopen the hearing based upon discrepancies between the testimony at the suppression hearing and at trial. The trial testimony was less definitive and unequivocal, raising a question about whether there was probable cause for defendant's arrest:

The defendant contends that trial counsel was ineffective for failing to move to reopen the pretrial suppression hearing on the basis that an individual had testified, during the trial, that he had told the police that the voice of the alleged kidnapper, who the individual had heard speaking on the telephone, was "possibly" that of the defendant, and the individual also admitted to testifying before the grand jury that he identified the voice after being shown a photograph of the defendant. Whereas, the police testimony at the pretrial suppression hearing regarding the same individual's identification of the defendant's voice, which formed the basis for the defendant's arrest, was more definitive and unequivocal, and did not involve the viewing of a photograph. We agree.

Courts have the discretion to reopen a suppression hearing based upon new facts, which could not have been discovered with reasonable diligence before the determination of the suppression motion, pertinent to the suppression issue … . These new facts need not establish a constitutional violation on their face, but must be facts that would either materially affect, or have affected, the earlier determination … . Here, where the reliability of a witness's identification of the defendant's voice as that of one of the perpetrators of the crime, which primarily formed the basis for the defendant's arrest, was called into question in light of that witness's trial testimony, an issue of fact was raised regarding whether there was probable cause for the defendant's arrest … . Although motions to reopen suppression hearings are generally denied where the new facts proffered go only to the circumstances surrounding the defendant's arrest, here, the defendant could not be presumed to know the basis of the communications or conduct between police, leading to his arrest … . The failure of trial counsel to move to reopen the suppression hearing on this ground was therefore both objectively unreasonable as well as prejudicial to the defendant … . Contrary to the People's contention, this is not a case in which trial counsel's error can be explained as part of any strategic design … . People v Clark, 2026 NY Slip Op 02414, Second Dept 4-22-26

Practice Point: Here trial testimony about the identification of defendant's voice was not as definitive or unequivocal as the testimony at the suppression hearing raising a question whether there was probable cause for defendant's arrest. Defense counsel was ineffective for failing to move to reopen the hearing. The matter was remitted for a reopened hearing.

April 22, 2026

CRIMINAL LAW, EVIDENCE, APPEALS.

ALTHOUGH THE DEFENDANT COULD HAVE BEEN ARRESTED AT THE TIME OF THE SEARCH OF HIS PERSON, HE WAS NOT, IN FACT, UNDER ARREST; THEREFORE THE KEY FOB AND THE FIREARM FOUND IN DEFENDANT'S VEHICLE SHOULD HAVE BEEN SUPPRESSED; AN APPELLATE COURT CANNOT AFFIRM ON ANY ALTERNATIVE BASIS (FOURTH DEPT).

The Fourth Department, suppressing the firearm found in defendants vehicle, determined the search of defendant's person, during the key fob for the vehicle was seized, was not a valid search incident to arrest. Although there may have existed probable cause to arrest defendant at the time of the search, the defendant had not yet, in fact, been arrested:

Even assuming, arguendo, that either the investigator or the searching officer could have arrested defendant prior to or contemporaneously with the search of his person, we note that "[a] search must be incident to an actual arrest, not just to probable cause that might have led to an arrest, but did not" … . A lawful search incident to arrest "requires proof that, at the time of the search, an arrest has already occurred or is about to occur" … . The search must be "substantially contemporaneous" to an actual arrest "so as to constitute one event" … . Under the circumstances of this case, we conclude that there was no actual arrest of defendant justifying the search, inasmuch as the only officer who was purported to have actually placed defendant under arrest prior to or contemporaneously with the search explicitly informed defendant that he was not under arrest at that time … . The court upheld the search as a lawful search incident to an arrest, and thus we are precluded from affirming on any alternative basis … . People v Moore, 2026 NY Slip Op 02508, Fourth Dept 4-24-26

Practice Point: If a search of defendant's person is justified as a search incident to arrest, the defendant must, in fact, be arrested before the search.

Practice Point: Here the motion court upheld the search as a search incident to arrest; the appellate court cannot affirm on any alternative ground.

April 24, 2026

CRIMINAL LAW, JUDGES, APPEALS.

THE JUDGE DID NOT HAVE A DISTINCT AND PROPER REASON TO DEMAND THE WAIVER OF DEFENDANT'S RIGHT TO APPEAL; IT APPEARS THE JUDGE WAS TRYING TO SHIELD THE DENIAL OF SUPPRESSION FROM APPELLATE REVIEW; THE POLICE OFFICERS WHO APPROACHED DEFENDANT BASED UPON AN ANONYMOUS TIP HAD ONLY THE COMMON LAW RIGHT OF INQUIRY; THE EVIDENCE DEFENDANT CONSENTED TO THE PAT DOWN SEARCH WAS INSUFFICIENT; SUPPRESSION SHOULD HAVE BEEN GRANTED (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined defendant's waiver of appeal was invalid and defendant's motion to suppress the evidence seized from his person should have been granted:

Here, the consent of the People to the plea agreement was not required because the charges remained as presented (see CPL 220.10 [2]) and, thus, the People were not in a position to demand a waiver of defendant's right to appeal nor was such a waiver—or any other plea condition—necessary to secure the People's consent … . It follows, then, that the court's demand of an appeal waiver, particularly as viewed in light of defendant's expressed desire to seek appellate review of the court's suppression ruling, "gives rise to the appearance that the court [was] seeking to shield its decisions from appellate review or otherwise act[ing] as an advocate for the People" and, therefore, "we must look to the record as a whole to determine whether there is a distinct and proper reason for the court's demand" … . * * *

Upon our review of the record …, including defense counsel's unrefuted assertion that the court unilaterally demanded an appeal waiver that would foreclose

appellate review of its determination of defendant's suppression motion as a condition of the court-initiated plea agreement, we conclude that it is not apparent that the court had a distinct and proper reason to demand that waiver of defendant's right to appeal. Therefore, the waiver of the right to appeal is invalid and does not preclude our review of defendant's contentions. * * *

… [T]he anonymous 911 phone tip generated only a belief that criminal activity was afoot and, as such, limited the officers' permissible action to a level two common-law right of inquiry … . * * *

Inasmuch as the People failed to present evidence at the suppression hearing establishing defendant's voluntary consent to the search of his person, all physical evidence seized as a result of that consent "should have been suppressed" … . People v Turner, 2026 NY Slip Op 02557, Fourth Dept 4-24-26

Practice Point: Where the defendant pleads to the charges and there is no need for the People's consent, the sentencing judge must have a distinct and proper reason to demand that defendant waive his right to appeal, absent here.

April 24, 2026

CRIMINAL LAW.

A HEARING REGARDING A REDUCED SENTENCE PURSUANT TO THE DOMESTIC VIOLENCE SURVIVORS JUSTICE ACT (DVSJA) CANNOT BE WAIVED AS A CONDITION OF A PLEA AGREEMENT (CT APP).

The Court of Appeals, reversing the Appellate Division, in a full-fledged opinion by Judge Rivera, over a concurring opinion and a three-judge dissent, determined the hearing regarding a reduced sentence pursuant to the Domestic Violence Survivors Justice Act (DVSJA) cannot be waived as part of a plea agreement:

The issue on appeal is whether, as a condition of a negotiated plea agreement, a defendant may waive a Penal Law § 60.12 hearing to determine their eligibility for an alternative sentence under the Domestic Violence Survivors Justice Act (DVSJA). The Legislature designed the DVSJA's alternative sentencing framework to remedy a systemic injustice of the criminal legal system. Specifically, the

Legislature recognized that the standard sentencing scheme fails to adequately consider how domestic violence impacts a survivor defendant's criminal conduct, and their potential for rehabilitation, resulting in harsh and unfair sentences for many survivors. The DVSJA, in Penal Law § 60.12, provides a survivor defendant with the opportunity to request a hearing to establish the impacts of domestic violence in their case and their eligibility for a lesser sentence that accords with the legislative purpose of fair and compassionate treatment of survivors.

Here, defendant N.H. requested a reduced sentence under the DVSJA sentencing framework or, in the alternative, a section 60.12 hearing to demonstrate her eligibility for such a sentence. The prosecution subsequently offered, and N.H. accepted, a plea bargain contingent on N.H.'s waiver of a section 60.12 hearing. We hold that section 60.12 hearings are not waivable as a condition of a plea agreement. People v N.H., 2026 NY Slip Op 02437, CtApp 4-23-26

Practice Point: A defendant eligible for a reduced sentence hearing pursuant to the Domestic Violence Survivors Justice Act cannot waive the hearing as a condition for a plea agreement.

April 23, 2026

FAMILY LAW, JUDGES, ATTORNEYS, CONSTITUTIONAL LAW, APPEALS.

MOTHER ASKED TO REPRESENT HERSELF IN THIS CUSTODY PROCEEDING AND THEN DEFAULTED; THE ISSUE IS APPEALABLE DESPITE THE DEFAULT; THE JUDGE'S FAILURE TO CONDUCT A SEARCHING INQUIRY UPON MOTHER'S REQUEST TO REPRESENT HERSELF REQUIRED REMITTAL AND A NEW HEARING ON THE PETITION (FOURTH DEPT).

The Fourth Department, reversing Family Court and ordering a new custody hearing, determined Family Court did not conduct an adequate inquiry before accepting mother's waiver of the right to counsel. The issue was appealable despite mother's default:

At the mother's initial appearance, Family Court advised the mother that she had the right to counsel, and the mother indicated that she planned to represent herself. The court scheduled a hearing on the petitions and warned the parties that, if a party failed to appear, the court would dismiss that party's petition and proceed without the party. The mother failed to appear at the hearing, and the court noted her default and proceeded on the father's petition. The mother now appeals from an order that, inter alia, dismissed her petition and awarded the parties joint custody of the children. * * *

The "request by a party to waive the right to counsel and proceed pro se . . . places in issue whether the court fulfilled its obligation to ensure a valid waiver" and may be reviewed by this Court on an appeal by the subsequently defaulting pro se party … .

"[A] court's decision to permit a party who is entitled to counsel to proceed pro se must be supported by a showing on the record of a knowing, voluntary and intelligent waiver of [the right to counsel]" … . "If a timely and unequivocal request [to proceed pro se] has been asserted, then the trial court is obligated to conduct a 'searching inquiry' to ensure that the [party's] waiver is knowing, intelligent, and voluntary" … . Although "[a] 'searching inquiry' does not have to be made in a formulaic manner" … , "the record must demonstrate that the party was aware of the dangers and disadvantages of proceeding without counsel" … . Matter of Crespo v Wynn, 2026 NY Slip Op 02517, Fourth Dept 4-24-26

Practice Point: In a custody proceeding, before accepting a party's request to represent herself, the court must conduct a searching inquiry to make sure the party understands the dangers and disadvantages. The issue is appealable despite a subsequent default.

April 24, 2026

FAMILY LAW, CIVIL PROCEDURE, JUDGES.

MOTHER, WHO NOW RESIDES IN NEW YORK, MOVED TO MODIFY A TEXAS CUSTODY ORDER; BECAUSE TEXAS DID NOT CEDE JURISDICTION AND FATHER RESIDES IN TEXAS, FAMILY COURT DID NOT HAVE JURISDICTION; ALTHOUGH FAMILY COURT COULD HAVE EXERCISED TEMPORARY EMERGENCY JURISDICTION AND COMMUNICATED WITH THE TEXAS COURT, IT DID NOT (FIRST DEPT).

The First Department, reversing Family Court, in a full-fledged opinion by Justice Gesmer, determined the judge did not have jurisdiction to grant mother's petition to modify custody. The original custody order was issued in Texas, where father resides. Mother and child, with the permission of the Texas court, now reside in New York:

This case presents the difficult situation faced by a judge addressing a petition by a party who seeks to modify a custody order issued by a court of another state. Under the Uniform Child Custody Jurisdiction and Enforcement Act [UCCJEA] (Domestic Relations Law Art. 5-A, §§ 75 — 78-a), even where New York has become the child's "[h]ome state" (Domestic Relations Law §75-a[7]), a New York judge does not have jurisdiction to modify a custody order issued by a foreign state unless either: 1) the foreign state cedes jurisdiction; or 2) neither the parents nor the child continue to reside in the foreign state (Domestic Relations Law § 76-b). Since neither of these situations was present in this case, Family Court had no jurisdiction to modify the custody order before it. Alternatively, if the New York judge determines that it is necessary to protect a child, sibling or parent, the court may take temporary emergency jurisdiction, communicate with the foreign court, and issue a time-limited order as necessary to protect the child and t0 permit the party seeking a modification to request it in the foreign court (Domestic Relations Law § 76-c). Here, since Family Court failed to communicate with the foreign court and failed to specify a time-limited duration for its order, it also did not appropriately take emergency jurisdiction. * * *

… [H]ad Family Court recognized that Texas had exclusive, continuing jurisdiction over its custody order that the mother sought to modify, it could have contacted the Texas court in order to determine whether the Texas court would relinquish jurisdiction, thus permitting Family Court to exercise jurisdiction to modify the Texas custody order pursuant to Domestic Relations Law § 76-b. If the Texas court did not agree to relinquish jurisdiction, Family Court could then determine whether it should take emergency jurisdiction and issue a time-limited order pursuant to Domestic Relations Law § 76-c. Matter of Natalie P. v Steven L.R., 2026 NY Slip Op 02458, First Dept 4-23-26

Practice Point: A New York court does not have jurisdiction to modify an out-of-state custody order unless the foreign state cedes jurisdiction or no party continues to reside in the foreign state.

April 23, 2026

FAMILY LAW, JUDGES.

IT WAS ERROR FOR THE JUDGE TO DELEGATE TO THE ADMINISTRATION FOR CHILDREN'S SERVICES (ASC) THE AUTHORITY TO DETERMINE MOTHER'S THERAPEUTIC SUPERVISED PARENTAL ACCESS; ELEVEN-YEAR-OLD AUTHORITY TO THE CONTRARY SHOULD NOT BE FOLLOWED (SECOND DEPT).

The Second Department, reversing (modifying) Family Court, determined it was error for the judge to delegate to the Administration for Children's Services (ACS) the authority to determine mother's therapeutic supervised parental access. The Second Department made it clear that its decision to the contrary in Matter of Victoria P. (Victor P.), 121 AD 2d 1006, should no longer be followed:

Eleven years ago, in a proceeding pursuant to Family Court Act article 10, this Court, in Matter of Victoria P. (Victor P.) (121 AD3d 1006, 1007), held that a determination of the Family Court to limit the father to supervised parental access with the subject children at the discretion of the petitioning agency had a sound and substantial basis in the record. This holding seemingly indicated that a court

may delegate its authority to set parental access to an agency in a proceeding pursuant to Family Court Act article 10. However, since that appeal was decided, this Court has made clear, in numerous other appeals, that a court may not delegate its authority in such a way as to permit a determination of parental access to be made by either a therapist, a parent, or by the subject children … . Considering the foregoing, and that "[t]he determination of visitation is entrusted to the court based upon the best interests of the children" … , to the extent that Matter of Victoria P. (Victor P.), stands for the proposition that a court in a proceeding pursuant to Family Court Act article 10 may delegate its authority to determine issues of parental access to an agency, that case should no longer be followed. Thus, here, the Family Court erred by delegating to ACS the authority to determine the mother's therapeutic supervised parental access with the child … . Matter of Jayceon H. (Aniya M.), 2026 NY Slip Op 02405, Second Dept 4-22-26

Practice Point: A court cannot delegate its authority to determine issues of parental access to an agency.

April 22, 2026

FORECLOSURE, CIVIL PROCEDURE, REAL PROPERTY ACTIONS AND PROCEEDINGS LAW (RPAPL), EVIDENCE.

DEFENDANT IN THIS FORECLOSURE TRANSFERRED THE SUBJECT PROPERTY TO A THIRD PARTY DURING THE PROCEEDINGS WHICH ORDINARILY WOULD DIVEST DEFENDANT OF STANDING; HOWEVER, PLAINTIFF DID NOT WAIVE A DEFICIENCY JUDGMENT AND THE TIME FOR SEEKING A DEFICIENCY JUDGMENT HAD NOT PASSED; BECAUSE DEFENDANT RETAINED AN INTEREST IN DEFENDING AGAINST A DEFICIENCY JUDGMENT, DEFENDANT HAD STANDING TO ARGUE THE RPAPL 1304 NOTICE WAS JURISDICTIONALLY DEFECTIVE; THE NOTICE ARGUMENT, HOWEVER, WAS REJECTED (FIRST DEPT).

The First Department, in a full-fledged opinion by Justice Moulton, determined defendant in this foreclosure action had standing to argue the RPAPL 1304 notice

of foreclosure was jurisdictionally defective, despite defendant's transfer of the subject real property during the foreclosure proceedings. Plaintiff had not waived a deficiency judgment and the time for seeking one had not elapsed. Therefore defendant still had an interest in defending the action, i.e., defendant had standing to contest the notice. The First Department rejected defendant's notice argument:

It is well settled that a defendant lacks standing to defend the action where it transfers the mortgaged property to a third party during the foreclosure action and the plaintiff waives its right to a deficiency judgment * * *.

… [I]n this case, plaintiff chose not to waive a deficiency judgment and its time to move for a deficiency judgment has not yet expired. Because [defendant] is subject to a potential deficiency judgment and is a debtor on the underlying mortgage, he has an interest in defending the action notwithstanding that he transferred the mortgaged property … and as a result, no longer has the right to redeem the property. Nationstar Mtge. LLC v Vassi, 2026 NY Slip Op 02375, First Dept 4-21-26

Practice Point: If the time for seeking a deficiency judgment in a foreclosure has not passed, a defendant who transferred the subject property to a third party during the foreclosure proceedings still has standing, i.e., defendant has an interest in defending against a deficiency judgment. However, if the plaintiff had waived a deficiency judgment defendant would have lost standing.

April 21, 2026

INSURANCE LAW, CONSTITUTIONAL LAW, NEGLIGENCE, VEHICLE AND TRAFFIC LAW.

TO THE EXTENT VEHICLE AND TRAFFIC LAW SECTION 370 HAS BEEN INTERPRETED TO REQUIRE RENTAL-CAR COMPANIES TO PROVIDE PRIMARY LIABILITY INSURANCE COVERAGE TO RENTER-DRIVERS, SECTION 370 IS PREEMPTED BY THE FEDERAL "GRAVES AMENDMENT" (CT APP).

The Court of Appeals, in a full-fledged opinion by Judge Singas, affirming the Appellate Division, over a three-judge dissent, determined the federal "Graves Amendment (49 USC 30106)," which relieves rental-car companies of vicarious liability for the negligence of the renter-drivers, preempts Vehicle and Traffic Law 370 to the extent that section 370 has been interpreted to require rental companies to provide primary liability insurance coverage to renters. But section 370's requirement that rental-car companies carry a specified minimum amount of insurance is not preempted by the Graves Amendment:

The Appellate Division [held] that "the Graves Amendment does not supersede Vehicle and Traffic Law § 370 insofar as it is a state law that requires rental car companies to carry a specified minimum amount of insurance for each of their vehicles" but "is superseded to the extent it requires a rental car company to 'provide primary insurance to their renters up to the minimum liability limits provided by the statute' " … . The Court reasoned that "[t]o hold otherwise would rescue every vicarious liability claim up to statutory minimum insurance amounts and render the Graves Amendment's preemption clause a nullity" … . The Court further held that section 370 does not reverse preempt the Graves Amendment under the McCarran-Ferguson Act, because the Graves Amendment "does not entirely 'invalidate, impair, or supersede' " section 370 … . * * *

We note that the Graves Amendment does not free car rental companies from all liability arising from the use of a rented vehicle. On the contrary, it expressly permits States to impose liability on rental companies for damages arising from their own negligence or criminal wrongdoing (see 49 USC § 30106 [a] [2]). Nor does the Graves Amendment restrict New York's ability to require rental

companies to obtain insurance, no matter what kind, "for the privilege of registering and operating a motor vehicle" (id. § 30106 [b] [1]). Our decision today does not affect section 370's requirement that car rental companies obtain insurance coverage for such other liability or for the privilege of registering vehicles in New York. Rather, we narrowly hold that the Graves Amendment preempts Vehicle and Traffic Law § 370 to the extent that it requires car rental companies to provide primary liability insurance to their renters up to the statute's minimum liability amounts. Second Child v Edge Auto, Inc., 2026 NY Slip Op 02436, CtApp 4-23-26

Practice Point: The interpretation of Vehicle and Traffic Law 370 which required rental-car companies to provide primary liability insurance to renter-drivers has been preempted by the federal "Graves Amendment."

April 23, 2026

MEDICAL MALPRACTICE, NEGLIGENCE, EVIDENCE, JUDGES.

IN A MEDICAL MALPRACTICE TRIAL, THE "ERROR IN JUDGMENT" JURY INSTRUCTION IS ONLY APPROPRIATE WHERE A PHYSICIAN IS CONFRONTED WITH SEVERAL MEDICALLY ACCEPTABLE TREATMENTS AND CHOOSES ONE; HERE IT WAS ALLEGED DEFENDANT MISREAD AN X-RAY; GIVING THE "ERROR IN JUDGMENT" INSTRUCTION WAS REVERSIBLE ERROR (FOURTH DEPT).

The Fourth Department, ordering a new trial in this medical malpractice case, determined the judge should not have given the jury an "error in judgment" jury instruction. The complaint alleged defendant physician failed to notice an abnormality in a lung X-ray. The "error in judgment" instruction is only appropriate when a physician is confronted with several medically acceptable treatments and chooses one, not the case here:

"[A]n error [in] judgment charge is appropriate in a case where a doctor is confronted with several alternatives and, in determining appropriate treatment to be rendered, exercises [their] judgment by following one course of action in lieu of

another" … . However, such a charge should be given "only in a narrow category of medical malpractice cases in which there is evidence that [the] defendant physician considered and chose among several medically acceptable treatment alternatives" … . An error in judgment charge is not warranted where, as here, there was no evidence introduced at trial that the defendant physician "made a choice between or among medically acceptable alternatives" … , and the "plaintiffs' [sole] theory of [the] defendant's alleged malpractice ar[ose] from [the] defendant's alleged lack of due care in assessing [the] plaintiff's condition," inasmuch as "the [sole] issue before the jury was [then] whether [the] defendant's failure to diagnose [the] plaintiff's [condition] constituted a deviation from medically accepted standards of care" … . Inasmuch as the error in judgment charge here "create[d] a risk that [the] jury w[ould] find that, because [Sobieraj] exercised his . . . best judgment, there can be no liability despite a failure to adhere to generally accepted standards of care," we conclude that the court's error in giving the charge cannot be deemed harmless … , and plaintiffs are thus entitled to a new trial. Burns v Sobieraj, 2026 NY Slip Op 02537, Fourth Dept 4-24-26

Practice Point: In a medical malpractice action, the "error in judgment" jury instruction is only appropriate where there evidence of more than one appropriate treatment and the physician chooses one. It was reversible error to give the instruction where it was alleged the defendant misread an X-ray.

April 24, 2026

REAL PROPERTY LAW, TRUSTS AND ESTATES.

THE WILL BEQUEATHED THE REAL PROPERTY TO PLAINTIFF ALONE; THE DEFENDANT ADMINSTRATOR DREW UP A DEED WHICH TRANSFERRED THE PROPERTY TO PLAINTIFF AND DEFENDANT AS JOINT TENANTS; THE ISSUE WAS WHETHER THE DEED IS VOID AB INITIO OR VOIDABLE; THE SECOND DEPARTMENT DETERMINED THE DEED WAS VOIDABLE (SECOND DEPT).

The Second Department, reversing Supreme Court, in a full-fledged opinion by Justice Landicino, determined that the deed drawn up by defendant, the

administrator of the decedent's estate, which was inconsistent with a specific bequest in the will, was voidable, not void ab initio. The will bequeathed the real property to plaintiff alone. The defendant administrator drew up a deed which transferred the property to plaintiff and defendant as joint tenants. Supreme Court determined deed was void ab initio. The Second Department reversed and determined the deed was voidable. The opinion is complex and cannot be fairly summarized here:

The primary question presented in this appeal is whether a transfer of property by an administrator c.t.a. in a manner that is inconsistent with a specific bequest in a will is voidable or void ab initio. In our view, an administrator c.t.a. who receives letters of administration c.t.a. from the Surrogate's Court is cloaked with apparent authority to make a transfer of property from the estate, even if that transfer is contrary to the terms of the decedent's will. As such, the transfer is voidable, not void ab initio.

The undisputed facts of this case are as follows: On April 13, 1998, Floribel Nelson (hereinafter the decedent) died. Prior to her death, the decedent owned real property located in Brooklyn (hereinafter the subject property). In her will, the decedent bequeathed her entire estate, including the subject property, to the plaintiff, who was the decedent's grandniece, and two other family members who had apparently predeceased the decedent. Because the will further provided that, "if any [of the named heirs] do not survive [the decedent], then his or her share shall be divided equally among the survivors, and if there is only one survivor, said survivor shall take the whole estate," the plaintiff was the sole surviving beneficiary of the decedent's estate at the time of the decedent's death. Rhiney v Rhiney, 2026 NY Slip Op 02428, Second Dept 4-22-26

Practice Point: Here a deed drawn up by the administrator of the estate conveyed decedent's real property to the administrator and the plaintiff as joint tenants. However, the will bequeathed the property to plaintiff alone. The court was asked to determine if the deed was void ab initio or voidable. The deed was deemed voidable.

April 22, 2026

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