CHILD WELFARE CASELAW/LEGISLATIVE UPDATE

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Current through: February 10, 2023

I. LEGISLATION, REGULATIONS AND POLICIES

ADOPTION: UNWED FATHERS/CONSENT/NOTICE

Chapter 828 of the Laws of 2022 (effective on December 30, 2022), § 1, amends Domestic Relations Law § 111(1), which now reads as follows:
Subject to the limitations hereinafter set forth consent to adoption shall be required as follows:
(d) Of any person or authorized agency having lawful custody or guardianship of the adoptive child;
(e) In the case of the adoption of a child transferred to the custody and guardianship of an authorized agency, foster parent, or relative pursuant to Social Services Law § 384-b or a child transferred to the custody and guardianship of an authorized agency pursuant to SSL § 383-c:
(i) Of any person adjudicated by a court of this state or a court of any other state or territory of the United States to be the father of the child prior to the filing of a petition to terminate parental rights to the child pursuant to SSL § 384-b, an application to execute a judicial surrender of rights to the child pursuant to SSL § 383-c(3), or an application for approval of an extra-judicial surrender pursuant to SSL § 383-c(4);
(ii) Of any person who filed a petition in a court in this state seeking to be adjudicated the father of the child prior to the filing of a petition to terminate parental rights to the child pursuant to SSL § 384-b, an application to execute a judicial surrender of rights to the child pursuant to SSL § 383-c(3), or an application for approval of an extra-judicial surrender pursuant to SSL § 383-c(4), provided that the parentage petition has been resolved in the petitioner's favor or remains pending at the conclusion of the proceedings pursuant to SSL § 384-b, § 383-c, or § 384;
(iii) Of any person who has executed an acknowledgment of parentage pursuant to SSL § 111-k, FCA § 516-a, or Public Health Law § 4135-b prior to the filing of a petition to terminate parental rights to the child pursuant to SSL § 384-b, an application to execute a judicial surrender of rights to the child pursuant to SSL § 383-c(3), or an application for approval of an extra-judicial surrender pursuant to SSL § 383-c(4), provided that such acknowledgement has not been vacated;
(iv) Of any person who filed an unrevoked notice of intent to claim parentage of the child pursuant to SSL § 372-c prior to the filing of a petition to terminate parental rights to the child pursuant to SSL § 384-b, an application to execute a judicial surrender of rights to the child pursuant to SSL § 383-c(3), or an application for approval of an extra-judicial surrender pursuant to SSL § 383-c(4).

The legislative memo notes that § 1 provides full parental rights to fathers of children in foster care who have been adjudicated or are in the process of being adjudicated a parent, have executed an unrevoked acknowledgement of parentage, or have filed an unrevoked notice of intent to claim parentage.

The legislative memo notes that Chapter 828, § 2, amends Domestic Relations Law § 111-a(1) to rescind the requirement of notice of adoption proceedings to fathers of children in foster care who do not have full parental rights because the child has been transferred to the custody and guardianship of an authorized agency, foster parent, or relative pursuant to SSL § 384-b or the child has been transferred to the custody and guardianship of an authorized agency pursuant to SSL § 383-c.

The legislative memo notes that Chapter 828, §§ 3-12 modify other statutory provisions to make them consistent with the modifications made by Chapter 828, §§ 1 and 2.
The following statutes were amended:
SSL §§ 383-c(3)(b), 383-c(4)(d), § 383-c(5)(h), § 384(8), § 384-a(1-b), § 384-b(3)(e), § 384-b(12) (repealed), § 384-c(1), § 384-c(3), § 384-c(7).

More from the legislative memo:
New York State has a clear policy in favor of prioritizing the preservation and reunification of families. However, current law fails to abide by this policy, and fails to keep families together, in cases of "public" adoptions resulting from state intervention. As a result of certain peculiarities in New York law, unmarried fathers may have their parental rights prematurely terminated without a proper hearing.
Under the Domestic Relations Law, in cases of "public" adoptions, only certain fathers have the right to consent to or prevent the adoption of their child. The only fathers who have "consent" rights if the child was placed for adoption at over six months of age are (1) those who were married to the child's mother at the time of the child's birth; (2) those who lived with the child for at least six months of the year preceding the child's placement for adoption and "openly held themselves out to be the father of the child"; and (3) those who otherwise "maintained substantial and continuous contact with the child" both by regularly visiting or communicating with them and by paying "a fair and reasonable sum" to support them. If a father meets these criteria, then the state is compelled to establish a basis for termination of parental rights by clear and convincing evidence.
With respect to unmarried fathers and "public" adoptions, it is necessarily impossible to prove that they have been married to the child's mother, and it is highly unlikely that the father has been living with the child for six months of the previous year if the child is in foster care and the foster care agency is considering adoption. Therefore, the only option for an unmarried father to preserve "consent" rights is to demonstrate that the father "maintained substantial and continuous contact with the child" both by regularly visiting or communicating with them and by paying "a fair and reasonable sum" to support them. In cases of "public" adoptions this rule leads to peculiar results because New York case law has interpreted the duty to pay "a fair and reasonable sum" in cases of "public" adoptions to require that the unmarried father - who may not have even known of such an obligation - to have made payments to the foster care agency that had been caring for the child. A father who fails to make these payments can permanently lose his parental rights. This is particularly egregious because there is no requirement that foster care agencies inform fathers of the requirement to pay support to the agency, nor even a requirement that agencies provide a means by which fathers may do so. Indeed, a significant percentage of fathers are never provided an option by which they could pay child support while their children are in foster care in New York.
With respect to "public" adoptions, and the termination of parental rights for failure to make payments to foster care agencies, current law has a disproportionate impact on fathers and children of color. Lawyers for fathers of children in foster care regularly challenge the constitutionality of

the current practice described above. However, regardless of the outcome of this litigation, legislation can remedy this issue and further New York's policy of prioritizing the preservation and reunification of families.

In order to remedy this issue, this legislation broadens the definition of "consent" fathers in cases of "public" adoptions, so that fathers who have been legally adjudicated to be the parent of the child or have timely executed a formal acknowledgment of parentage have full parental rights. This law does not affect "private" adoptions in any way. Rather, it applies only to adoptions that occur after a child has been involuntarily separated from their family by the state, and the state seeks to take the step of severing the parent-child relationship for an unmarried father. The state will still be able to terminate such an unmarried father's parental rights in appropriate cases on the grounds of abandonment, permanent neglect, mental illness, intellectual disability, and severe and repeated abuse, just as it would in the case of a mother or married father who failed to meet those obligations. The local child protective agencies will similarly still have the ability to seek child support from the parents of children in foster care, if they choose to do so. This legislation simply alters the potential consequence of an unmarried father's failure to comply with his (often hidden) obligation to pay support to a third party agency, so that his continued relationship to his child does not hinge on such payment alone.

Custody/Visitation: Forensic Evaluators

Chapter 740 of the Laws of 2022 (as summarized in the legislative memo), which takes effect on June 21, 2023, amends Domestic Relations Law § 240(1) with a new paragraph (a-4) which states that a court may appoint a child custody forensic evaluator to evaluate and investigate the parties and a child or children in a proceeding, provided such individual is a psychologist, social worker or psychiatrist who is licensed in the state of New York and has undergone the required biennial domestic violence-related training. The new paragraph requires a child custody forensic evaluator to-notify the court in which such individual requests to be considered for such court ordered evaluations; requires such individuals to notify the court should they fall out of compliance (regarding the biennial training requirement); and includes training documentation requirements.

Executive Law § 575(3) is amended with a new paragraph (n) that (as summarized in the legislative memo) requires the Office for the Prevention of Domestic Violence to contract with the New York State Coalition Against Domestic Violence to develop a training program for psychiatrists, psychologists and social workers, so that such individuals may conduct court ordered forensic evaluations involving child custody and visitation. The new paragraph lists the topics that shall be comprise such training, including but not limited to: relevant statutes, case law and psychological definitions of domestic violence, coercive control and child abuse; the dynamics and effects of domestic violence and child abuse; trauma, particularly as it relates to sexual abuse and the risks posed to children and the long-term dangers and impacts imposed by the presence of adverse childhood experiences; and the danger of basing child custody decisions on claims that a child's deficient or negative relationship with a parent is caused by the other parent. The new paragraph requires the issuance of a certification of completion for such course and requires OPDV to consult with NYSCADV to determine a reasonable number of training-hours that shall be required for the first instance such training is provided, and a reasonable number of training hours that shall be required for subsequent refresher courses that are provided to individuals taking them on a biennial basis..

The legislative memo also states:
In an effort to address this deficiency in the court system, this bill would require evaluators appointed on behalf of the court to be a psychologist, social worker or psychiatrist who has undergone the required biennial domestic violence-related training. With training and an awareness of the impact domestic violence has on victims (among other specific topics), custody evaluators will be better prepared to provide evaluations that are in the best interest of the child.

Governor's Approval Memo:
This legislation specifies that a court may appoint a forensic evaluator to evaluate and investigate the parties and child in a custody or visitation proceeding if the evaluator is a licensed psychologist, social worker, or psychiatrist who has received training on the dynamics of domestic violence and child abuse within the last two years. The Office for the Prevention of Domestic Violence (OPDV) is directed to contract with the New York State Coalition Against Domestic Violence (NYSCADV) to develop this training.
I fully support the goals of this legislation. Under current law, social workers, psychologists, and psychiatrists who perform court-ordered forensic custody evaluations are not mandated to undergo any training. While there are long-standing certification, training, and accountability processes in place administratively in the First and Second Appellate Divisions of the New York State Judiciary, which cover much of New York City and its suburbs, case law does not extend these protections in upstate communities. In 2021, the Governor's Blue Ribbon Commission on Forensic Custody Evaluators issued a report on the use of forensic custody evaluators in New York courts and found significant shortcomings, which this legislation aims to rectify.
Minor changes to this bill were needed to allow for remote evaluations to be conducted by a trained evaluator when a child lives out of state, and to include more governmental oversight in the training development process. I have reached an agreement with the Legislature to make these necessary changes.
Based on this agreement, I am pleased to sign this bill into law.

Electronic Notarization: Executive Law § 135-c
Here is a NYLJ article excerpt that summarizes Executive Law § 135-c, which took effect on January 31, 2023:
"2. Permanent Electronic Notarization on the Way. Remote Online Notarization (RON) and Remote-Ink Notarization (RIN) both allow a notary to witness documents via live audiovisual technology. RON is a completely electronic process, whereas RIN requires wet ink notarization of paper documents. On Dec. 22, 2021, Gov. Kathy Hochul enacted RON legislation (S.1780), effective 180 days after enactment (June 20, 2022). The new law requires the Secretary of State to provide regulations setting forth standards for ensuring the signal transmission is secure, conducted in real time and the notary is able to communicate with and identify the signer at the time of the notarial act. A notary must register with the New York Department of State (DOS) prior to performing electronic notarizations. The new law does not address remote witnessing of wills.
Creating a new online registration system will take longer than the six-month effective date provided in the law. In the interim, A.8691/S.7780 establishes a temporary RIN system that does not require additional licensing or fees, but notaries do need to use the appropriate technology to ensure they are recording the notary sessions, performing the necessary identity verification, and

maintaining the necessary log. The DOS has until Jan. 31, 2023 to complete the fully electronic notarization system. After Jan. 31, 2023, only RONs will be permitted."
Sharon L. Klein, **New York's Latest Legislative Session: What Passed, What Didn't, What's Next**, NYLJ, 9/9/22.
Link to legislation:
https://www.nysenate.gov/legislation/laws/EXC/135-C

II. ABUSE/NEGLECT

Removal/Central Register/Investigation Of Abuse And Neglect

ABUSE/NEGLECT - FCA § 1028 Hearing/Good Cause For Hearing

The First Department concludes that respondent failed to show good cause for a FCA § 1028 hearing where he contends that he complied with the August 27, 2021 order directing him to undergo a new mental health evaluation before he may reapply for the release of the child, but the two mental health evaluations upon which he relied were not evaluations contemplated by the August 2021 order. Those evaluations were performed within two weeks after the FCA § 1027 hearing and less than two months before the § 1028 application, were cursory and inconclusive, and did not address all the requirements of the August 2021 order.

Matter of Branson M.
(1st Dept., 10/6/22)

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ABUSE/NEGLECT - Removal/Imminent Risk
- Visitation

The First Department upholds the family court's finding under FCA § 1028 that the child would face imminent risk of harm if returned to the father's care where the petition charged that the father had committed acts of domestic violence against the non-respondent mother in the child's presence, and the case worker testified concerning the father's aggressive and uncooperative behavior during supervised visits and in dealings with the agency. Although the father was being treated for his mental health issues, he refused referrals for anger management and continued to show a lack of insight into the issues that gave rise to the proceedings.

The family court also properly found no good cause under FCA § 1061 to modify the release order to allow unsupervised visits by the father.

Matter of Kyng F.
(1st Dept., 3/24/22)

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ABUSE/NEGLECT - Removal/Imminent Risk

The Second Department upholds an order granting petitioner's application for removal of the children pursuant to FCA § 1027 where the evidence demonstrated that the mother suffers from mental illness but is not committed to treatment on a consistent basis, which results in her erratic and manic behavior, episodes of extreme hyperactivity and depression, and aggressive conduct toward the children. The evidence also established that the mother frequently hit, screamed at, and cursed at the children.

Matter of Daniella G.
(2d Dept., 6/8/22)

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ABUSE/NEGLECT - Central Register/Fair Hearings
STATUTES - Retroactivity

The First Department upholds a determination denying petitioner's request to amend and seal an indicated report finding of maltreatment of her adopted daughter.

The adjournment in contemplation of dismissal in Family Court does not create a presumption that there is a lack of a fair preponderance of the evidence. The Court declines to apply recent amendments to the Social Services Law retroactively, noting that a statute is presumed to apply only prospectively and will not be given retroactive effect unless the legislation expressly or by necessary implication requires it. Here, the amendment passed in 2020 and specifies that it "shall take effect January 1, 2022," well after petitioner's fair hearing.

There was no due process violation in the exclusion from the hearing record of an unsigned, undated and unnotarized note purportedly written by the child to the Family Court, in which she appeared to retract the allegation of abuse. OCFS was not required to credit the child's recantation, since it is accepted that such a reaction is common among abused children. Petitioner's right to due process also was not violated by the failure to assign her counsel.

Matter of Jeter v. Poole
(1st Dept., 6/28/22)

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ABUSE/NEGLECT - Removal/Imminent Risk

Upon a hearing pursuant to FCA § 1027, the Court denies ACS's request for removal of respondent mother's newborn child Dariel.

With respect to the removal of the older children in 2020, the Court notes that the child Amaia's injuries are shocking and should have been noticed by the mother. Her decision to lie to protect her boyfriend shows that her priorities put the children at risk. In the § 1028 hearing decision in that case, the judge stated that "Ms. R. has only superficially acknowledged that someone abused Amaia. She did not speculate as to whether she believed it was respondent P. or her nephew who perpetrated these heinous acts against her three-year-old daughter."

However, the risk at this time can be mitigated by putting orders in place. The mother's testimony was at times self-serving and evasive, but she was credible in stating that she knows that she failed to protect Amaia, that she understands that she was wrong, and that she would do things differently now. Although ACS and the attorney for the child want the mother to state that she knew Amaia was being abused by Mr. P. prior to Amaia's hospitalization, "the Court does not agree that this level of admission is required to show that she will act to protect Dariel if necessary."

The Court also notes, inter alia, that throughout her testimony, the mother became visibly upset, was at times crying, and seemed sincere and credible when discussing the injuries Amaia

sustained; that, since the time of her request for a § 1028 hearing in February 2021, the mother has consistently been in therapy and has shown sufficient progress in understanding her failure to act sooner; that the mother has testified as ACS's witness against Mr. P. at the fact-finding hearing despite the fact that ACS could choose to withdraw consent to a finding of neglect under FCA § 1051(a); that the mother's visitation with the children has continuously increased, and she is now enjoying unsupervised weekend visits with two of the children and there have been no identified safety concerns; that the mother continues to actively participate in all requested services; and that, with respect to the risk of harm from removal, the baby remains in the hospital and the mother has been with him and is breastfeeding.

Matter of Dariel R.
(Fam. Ct., Bronx Co., 8/3/22)
https://nycourts.gov/reporter/3dseries/2022/2022_50758.htm

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ABUSE/NEGLECT - Removal/Imminent Risk

The Third Department upholds the family court's denial of the mother's FCA § 1028 application for return of the child where the child presented to the hospital with serious injuries in multiple locations - including a fractured left femur and eight rib fractures - and medical professionals found the parents' explanation to be implausible; the father made certain inconsistent remarks regarding the circumstances surrounding the femur fracture; and the dilemma, as the family court recognized, is that the infant was cared for by one or the other parent at essentially all times, but neither parent offered a plausible explanation and both denied any wrongdoing.

Matter of Tyler Y.
(3d Dept., 2/17/22)

Respondent/Person Legally Responsible

ABUSE/NEGLECT - Allowing Abuse
- Respondent/Person Legally Responsible

The First Department finds sufficient evidence that respondent, the child's adult brother who was adopted by respondent mother, was a person legally responsible for the child where he lived in the same household from when the child was placed in the home when she was young until the allegations of abuse came to light when the child was about fifteen years old; the mother routinely left the child in the brother's care when she left for work or to go to a casino; the brother acted as the functional equivalent of a parent by feeding the child, allowing the child to watch television, and disciplining the child; and the court properly drew a negative inference from the brother's failure to testify.

The evidence was sufficient to support the abuse finding against the mother where she became aware of the allegations that the brother had been sexually abusing the child for years, asked him if they were true, and accepted his denials without taking any steps to protect the child.

Matter of Maridas A.
(1st Dept., 4/19/22)

Confidentiality: Public Access To Court And Records

ABUSE/NEGLECT - Confidentiality/Access To Court And Records

Non-party appellant, an online-only local news outlet, attempted to cover a motion to disqualify a Deputy County Attorney, who was simultaneously serving as a part-time judge. The family court did not allow appellant's owner access to the courtroom, and appellant published an article describing how the court had excluded the press. After unsuccessfully seeking the transcript, appellant moved for permission to "intervene" in the neglect proceeding and for release of the transcript, even if redacted. The court denied the motion.

The Fourth Department first concludes that while there are cases characterizing similar motions as seeking a form of intervention, the motion is better understood as an application for release of the transcript pursuant to FCA § 166. The Court also agrees with appellant that the Deputy County Attorney, a non-party, did not have to be served with the motion [see 22 NYCRR § 205.11(b)].

The Court then holds that the family court violated appellant's right to attend the disqualification hearing. Appellant is entitled to a transcript, the release of which, with appropriate redaction, would be consistent with 22 NYCRR § 205.5, which specifies certain persons and entities who are entitled to access to certain records, and FCA § 166, which permits discretionary disclosure to others.

The court failed to make findings prior to ordering exclusion, and there is no indication in the record that the court relied on supporting evidence or considered any of the relevant factors [see 22 NYCRR § 205.4(b)]. Moreover, appellant was not causing or likely to cause a disruption. There is no indication in the record that any party objected to appellant's presence for a compelling reason. The hearing would not have required disclosure of the underlying neglect allegations, and, in any event, less restrictive alternatives to exclusion were available; the court could have, inter alia, conditioned appellant's attendance upon the nondisclosure of confidential information.

Even if the hearing was no longer relevant because the attorney had already been elected to a full-time judgeship, the court improperly ignored both the continued importance of appellant's role in reporting accusations of ethical violations or conflicts of interest on the part of a judge, and the principle that it was within appellant's province to determine whether the hearing remained newsworthy.

Matter of Rajea T.
(4th Dept., 3/18/22)

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CONFIDENTIALITY - Records Of Proceeding/First Amendment

The First Department upholds the denial of a motion for access to the parties' motion papers submitted in connection with an order entered in a matrimonial action directing the website Leagle.com to take down an appellate decision that was later recalled and vacated.

The motion papers at issue fall within the ambit of Domestic Relations Law § 235(1). This Court recalled a prior decision originally published under a caption with the parties' full names, and granted plaintiff's motion seeking confidentiality to the extent of reissuing the same decision using only the parties' initials. The Supreme Court directed Leagle.com to take down the recalled decision in furtherance of this Court's order granting the parties limited anonymity. Under these circumstances, there is no "good cause" to grant public access to the underlying motion papers, which were deemed confidential by law (see Domestic Relations Law § 235[1]; 22 NYCRR 1250.1[e][2][ii]).

There is no First Amendment right to access since there was no "gag order" and modification of the case caption is designed to protect the privacy of the parties and their minor child.

F.L. v. J.M.
(1st Dept., 10/6/22)

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SEALING - Domestic Incident Reports

At a hearing held pursuant to Crawford v. Ally (197 A.D.3d 27), the Court ruled that two prior Domestic Incident Reports were admissible even though the cases for which they were prepared were dismissed. The Court concluded that DIRs are not official records within the scope of the sealing requirement in CPL § 160.50,

People v. P.D.
(Sup. Ct., Kings Co., 1/5/23)
https://nycourts.gov/reporter/3dseries/2023/2023_23005.htm

Petitions/Jurisdiction

ABUSE/NEGLECT - Leaving Child Alone
- Petition/Amendment To Conform To Proof

The First Department upholds findings of neglect and derivative neglect where the father left a one-year-old child unattended in the bathtub for about two minutes, with the water running, while he went to clean up the kitchen, resulting in the child nearly drowning and going into cardiac arrest.

Although derivative neglect charges were not alleged in the petition, the father did not object or respond when petitioner requested derivative neglect findings, and, given the father's admission, no surprise or prejudice resulted when the court sua sponte conformed the petition to the proof.

Matter of M.G.
(1st Dept., 1/10/23)

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ABUSE/NEGLECT - Petition
PERMANENCY HEARINGS - Appeal/Mootness
ETHICS

The Third Department rejects the father's contention that the Family Court lacks subject matter jurisdiction because the proceeding was commenced by the children themselves, whereas FCA § 1032 requires that the petition be commenced by a child protective agency or another person as directed by the court. Although CPLR 2101(c) requires that the caption of a summons and complaint in a civil matter include the names of all parties, and including this information comports with best practices, captions in FCA Article Ten proceedings often include the names of the children and the respondents, but not the name of the petitioning child protective agency.

Defects in the form of papers shall be disregarded by the court unless a substantial right of a party is prejudiced, and objections to defects in form are waived unless the paper is returned with particular objections within fifteen days of receipt (see CPLR 2101[f]). Here, the father waived any objection to the form of the caption in the petition and he has not demonstrated any prejudice. The Court also notes that this argument is specious, and, in a footnote, asserts that "counsel has an obligation to avoid misrepresentations to any court, and must affirmatively inform the court of correct facts as well as legal authorities adverse to counsel's position…."

The Court affirms a permanency order, noting first that although a permanency order effectively supersedes prior permanency orders, an appeal from a prior order is not moot if that order modified the permanency goal because the agency's obligations were altered and subsequent orders will be a direct result of the modification.

Matter of Jaylynn WW.
(3d Dept., 2/24/22)

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ABUSENEGLECT - Jurisdiction/Deceased Child

The petition charging neglect, abuse and severe abuse alleges that respondent inflicted serious, life-threatening and non-accidental injuries on the subject child, causing the child's death. Petitioner DSS moves for summary judgment based on a certificate of conviction.

The Court denies DSS's motion and dismisses the petition. DSS does not allege that respondent is the parent of or person legally responsible for any other children. The Court does not have jurisdiction over a neglect matter where the subject child is deceased, or over an abuse or severe abuse matter when there are no surviving children to protect.

Matter of NL
(Fam. Ct., Warren Co., 7/26/22)
https://nycourts.gov/reporter/pdfs/2022/2022_32974.pdf\

Right To Counsel

RIGHT TO COUNSEL - AFC/Assigned Counsel Compensation Rates

In a New York County Lawyers Association suit challenging New York's statutory pay structure for assigned counsel, a court recently concluded that the rates likely violate the statutory guarantee of right to counsel, and issued a preliminary injunction requiring the State to, inter alia, compensate attorneys for children at a higher rate of $158/hour. The order is retroactive to February 2, 2022. The State has not appealed. (However, New York City has appealed those portions of the order which direct it to pay $158/hour to attorneys assigned pursuant to County Law § 722-b, and the Appellate Division has stayed enforcement of the retroactivity provision as it relates to County Law-funded assignments.)

The AFC in these child protective cases asks the Court to award her enhanced compensation in the amount of $158/hour for work that occurred prior to the effective date of the preliminary injunction.

The Court denies the request. The unjust system of compensation for assigned counsel does not, by itself, present "extraordinary circumstances" warranting across-the-board enhanced rates. A finding of extraordinary circumstances under Judiciary Law § 35 or County Law § 722-b should be rare. It should be made in cases where several criteria of extraordinariness are present and manifested to a significant extent. Here, the AFC offers no assertion that any of the criteria were present. Her arguments are solely about the woefully under-market compensation rates and the systemic problems they engender, for clients and lawyers alike. These equitable claims deserve the most careful consideration from the public and our elected leaders. The Court has no authority to address systemic deficiencies in the assigned counsel program.

Matter of Jeremi C.
(Fam. Ct., Kings Co., 9/2/22)
https://nycourts.gov/reporter/3dseries/2022/2022_22276.htm

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RIGHT TO COUNSEL - Effective Assistance/Assigned Counsel Payment Rates

Plaintiffs seek an immediate preliminary injunction requiring defendants to compensate assigned counsel at the rate of $158.00 per hour. Plaintiffs argue that increasing the rate would prevent the ongoing violation of the constitutional rights of children and indigent adults in Family and Criminal Court proceedings at the trial and appellate levels in New York City. Plaintiffs also argue that defendants' failure to increase the rates since 2004 has caused the number of assigned counsel willing to take on cases to decrease, which has led to an increased workload for counsel who remain in the program. Plaintiffs argue that the increased workload has directly caused counsel to spend less time on tasks that are critical to effective representation, and that a number of children and indigent adults are not receiving adequate legal representation.

The Court grants plaintiffs' application, and directs defendants to pay assigned counsel the interim rate of $158.00 per hour, retroactive to February 2, 2022, the date plaintiffs' Order to Show Cause

was filed. Plaintiffs have established a likelihood of success on the merits, and that severe and irreparable harm to children and indigent adult litigants would occur without an injunction. Plaintiffs have demonstrated that the quality of legal representation for children and indigent adults, as well as protection of their due process rights, would continue to decline without a preliminary injunction, and that a balance of the equities weighs in favor of granting injunctive relief because, in the absence of injunctive relief, the constitutional rights of child litigants and indigent adults would be violated.

New York County Lawyers Association et al. v. New York State, et al.
(Sup. Ct., N.Y. Co., 7/25/22)
https://nycourts.gov/reporter/pdfs/2022/2022_32476.pdf

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ABUSE/NEGLECT - Agency Supervision/Home Visits
- Right To Counsel

The family court ordered that pending determination of the neglect proceedings, the mother "shall comply with all announced and unannounce [sic] visits by ACS." ACS then filed an order to show cause seeking to preclude the mother's attorney from being present, either in person or electronically, during ACS home visits. A Child Protective Specialist for ACS alleged that during a visit to the mother's home, the mother's attorney could be seen and heard on FaceTime, that she contacted her supervisor, who directed her to terminate the visit unless the attorney agreed to end the FaceTime call, and that she left when the attorney declined to end the call. The family court precluded the mother's attorney from being present, either in person or electronically, during home visits conducted by ACS.

The Second Department reverses. Where, as here, the family court issues an order temporarily releasing the child to a parent pending a final order of disposition, the order may include a direction for the parent to "cooperat[e] in making the child available for … visits by the child protective agency, including visits in the home." However, there is no authority for prohibiting a respondent in an Article Ten proceeding from having counsel present during a home visit. A respondent is not automatically prohibited from having an attorney, or any other individual, present in her home during the home visit, either in person or electronically.

Respondent was not required to demonstrate that her attorney's presence would not impair the effectiveness of the home visit. It was ACS's burden to establish justification for exclusion of the attorney. While the attorney should refrain from interrupting the ACS employee and from interacting with the child during the visit, the limited instances of conduct by the mother's attorney alleged here did not justify exclusion of the attorney during home visits.

Matter of Lexis B.
(2d Dept., 6/8/22)

Notice To/Investigation Of/Intervention By/Release By Agency To Custody Of Parent Or Other Relative/Visitation/ICPC

CUSTODY - Out-of-State Parent
INTERSTATE COMPACT ON THE PLACEMENT OF CHILDREN

In 2012, the Suffolk County Department of Social Services removed the child from the custody of the mother, who admitted neglecting the child, and placed the child in foster care. The father, who resides in North Carolina, exercised his right to appear in the neglect proceeding and, in 2013, an application was made under the ICPC for North Carolina's approval of the father's home as a suitable placement. The relevant North Carolina authority denied the ICPC request. The child remained in foster care with the goal of reunification with mother and, according to the father, he maintained contact with and continued to visit with the child.

In 2017, the father commenced these custody proceedings. DSS argued that the child could not be placed with the father given North Carolina's refusal to consent. The Family Court dismissed the petitions without conducting a hearing, holding that the requirements of the ICPC applied. The Appellate Division affirmed.

The Court of Appeals reverses, holding that the ICPC does not apply to out-of-state, noncustodial parents seeking custody of their children who are in the custody of New York social services agencies. By its terms, the ICPC governs, and unambiguously limits its applicability to, the out-of-state "placement" of children "in foster care or as a preliminary to possible adoption," which are substitutes for parental care that are not implicated when custody of the child is granted to a noncustodial parent. The Court adds, emphatically, that nothing in the language of the statute or the legislative history indicates that the ICPC was ever intended to address any individual other than an out-of-state foster or adoptive parent.

Indeed, applying the ICPC to noncustodial parents would be inconsistent with the statutory requirement that, when a child is placed pursuant to the ICPC, "[t]he sending agency shall continue to have financial responsibility for support and maintenance of the child during the period of the placement." Such application also would be inconsistent with components of New York's statutory framework governing child protection which overwhelmingly reflects the preeminence of the biological family and embraces a policy of keeping biological families together whenever safely possible. This Court has long acknowledged, and is bound by, the Legislature's fundamental social policy choice to structure New York's foster care scheme around the right of parents to the care and custody of a child, superior to that of others, unless the parent has abandoned that right or is proven unfit.

The Court's interpretation of the ICPC does conflict with Regulation 3 promulgated by the Association of Administrators of the Interstate Compact on the Placement of Children, which states in 3(2)(a) that compliance with the ICPC is required for placements with parents and relatives when a parent or relative is not making the placement. However, Regulation 3(2)(a) is inconsistent with its enabling legislation and, therefore, cannot be given effect.

The Family Court Act contains other effective means to ensure the safety of a child before awarding custody to an out-of-state parent. The Family Court can hold hearings and request

courtesy investigations and reports from the local social service agencies or department of probation. Additionally, FCA § 1052 provides for other dispositional options, including release to a parent with supervision. The Family Court also may grant a temporary order of custody or guardianship to a noncustodial parent under FCA § 1017 which requires that the parent submit to the Family Court's continuing jurisdiction and comply with the terms and conditions of the order, which may include making the child available for visits with social services officials; under FCA § 1088, the case remains on the calendar and the Family Court maintains jurisdiction until the child is discharged from placement and all orders regarding supervision, protection or services have expired.

Matter of D.L. v. S.B.
(Ct. App., 10/25/22)
https://www.nycourts.gov/reporter/3dseries/2022/2022_05940.htm

Practice Note: It is true that this case involved a noncustodial parent, and that the Court of Appeals' ruling and pronouncements expressly refer to out-of-state placements with noncustodial parents. The Court did not expressly make its ruling applicable to non-foster care/adoptive placements with other relatives or with unrelated, suitable persons. Nevertheless, there is no rational way to read this decision except as being equally applicable to ANY parent - custodial or noncustodial, respondent or nonrespondent - and, more generally, to ANY non-foster care/adoptive placement out-of-state. Given the Court's reasoning, it would have been compelled to reach the same result regardless of who the custodial resource was.

The Court held that the ICPC governs, and unambiguously limits its applicability to, out-of-state placement of children "in foster care or as a preliminary to possible adoption," which are substitutes for parental care that are not implicated when custody of the child is granted to a noncustodial parent. The Court added that nothing in the language of the statute or the legislative history indicates that the ICPC was ever intended to address any individual other than an out-of-state foster or adoptive parent. These declarations by the Court apply with full force to ANY out-of-state custodial resource. The mere fact that this case involved a noncustodial parent, and that the Court did not color outside the lines and toss in dicta referencing other custodial resources, does not detract from the clear and unambiguous import of the Court's holding and its reasoning.

The Court also noted that Regulation 3(2)(a), which states that compliance with the ICPC is required for placements with parents *and relatives* when a parent or relative is not making the placement, is inconsistent with its enabling legislation and, therefore, cannot be given effect. Could the Court have come any closer to stating outright that non-foster care/adoptive placements with relatives are not covered by the ICPC?

As well, the Court's observation that applying the ICPC to noncustodial parents would be inconsistent with the statutory requirement that, when a child is placed pursuant to the ICPC, "[t]he sending agency shall continue to have financial responsibility for support and maintenance of the child during the period of the placement," is persuasive no matter who the custodial resource may be.

Stated simply, this holding means that the ICPC does not apply to ANY FCA Article Six or Article Ten out-of-state custody/guardianship or direct placement order issued at ANY stage of a proceeding. Starting on the day a petition is filed, temporary and final orders are covered by the ruling.

* * *

ABUSE/NEGLECT - Intervention By Non-Respondent Parent
- Experts/Sex Abuse And Credibility Of Child
- Petitions/Amendment

In this appeal from an order dismissing an Article Ten petition, the Third Department holds that the non-respondent mother is not a proper party to the appeal. There is no question that the mother has an interest in the child's welfare. Issues determined in the course of an Article Ten proceeding can affect the outcome of other custody determinations. However, allowing the mother to participate with full party status - essentially echoing and bolstering petitioner's arguments - would significantly expand the intended role of a non-respondent parent.

The Third Department affirms the dismissal order. Although petitioner ultimately moved to conform the pleadings to the proof at the conclusion of the hearing, it repeatedly declined to move to amend its petition prior to the close of proof, and thus the family court did not err in excluding evidence regarding conduct not alleged in the petition.

The court's forensic evaluator found no credible evidence that respondent had sexually abuse the child, and opined that petitioner's caseworkers repeatedly deviated from guidelines and best practices for child forensic interviews. This included failing to establish the child's ability to understand the importance of telling the truth and elicit a commitment from her to do so; having two individuals involved in the interview; allowing the interview of the then six-year-old child to go on for more than 2½ hours, far exceeding age-based duration recommendations; using anatomical dolls and diagrams in a suggestive manner, and providing distracting toys in the interview room; interacting with the child in a manner that encouraged imagination and creativity rather than truth-telling; and failing to follow up on the child's description of implausible details related to allegations of sexual contact.

The evaluator observed that the child's description of the alleged conduct "morphed" over the course of the interview with petitioner's caseworkers, whose questioning the expert characterized as "unbelievabl[y] leading, coercive [and] close[d-]ended" and "egregious and unconscionable." The evaluator conducted her own interview, where the child initially made no allegation, then alleged that respondent touched her vagina while she was sleeping, and subsequently admitted that she had been lying.

Matter of Andreija N.
(3d Dept., 6/2/22)

* * *

ABUSE/NEGLECT - Notice To Parent/Service Of Process
TERMINATION OF PARENTAL RIGHTS

After the initiation of dependency proceedings alleging abuse by the father, he told the agency that the mother resided in El Salvador, but the agency made no attempt to ascertain the mother's location in that country. Instead, the agency searched federal records and databases concerning California residents, and later purported to serve the mother with notice via publication in a Los

Angeles-based newspaper. After the mother contacted the agency on the telephone, disclosed her cell number and her address in El Salvador, and provided the child's birth certificate upon receiving a request through social media for that document, the agency did not use any of that contact information to afford the mother proper notice of the proceedings.

Upon the father's appeal from an order terminating his and the mother's parental rights, a California appeals court concludes that the agency violated the mother's right to due process. The due process clause requires child welfare agencies to exercise reasonable diligence in attempting to locate and notify parents of dependency proceedings.

The father has standing to raise the due process claim. The fate of each parent's rights depends upon whether the mother's due process claim is meritorious, and thus their interests are "intertwined." Allowing the child's interest in permanency and stability to bar the father from raising the mother's constitutional claim would reward the agency's failure to provide the mother with any meaningful opportunity to protect her rights.

The error is not harmless. The agency has failed to show beyond a reasonable doubt that if the mother had received constitutionally sufficient notice, she would have failed to appear, and that if she had appeared, the juvenile court still would have terminated her parental rights.

The Court reverses the termination order and reinstates parental rights conditionally. Upon remand, the agency shall exercise reasonable diligence to locate and properly serve the mother. If she does not appear within a reasonable period of time, the juvenile court shall reinstate the termination order as to both parents.

In re J.R.
2022 WL 3655392 (Cal. Ct. App., 2d Dist., 8/23/22)

* * *

ABUSE/NEGLECT - Visitation Order

The Court orders pursuant to FCA § 1015-a that the foster care agency transport two of the children, I.C. and S.C., to the second weekly supervised in-person visit ordered by the Court.

The agency acknowledges that the foster parent will have difficulty in transporting the children, and that the foster parent's backup resources are unable to bring the children. While the agency argues that respondent consented to the second visit being virtual, the Court finds that given the choice between a virtual visit and no visit, most parents would feel constrained to accept the virtual option. A virtual visit does not provide the same quality of interaction. S.C. is approximately two years and four months old and would not be able to participate in the same manner during a virtual visit.

The agency's suggestion that the second visit take place in the community close to the foster home is not acceptable, given the unpredictability of the weather and colder temperatures, nor would it be in the children's best interest to have the visit supervised by the foster parent or another resource over respondent's objection.

Family Court Act § 1030 provides that a parent has a right to reasonable and regularly scheduled visits. Visitation is the most critical way for families to stay connected and to achieve family reunification. State regulations require that parents receive at least bi-weekly visits, but that is only the minimum requirement; families should receive the most frequent and least restrictive visits possible. Although the agency argues that requiring it to transport I.C. and S.C. would encroach on its administrative discretion to allocate its scarce resources, FCA § 1015-a has been interpreted broadly and courts have authorized the provision of a wide variety of services.

Matter of D.G.
(Fam. Ct., Bronx Co., 11/2/22)
https://nycourts.gov/reporter/3dseries/2022/2022_22379.htm

* * *

ABUSE/NEGLECT/TERMINATION OF PARENTAL RIGHTS - Notice To Parent

A California appeals court vacates an order terminating the father's parental rights where there were inadequate efforts to notify the father regarding the opportunity to come forward.

The agency failed to make any attempt to supply statutory notice to the father, which would have apprised him of the significance of the case, and his right to attempt to prevent the court from severing all legal ties between him and the child and the steps he needed to take, with the benefit of counsel if he could not afford one.

The juvenile court passed up numerous opportunities to proactively require a more forceful search for the father's whereabouts, as it was statutorily and constitutionally required to do, and numerous opportunities to require a thorough investigation to ascertain, with or without him, complete information about parentage and whether there had been prior determinations of his paternity.

The court proceeded against the father despite evidence that would support a bid for presumed parentage status and evidence that the child regards him as her father; phone contact with the father three weeks after the detention hearing; and subsequent agency statements indicating that it had spoken with the father two more times (once by phone about the child's need for dental work and then in person about her social security number) and that the father's whereabouts were known and the child missed him and wanted to have contact with him.

In re A.H.
2022 WL 11008421 (Cal. Ct. App., 1st Dist., 10/19/22)

Foster Care

FOSTER CARE/FAMILY FIRST PREVENTION SERVICES ACT

To determine if now 17-year-old Trevon G. should remain in a qualified residential treatment program (QRTP) in which he was placed after the filing of the underlying neglect petition, the Court held a combined permanency/QRTP hearing.

Upon the hearing, the Court orders that Trevon shall be trial discharged to his mother's care.

The information presented by petitioner is stale and does not support continued placement in a QRTP. The evaluator reviewed evaluations and assessments of from June and December of 2020. Although anecdotal information is more recent, the Court cannot continue to place a child in residential care based on dated assessment information.

Given Trevon's frequent trips out of placement, it is time to develop a plan that will work with Trevon in the community and allow him to develop longer term skills and strategies. The agency must work with Trevon's attorney to put a plan in place that acknowledges Trevon's significant needs, his mother's health condition, his clear desire to be at home, and his age.

Under the requirements of Family First, a structured return to the mother's home with extensive services in place is most consistent with Trevon's short- and long-term needs and is the least restrictive alternative.

Matter of Trevon G.
(Fam. Ct., Bronx Co., 4/29/22)
https://www.nycourts.gov/reporter/3dseries/2022/2022_51188.htm

* * *

FOSTER CARE/FAMILY FIRST PREVENTION SERVICES ACT

At a hearing pursuant to the Family First Prevention Services Act and FCA 1055-c, the attorney for the child presented a report entitled "Away from Home: Youth Experiences of Institutional Placements." The Court, noting that hearsay is admissible, admitted the report into evidence pursuant to CPLR 4532 as a periodical of general circulation.

Upon the hearing, the Court concludes that ACS has failed to meet its burden to demonstrate that placement of the ten-year-old autistic child in a residential treatment facility is the least restrictive alternative. The Court notes, inter alia, that, until the filing of the underlying Article Ten petition, the child has been living with his adoptive mother and siblings and his basic needs have been met without extensive additional services, and ACS has not established a change in the child's medical, physical or emotional circumstances that would justify placement in a residential treatment facility as opposed to a family setting; that it would be easier to attend to the child's needs in a group care facility where there are numerous trained professionals and an on-site school, but the Court must find that the setting is the least restrictive possible; that the child did not transition to group care easily, has received bruises during his stay, and acts out during group activities; and that, as

documented in "Away from Home," young people placed in group facilities lack access to the kind of love and support that is possible in a family setting.

For the Court to reach a different result "would essentially mean that any child suffering from relatively severe autism can only live in a group facility."

Matter of Felipe R.
(Fam. Ct., Bronx Co., 7/5/22)
https://nycourts.gov/reporter/3dseries/2022/2022_22216.htm

Summary Judgment/Collateral Estoppel

COLLATERAL ESTOPPEL/SUMMARY JUDGMENT

In this family offense proceeding, the Third Department concludes that the mother's motion for summary judgment was properly granted after the father was found guilty of criminal contempt in the related criminal proceeding.

Although the jury verdict had not yet been reduced to a final judgment of conviction via imposition and entry of the sentence, and collateral estoppel does not, as a rule, apply when no order or final judgment has been entered on a verdict, that rule is aimed only at ensuring that an irrevocable and final decision exists. Here, the court confirmed that it had planned on sentencing the father before addressing the mother's motion, and that the only reason it did not do so was because the prosecutor handling the criminal matter had been delayed by another court appearance. Thus, finality of the issue was clear when the court decided the mother's motion.

Matter of Stephanie R. v. Walter Q.
(3d Dept., 1/13/22)

Discovery

ABUSE/NEGLECT - Discovery/Mental Health Records

Respondent seeks disclosure of records relating to the prior and current mental health treatment of the thirteen-year-old child who reported that he sexually abused her, claiming that those records are material and necessary to his defense that the child is fabricating her allegations.

When the child was approximately four years old, she reportedly made allegations of inappropriate touching against another male and later recanted. Respondent alleges that the child has received mental health services in the past for unspecified "underlying mental health issues, which informed the earlier false allegation."

With respect to those mental health records, the Court concludes that, given respondent's need to prepare his defense, his right to impeach the child's credibility if, as is likely, she is a witness, and the child's diminished interest in the confidentiality of older records from an institution that is not currently providing services to her, the matter must be remanded to the Family Court to review the records. The Court notes that confidential mental health records may be disclosed only upon a

finding by a court that the interests of justice significantly outweigh the need for confidentiality (Mental Hygiene Law § 33.13[c][1]), and that, pursuant to Family Court Act § 1038(d), the court must weigh the need of the moving party for the discovery to assist in the preparation of the case against any potential harm to the child arising from the discovery.

With respect to records related to the child's current relationship with her therapist, the Court concludes that given the potential harm to the child from disclosure, and the "thin showing" made by respondent, the Family Court properly denied respondent's request for those records. "Were a court to grant such a request on the sparse showing in this case, virtually every child's therapy records would be subject to exposure."

Matter of Briany T.
(1st Dept., 2/1/22)

Hearings: Dismissal/Right To Be Present/Defaults/Adjournments

TERMINATION OF PARENTAL RIGHTS - Defaults

In this termination of parental rights proceeding, a Court of Appeals majority concludes that the father has failed to raise any basis for reversal and he does not dispute the Appellate Division's determination that his failure to appear constituted a default.

Judge Rivera, dissenting along with Judge Wilson, asserts that there was no default, and thus the family court's order is appealable, because the father appeared through counsel during the fact-finding and dispositional hearings. CPLR 3215(a) provides that a "default" occurs when a party "fail[s] to appear, plead or proceed to trial of an action reached and called for trial, or when the court orders a dismissal for any other neglect to proceed." With limited exceptions, under CPLR 321(a) "[a] party … may prosecute or defend a civil action in person or by attorney." Thus, "it is unsurprising that the Family Court Act Practice Commentaries conclude that 'unless the party is ordered by the court to appear, a failure to appear in person for any reason at a hearing cannot legally be deemed a default' (Merril Sobie, 2017 Supp Practice Commentaries, McKinney's Cons Laws of NY, Family Ct Act § 165)." Here, as permitted under CPLR 321(a), the father appeared at the fact-finding hearing through counsel. The Family Court proceeded to a fact-finding hearing on the disputed termination petition, rather than by inquest, and the agency did not move for entry of a default judgment, as would have been required for the Court to proceed by inquest (see CPLR 3215[b]. The fact that counsel stayed silent during the proceedings - a tactical choice - does not support a finding that the father defaulted. At the hearing, counsel did not seek to be relieved as attorney for the father, nor did counsel state that he was unable to diligently or competently represent the father.

The Fourth Department's opinion (188 A.D.3d 1744) states: "The father failed to appear at the dispositional hearing and his attorney, although present, elected not to participate in the father's absence. Under those circumstances, we conclude that the father's refusal to appear constituted a default, and we therefore dismiss the appeal…."

Matter of Irelynn S.
(Ct. App., 3/17/22)

* * *

TERMINATION OF PARENTAL RIGHTS - Adjournments
RIGHT TO BE PRESENT

In this termination of parental rights proceeding, the Fourth Department rejects the father's contention that the court erred in denying his attorney's request for an adjournment when the father was not transported from the facility where he was incarcerated to the courthouse on the first day of the fact-finding hearing.

The father was able to assist his attorney in cross-examining the mother after she testified during her case-in-chief, and in cross-examining a caseworker during her continued testimony on the second day of the hearing. The court balanced the need for a prompt adjudication with the father's interests in its evidentiary rulings by, inter alia, denying petitioner's application to play an exhibit on the first day of the hearing when the father was not present.

Matter of Briana S.-S.
(4th Dept., 11/10/22)

* * *

CUSTODY - Defaults

The Second Department upholds the denial of the mother's motion to vacate the final order of custody. The mother established a reasonable excuse for her default where her attorney was delayed by an appearance in another court and failed to provide her with a link to attend the virtual hearing, but she failed to establish a potentially meritorious defense.

Matter of Spagnuolo v. Anderson
(2d Dept., 2/2/22)

* * *

CUSTODY - Defaults

The First Department concludes that the mother's motion to vacate the custody order should have been granted. The motion was timely under an Executive Order which extended time limitations for filing motions. The mother's moving papers provided both a reasonable excuse for her default and a meritorious defense to the father's modification petition. Neither the mother nor her attorney was served, and the mother asserts that she did not prevent the father from visiting the child as alleged, that the father violated the consent custody order by refusing to return the child after a visit, and that uprooting the child from her home with the mother would be detrimental to the child.

Matter of Kenneth A.S. v. Jennice C.
(1st Dept., 2/22/22)

Physical Force/Evidence Of Injury

ABUSE/NEGLECT - Appeal/Timeliness
- Excessive Use Of Force

The father, his girlfriend, and the girlfriend's eighteen-year-old daughter arrived in a vehicle at the home of the paternal grandparents, where the fourteen-year-old subject child ("the child") and his fifteen-year-old sister were residing, to pick up some toys for two younger children the father and the girlfriend had together. A verbal dispute arose in which the father argued with the grandfather and the child primarily over ownership of a certain toy, with the child maintaining that the toy belonged to him and that he was not obligated to give it to the younger children. The child's sister joined the child outside in an argument with the father, who was joined by the girlfriend and the girlfriend's daughter. The argument turned physical, with the sister beating up the girlfriend's daughter while the father and the girlfriend attempted to stop the sister. The child threw a rock at the vehicle and caused the window to break, at which point the father struck the child once. The Family Court, drawing the strongest possible negative inference against the father after he failed to appear or testify at the fact-finding hearing, concluded that the child was neglected by the father.

The Fourth Department first rejects the contention made by the attorney for the child and by petitioner that the father did not timely take his appeal within thirty days as required by FCA § 1113. There is no evidence in the record that the father, who was served by the court with the order of fact-finding and disposition via email, was served by a party or the child's attorney, that he received the order in court, or that the court mailed the order to him. The statute does not provide for service by the court through email or any other electronic means.

The Court reverses. Petitioner presented no evidence that the child sustained any injury or required medical treatment, and the police who investigated the incident did not file any charges. Petitioner did not establish a pattern of excessive force by the father; indeed, the proof establishes that this was a single, isolated incident.

Matter of Grayson S.
(4th Dept., 10/7/22)

* * *

ABUSE/NEGLECT - Excessive Corporal Punishment
- Derivative Neglect

The First Department upholds findings of neglect and derivative neglect, noting that whether or not respondent had a valid reason for disciplining her then fourteen-year-old child, who had left the home with an older cousin without permission for two days, the testimony describing her violence toward the child and the child's resulting injuries reflect that the discipline far exceeded any reasonable force that she had a common-law right to use.
The child's younger siblings were home during the incident. The youngest child witnessed it, and both siblings saw the eldest child's bloody lip afterwards.

Matter of Empress B.
(1st Dept., 4/26/22)

Medical/Mental Health Issues

ABUSE/NEGLECT - Medical Neglect
- Inflicting Physical Harm

The Fourth Department finds sufficient evidence of neglect where the father cut the bottom of the child's toe with a sword.

However, the evidence did not establish that the father neglected the child by failing to obtain medical care and treatment after the child was cut. The mother testified that she and the father tended to the child's injury by washing the area with a washcloth, putting ointment on the cut, and bandaging the area. The caseworker testified that she instructed the mother two days after the incident to have the child seen by a doctor, who treated the injury the same way the parents had.

Matter of McKinley H.-W.
(4th Dept., 6/10/22)

* * *

ABUSE/NEGLECT - Educational Neglect
- Respondent's Mental Condition
- Evidence/Recordings
- Corroboration

Upon a hearing, the Court dismisses neglect charges against respondent uncle, Mr. V. With respect to the alleged excessive corporal punishment, the Court notes that most of Ms. F.'s testimony consisted of the child's out-of-court statements, and that her own allegation against Mr. V. regarding corporal punishment years earlier when she was a minor living with him was later recanted and is not enough to corroborate the child's statements.

With respect to the allegations of educational neglect, the Court notes that Mr. V. could have done more to ensure that the child was connected to the internet and to his remote classroom by taking advantage of the mobile hotspots offered by the school free of charge, but he was within his rights to opt the child out of his special education services due to their virtual nature; that the school had challenges in connection with keeping accurate attendance records during the remote schooling period; and that, despite the school's obligation to address neglect by encouraging a family struggling with remote schooling to switch to in-person, there is no evidence in the record that the school fulfilled this obligation prior to the time when the child did switch to in-person.

With respect to the allegations of bizarre behavior by Mr. V., the Court notes that his threats towards his nieces and nephew were distasteful, but were so outlandish that they cannot be deemed credible threats and they appear to be within the protected zone of the First Amendment; that Mr. V. used derogatory language towards ACS workers in front of the child, who mimicked his uncle's belligerent style of communication and styled himself a gangster-in-training, but, although cultivating a minimum degree of respect for authority is a basic parenting duty, teaching children to stand up for their rights and to protest government action they disagree with is not unreasonable,

and there is a large range of acceptable parenting when it comes to the development of the child's civic responsibilities; and that, although Mr. V. was very angry when the child was removed with police assistance, the child agreed to walk out without much of a fuss, and "these were not the Branch Davidians, and this is not a family where the child was being taught to respond violently to law enforcement or otherwise take basic First Amendment rights to an unreasonable, unlawful extreme."

Reviewing an evidence ruling, the Court, citing *People v. Goldman* (35 N.Y.3d 582), notes that certain recordings were admitted to show respondent behaving in a particular way and not for the truth of anything that anyone said, and that respondent has admitted that his voice is on the recordings, and thus there was no need to establish that the recordings are complete and unaltered. That it is unknown when exactly the recordings were made and under what circumstances, and who the intended recipient was, goes to weight, not admissibility.

Matter of Armani V.
(Fam. Ct., Kings Co., 8/30/22)
https://nycourts.gov/reporter/3dseries/2022/2022_50898.htm

* * *

ABUSE/NEGLECT - Medical Neglect/Creating Risk Of Harm

The Third Department upholds a finding of neglect where, following a night of drinking, respondent and the child's father got into a verbal altercation in the early morning hours, prompting the father to leave the residence around 3:00 a.m.; respondent followed with the child, who was wearing a full-length onesie; given the extremely cold temperature, two citizens made reports and the police were summoned to investigate, and encountered respondent and the father while they were still walking with the child; an ambulance was eventually called and the child was taken to a hospital, where she was found to have a below normal body temperature; and, despite that finding, respondent discharged the child from the hospital against medical advice prior to the child's temperature reaching normal levels, claiming that she had "other things that [she] had to do."

There is a dispute as to whether respondent walked outside with the child for forty-five minutes, or, instead, the police kept her waiting for that amount of time during their questioning, but in either case respondent's behavior supports the finding.

Matter of Kaelani KK.
(3d Dept., 1/13/22)

Leaving Child Alone Or Unsupervised Or With Harmful Individual

ABUSE/NEGLECT - Leaving Children Alone/Unsupervised
- Appeal/Orders

The Fourth Department first rejects petitioner's contention that the appeal from an intermediate order finding neglect must be dismissed on the ground that no appeal lies from a decision. The paper appealed from meets the essential requirements of an order.

The Court agrees with the mother that petitioner failed to establish neglect. There was nothing intrinsically dangerous about leaving two of the children to eat and watch television while the mother was in the bathroom with the door open. The mother knew that one of her children was sometimes aggressive towards his younger siblings, but there is no evidence in the record that she was aware that he might open a locked window, remove the screen, and drop his sibling from a height of two stories. The window was not deemed dangerous by a caseworker during a home visit less than a month before the incident.

Matter of Silas W.
(4th Dept., 7/8/22)

* * *

ABUSE/NEGLECT - Presumption Of Abuse/Neglect
- Allowing Abuse/Neglect

The First Department upholds a finding of neglect made against the mother where the child, who was only four months old at the time of his removal from the parents' care, had sustained at least seven nonaccidental fractures to the bones in his arms, legs, and elsewhere, which medical witnesses testified had been caused on multiple occasions by forceful pulling or twisting of the child's limbs.

The evidence belies the mother's contention that she did not know and could not have known that the father was abusing the child. The father mentioned to the caseworker that he had anger issues, and acknowledged that his treatment of the child could have led to the child's injuries. The mother testified to one instance in which she reprimanded the father for the way he picked up the child by the shoulder.

Matter of Adonis M.C.
(1st Dept., 1/12/23)

* * *

ABUSE/NEGLECT - Leaving Child Alone

The Second Department upholds a determination of the New York State Office of Children and Family Services denying petitioner's application to amend and seal an indicated report where petitioner left his child home alone in a crib for an undetermined amount of time. Petitioner's maltreatment of the child also was relevant and reasonably related to childcare employment, the adoption of a child, or the provision of foster care.

Matter of Conklin v. New York State Office of Children and Family Services
(2d Dept., 4/6/22)

* * *

ABUSE/NEGLECT - Leaving Child With Inappropriate Caretaker/Allowing Neglect

The First Department upholds a finding of neglect where although the child told the mother that she feared the mother's boyfriend and did not want to be left in his care because he hit her, and the mother also knew that her boyfriend was an alcoholic who drank daily, at times in the child's presence, and suffered from mental health issues, the mother left the child alone with her boyfriend, who then subjected the child to physical and sexual misconduct.

Matter of Jalisa C.
(1st Dept., 2/3/22)

Emotional Neglect

ABUSE/NEGLECT - Emotional Neglect

The Second Department finds legally sufficient evidence of neglect where the mother, inter alia, imposed excessive household and childcare responsibilities on the child, which, according to the testimony of the child's guidance counselor, caused the child to feel like a "second-class citizen," and there was evidence demonstrating that the child expressed in writing that she "[felt] like dying."

Matter of Raveena B.
(2d Dept., 10/5/22)

Derivative Abuse/Neglect

ABUSE/NEGLECT - Derivative Neglect
- Expert Testimony

The First Department upholds the family court's finding of derivative neglect where the prior findings of neglect against the mother with respect to two of her older children, issued between July 2002 and July 2013, establish that because of her untreated mental health issues, she was unable to properly care for any child. The conduct underlying the prior findings - the most recent of which was entered about one year before this petition was filed - is close enough in time to support the conclusion that the mother's parental judgment remained impaired.

The Court also upholds the finding of neglect against the father, noting, inter alia, that the family court properly credited the opinion of petitioner's expert witness over that of the father's expert, who did not consider case progress notes showing that the father missed a majority of his scheduled visits with the child's older brother and did not take advantage of the services being offered to him despite an order of disposition directing him to comply with supervision and visit the older brother.

Matter of Raymond F.
(1st Dept., 1/5/23)

* * *

ABUSE/NEGLECT - Consent Finding/Derivative Neglect

The Second Department upholds a finding of derivative neglect, noting that the mother's consent to a finding of neglect with respect to two older children, without admitting or denying the allegations, constitutes proof that those children were neglected; and that the older children were surrendered approximately nine months before the birth of the subject child, which allows for a presumption that the condition continues to exist.

Matter of Jolani P.
(2d Dept., 10/19/22)

* * *

ABUSE/NEGLECT - Derivative Neglect
- Allowing Neglect
- Failure To Plan

The First Department concludes that the agency established a prima facie case of derivative neglect where there were prior findings that the mother had neglected her four older children; the dispositional order with respect to the mother's fourth child was entered approximately six months prior to the birth of the subject child; none of the older children were ever returned to the mother's care; and the mother failed to comply with the requirements of the outstanding orders of disposition, which included mental health and substance abuse treatment. The reasons for removal of the older children included the mother's longstanding use of marijuana, but the prior petitions also alleged that she medically neglected one child and failed to provide adequate and healthy shelter for the children.

The Court also upholds the neglect finding against the father. Before the child's birth, the father participated in two safety conferences with the mother where her extensive child protective history, and her failure to address her mental health and substance abuse issues, were discussed. He testified that he understood that the child would not be released to the mother upon birth and conceded that he did not make any efforts to plan until after the agency filed a neglect petition against him.

Matter of Mahkayla W.
(1st Dept., 6/30/22)

Sexual Abuse Or Related Misconduct

ABUSE/NEGLECT - Creating Risk Of Abuse
- Disposition/Conditions

The Third Department upholds a finding of neglect where the mother had a friend with whom she sometimes performed sexual services for money; the friend began asking for things involving the child, and, despite her knowledge of the friend's sexual interest in the child, the mother continued her involvement with the friend over a span of a few months; on one occasion, the mother sent a naked photograph of the child to the friend, and, on another occasion, the mother offered to

perform oral sex on him while allowing him to look at the child naked while she slept; and, in text messages, the mother provided her address to the friend.

The Court also rejects the mother's challenge to conditions of the dispositional order that require that she "maintain and provide documentation of legal income source(s) sufficient to support the child," where she has admitted to engaging in illegal prostitution and testified as to a desire to no longer earn money this way, and require her to "acknowledge and demonstrate an understanding of … how her prostitution and involvement of [the subject child] in that prostitution as sexual bait for a pedophile harmed [the subject child] and placed [her] at risk of further harm."

Matter of Y. SS.
(3d Dept., 12/22/22)

Drug/Alcohol Abuse/Activity

ABUSE/NEGLECT - Marihuana/Cannabis Misuse
STATUTES - Retroactivity

On March 31, 2021, the Marihuana Regulation and Taxation Act amended Family Court Act § 1046(a)(iii) to provide that "the sole fact that an individual consumes cannabis" is not sufficient to constitute prima facie evidence of child neglect. The statute previously permitted a presumption of neglect where a parent repeatedly misuses a drug to an extent that it produces certain specified effects.

The Second Department concludes that the Legislature intended that the amendment should be retroactively applied to events that occurred, and to a Family Court decision that was rendered, prior to March 2021.

The amendment did not merely alter a jurisdictional or procedural provision. Rather, the amendment affects the substantive rights of parents, and thus appears to fall into the category of legislation that should not be applied retroactively unless the Legislature's preference for retroactivity is explicitly stated or clearly indicated. The MRTA does not contain any provision specifying that the act should or should not be applied retroactively.

However, the considerations animating the presumption against retroactivity include enabling individuals to conform their conduct to the law and protecting them from arbitrary governmental action. Here, the amendment does not impose a burden or penalty upon individuals. It does the opposite by placing a restriction on the kind of proof that can establish a prima facie case of neglect.

Moreover, the remedial nature of the legislation supports retroactive application. The Legislature expressed the view that marihuana prohibition had been a mistake, with unfortunate consequences, and that the MRTA was designed to correct that mistake and address those consequences. The language added to § 1046(a)(iii) seeks to counteract one ill effect of marihuana prohibition - potential loss of custody of a child - by prohibiting a finding of neglect that is based solely on a parent's marihuana use. By declaring the act effective immediately, the Legislature evinced a sense of urgency.

The Court then concludes that the evidence established neglect. The mother misused marihuana and clearly had a substantial impairment of judgment and/or substantial manifestation of irrationality and was disoriented and/or incompetent. This finding was not based solely on the fact that the mother consumed cannabis.

Matter of Mia S.
(2d Dept., 12/7/22)

* * *

ABUSE/NEGLECT - Creating Risk Of Harm
- Marihuana Misuse

The Fourth Department finds sufficient evidence of neglect where the mother wrapped the infant to sleep, on more than one occasion, in loose blankets, despite repeated warnings that doing so created a substantial risk to the child.

However, the court erred in applying former FCA § 1046(a)(iii), and making a finding of neglect based solely on the mother's use of marihuana. "The Marihuana Regulation and Taxation Act" § 1046(a)(iii) by foreclosing a prima facie neglect finding based upon the use of marihuana unless there is a separate finding that the child's physical, mental or emotional condition was impaired or is in imminent danger of becoming impaired. The amendment went into effect two days before the court rendered its decision in this case; as a general matter, a case must be decided upon the law as it exists at the time of the decision.

The matter is remitted for the family court to reopen the hearing since petitioner's presentation of evidence was based on the state of the law at the time of the hearing and thus petitioner may not have fully explored the issue of impairment.

Matter of Gina R.
(4th Dept., 12/23/22)

* * *

ABUSE/NEGLECT - Drug Misuse/Risk Of Physical Harm To Child

The First Department finds sufficient evidence of neglect where the mother abused cocaine in the bathroom of the one-room apartment approximately three feet from the then two-year-old child, who was walking and able to get in and out of his crib unassisted; and, two weeks later, the mother had a vial of cocaine in the bathroom while the child was in the home and could have entered the bathroom and come into contact with, ingested, or inhaled the narcotic.

Matter of Zorren T.
(1st Dept., 10/20/22)

* * *

ABUSE/NEGLECT - Alcohol Misuse/Leaving Children Alone

The Third Department finds sufficient evidence that the mother, who was residing with the children in a private room in a homeless shelter, became intoxicated and left the children unsupervised for a brief period. However, the agency failed to establish that the mother's conduct placed the children at risk of anything beyond possible harm. Respondent testified that her youngest children were in age-appropriate sleeping arrangements that presented no inherent danger resulting from her inebriated state. Although there was a period when the children were no longer supervised after the mother was taken to the hospital, shelter staff were watching the children until the agency took custody of them.

There is no proof that the children were awake when the mother was drinking alcohol or when she was asleep in the bathroom across from their private room. Petitioner failed to call witnesses who could shed light on the effect the mother's conduct had on the children or what, if anything, prompted shelter staff to enter the bathroom to wake the mother.

A dissenting judge notes that the youngest child was less than two months old; that the bedroom door was open and, with the mother asleep in the bathroom, other occupants at the shelter would have had access to the children's room; and that the mother's testimony that she had one small mixed drink is belied by Fire Department personnel's assessment that she was so intoxicated that she needed to be transported to the emergency room.

Matter of Hakeem S.
(3d Dept., 6/30/22)

* * *

ABUSE/NEGLECT - Excessive Corporal Punishment
- Alcohol Misuse
- Derivative Neglect

The First Department finds sufficient evidence that the father neglected the child by inflicting excessive corporal punishment and misusing alcohol to the extent he lost self-control of his actions where the father struck the child and pushed him to the floor, causing visible scratches to his neck, chest, and right hand, after the child refused to allow the father to drive him home because the father had consumed alcohol and appeared intoxicated.

The finding of derivative neglect as to the other child was supported by evidence of her presence in the room during the altercation.

Matter of EJ W.
(1st Dept., 1/26/23)

* * *

ABUSE/NEGLECT - Drug Misuse
- Creating Risk Of Harm
- Verbal Misconduct

The Third Department reverses a finding of neglect, concluding that the evidence did not show that respondent placed the child at risk of imminent harm when he opened the rear passenger door to the grandmother's vehicle. The vehicle was just beginning to pull away or, at worst, traveling no more than four miles per hour, and respondent opened the rear door on the opposite side of the vehicle from where the child was located.

There was no evidence adduced suggesting that the frequency of respondent's current marihuana use would produce a substantial state of stupor, unconsciousness, intoxication, hallucination, disorientation, or incompetence, or a substantial impairment of judgment, or a substantial manifestation of irrationality (see FCA § 1046[a][iii]). The Court notes that the Marihuana Regulation and Taxation Act - which amended § 1046(a)(iii) by specifically foreclosing a prima facie neglect finding based solely upon the use of marihuana, while allowing for a finding where it is established that the child's physical, mental or emotional condition was impaired or in imminent danger of becoming impaired - was not in effect at the time of the hearing.

While a deputy detected the odor of marihuana emanating from respondent's residence during a visit to the home, he did not conclude that respondent was under the influence of marihuana during the visit or that respondent had used marihuana in the presence of the child.

Respondent's additional history of drug use - opioid and heroin abuse that precipitated his participation in a substance abuse program, which he completed in November 2016 - is too attenuated to establish any current threat of impairment.

Respondent's verbal hostility toward petitioner's caseworker and a deputy during a home visit - he was uncooperative and noncompliant, and was frequently coming in and out of the front door and yelling at the mother telling her to keep her mouth shut and to not cooperate with the caseworker - does not establish neglect.

Matter of Micah S.
(3d Dept., 6/2/22)

* * *

ABUSE/NEGLECT - Allowing/Exposing Children To Sexual Activity
- Marijuana Misuse

The First Department concludes that the mother neglected the three oldest children and derivatively neglected the youngest child where she discovered her eldest son naked on top of her daughter and her younger son told her that the eldest son did the same thing to him, but she then continued to allow her son to have access to her daughter and to continue sharing a bedroom with the younger son.

The mother also allowed her older daughter to be exposed to adult sexual activity and pornography.

The finding of neglect based solely on use of marijuana is reversed. The mother smoked marijuana while pregnant with her youngest daughter, and she and the child tested positive for marijuana at the time of the birth, but there is no evidence that the mother's marijuana use impacted her judgment or behavior, or caused impairment or an imminent risk of impairment. A finding with proof of actual or imminent impairment is inconsistent with this State's public policy legalizing marijuana (see FCA § 1046[a][iii]).

Matter of Saaphire A.W.
(1st Dept., 4/12/22)

Failure To Supply Shelter, Supervision Or Care

ABUSE/NEGLECT - Failure To Supply Adequate Food/Shelter Or Plan

In a case in which the judgment was entered upon the father's default, the First Department concludes that the family court properly denied the father's motion, made at the close of petitioner's case, to dismiss the petition for failure to establish a prima facie case of neglect.

For a two-year period, the child slept on an air mattress in an unfurnished room, while the father's room was furnished. There was little food in the apartment, and even though the father told the child to buy some food, he refused to give the child money to do so. While the child was staying with a friend, the father changed the locks in the apartment and did not give the child a set of keys, and during that time, failed to ensure that the child had adequate food, clothing, or shelter. When the child relocated to her paternal aunt's house, the father eventually contributed only $400 toward her care, and later rejected the child's attempts to reconcile and return home. He did not present any plan for the child's care, instead rejecting ACS's attempts to engage him in formulating a viable plan.

Matter of Jada J.
(1st Dept., 11/16/22)

* * *

ABUSE/NEGLECT - Failure To Supply Shelter/Care

In a 3-2 decision, the Third Department upholds the OCFS's determinations that the mother was guilty of child maltreatment and that the maltreatment was relevant and reasonably related to the mother's potential involvement in child care, adoption and foster care

The child left the mother's home in 2017 when the child was fifteen, and moved in with her sister. The sister and the child relocated to Vermont in early 2018. The child left the sister's home after she confronted the child over concerns of promiscuous behavior and the use of marihuana. The child stayed with a friend for a few days but, after an argument, moved in with a neighbor. Subsequently, a caseworker arranged a meeting with the mother, the sister and the neighbor to discuss a plan for the child's care. The child was not enrolled in school and the mother, who had filed a person in need of supervision petition, declined to discuss the situation further. Five days

later, the child left the neighbor's home to live with her boyfriend. During a home visit, the mother informed the caseworker that she had allowed the child's nineteen-year-old brother to move back into her home. At that time, the child had a stay away order of protection against the brother, who had threatened to harm her.

The majority notes that once the child left the sister's house, it was the mother's obligation to establish an alternative living arrangement. The child was experiencing the uncertainty and instability of transitioning from house to house. She tried to communicate with the mother, who was blocking her calls. The child was no longer welcome in the homes of the mother, the sister or the neighbor. The child had confided to the neighbor that she felt no one wanted her and was very upset.

The dissenting judges assert that the OCFS found only in a conclusory fashion that the child's physical, mental or emotional condition was impaired or in imminent danger of being impaired. Indeed, the OCFS's decision noted, and the record confirms, that the neighbor's residence was "safe" and posed "no concerns," and the OCFS also noted that the neighbor was approached about obtaining custody of the child.

Matter of Tammy OO. v. New York State OCFS
(3d Dept., 2/3/22)

Domestic Violence

ABUSE/NEGLECT - Domestic Violence

In this domestic violence case, the Third Department upholds neglect determination made against the father, and also concludes that the mother neglected the child when, having reached a place of relative safety at the grandmother's residence, the mother decided to obtain a weapon and return to the fray with the child in tow.

Matter of R.E.
(3d Dept., 1/19/23)

* * *

ABUSE/NEGLECT - Domestic Violence

The father punched the mother with a closed fist while he was arguing with her about the family's expenses in the living room where the two older children were present, and then continued fighting with her behind a closed bedroom door, leading the children to ask him to stop and to summon the police.

The First Department upholds findings of neglect, noting that the children who had been present were scared of what the father was going to do to the mother, which supports the finding that they were in danger of or were emotionally impaired. The two younger children, who were in their own

bedroom when the incident occurred, were in imminent danger of physical impairment due to their proximity to the violence.

Matter of Esther N.
(1st Dept., 6/28/22)

* * *

ABUSE/NEGLECT - Domestic Violence/Verbal Abuse

The Second Department finds sufficient evidence of neglect where the out-of-court statements of three of the children alleging that the father threw an object at the mother cross-corroborated each other, and the record establishes that the physical, mental, or emotional condition of those three children was impaired or was in danger of becoming impaired when the father threw an object at the mother in their presence. However, neglect was not established as to the children who did not witness the event.

The Court also concludes that although it was inappropriate for the father to yell at the mother in the presence of the children, the evidence concerning those arguments was insufficient to establish that the children's physical, mental, or emotional condition was impaired or in imminent danger becoming impaired.

Matter of Divine K.M.
(2d Dept., 12/7/22)

Hearing Requirement

ABUSE/NEGLECT - Domestic Violence
- Hearing Requirement/Consolidation

The Second Department upholds a finding of neglect where the mother engaged in acts of domestic violence against the maternal grandmother while holding the child.

However, the family court erred in finding derivative neglect, and respondent was denied due process, where, during the hearing held in connection with the other petition, the court made no reference on the record to the newly-filed derivative neglect petition, and the only reference in the record to a joint hearing or consolidation of the two petitions occurred at the commencement of the dispositional hearing, when the court confirmed that it had consolidated the petitions for purposes of its decision.

Matter of Serena G.
(2d Dept., 7/13/22)

Out-of-Court Statements Of Children And
Other Hearsay/Witnesses/Right Of Confrontation

ABUSE/NEGLECT - Corroboration/Admissions By Respondent

In this sexual abuse case, the Third Department concludes that the child's out-of-court statements were adequately corroborated where a State Police investigator testified that, during the course of an interview, respondent admitted that he had previously had sexual thoughts about the child "touching his penis and him touching her sexually," and admitted that he had become erect while the child sat and wiggled on his lap and that he would leave her on his lap for a few seconds when that occurred; and respondent testified and maintained that any touching of the child's private parts was accidental or incidental to playing with the child, but admitted during his testimony that he did get an erection once or twice when the child was climbing on his lap, although he insisted that his arousal was not intentional.

Matter of Olivia RR.
(3d Dept., 7/7/22)

* * *

ABUSE/NEGLECT - Hearsay/Excited Utterance By Child/Corroboration

The First Department upholds a finding of neglect where the mother refused to enforce a final order of protection issued against her boyfriend and in favor of the child in a prior neglect proceeding.

The then eleven-year-old child is heard crying on a tape of a 911 call in which he reported that the boyfriend choked the mother and then threatened to kill the child. The caseworker testified that the child was crying at the police station after the incident. The 911 tape was properly admitted into evidence as an excited utterance, which does not require corroboration.

Matter of Taveon J.
(1st Dept., 10/4/22)

* * *

ABUSE/NEGLECT - Corroboration
- Failure To Respond To Abuse

Upon a hearing, the Court finds that the Administration for Children's Services has proven by a preponderance of the evidence that respondent Manuel R. sexually abused the child Sarah and derivatively abused the child Manuel; and that respondent Regina F. neglected Sarah and derivatively neglected Manuel by failing to respond appropriately to Sarah's disclosures of the abuse.

Sarah's out-of-court statements alleging sexual abuse were adequately corroborated. The Court notes the following factors: Sarah's provided specific details and dates, her disclosures to different

people over time were consistent; her detailed descriptions are even more noteworthy since her disclosures occurred after she had already been taken to a doctor and failed to disclose the abuse, and had been examined and informed that there was no evidence of sexual activity, since, "[i]f a child were making up sexual abuse in order to frame an innocent person, and where she had been disbelieved by her own mother and informed by medical providers that there was no evidence to support her, it would make much more sense to withdraw the allegations or at least allege less-severe touching, such as groping or kissing, that would not likely yield any evidence"; even for a 15 or 16-year-old, Sarah provided details that are arguably age-inappropriate, given that "the concepts of grooming children and escalating the contact over time, unsuccessful sexual activity, and bleeding are not ordinarily depicted in readily-available sources of pornography and sexual content, and there is no evidence of any kind that Sarah was sexually active with anyone else or had viewed or been exposed to such types of materials"; when discussing the abuse, Sarah was, at times, upset, uncomfortable, and sad; there was evidence of Sarah's self-isolating behavior, depression, anxiety, self-harming and cutting, and decline in school attendance and performance; Manuel R. was a regular presence in the family's home and life for nine years, which gave him an opportunity to abuse Sarah; there is no evidence of a motive for Sarah to make false accusations, and her actions are consistent with child sexual abuse victims who are confused, conflicted, distrustful, and afraid of upsetting the status quo for themselves and their families; Sarah's recantations seem to be the result of her powerful feelings of conflict, guilt, and remorse arising from the abuse itself, from having upended her own life and the lives of her family members by disclosing, and from the pressure put on her by Regina F.; the lack of medical findings do not undermine Sarah's credibility; and Sarah's disclosures qualify as "prompt outcries" and statements made for the purpose of medical or mental health treatment, safety planning, or other forms of medical and mental health services.

Although there are no allegations or evidence that Regina F. was aware of the abuse while it was going on or that she should have been known about it prior to Sarah's disclosure, she ostracized Sarah and failed to support her, sided with Manuel R. without taking appropriate action, and failed to seek and actively impeded a full and fair investigation.

Matter of Manuel R.
(Fam. Ct., Bronx Co., 11/14/22)
https://nycourts.gov/reporter/3dseries/2022/2022_51192.htm

Practice Note: The Court refers to the child's statements made for purposes of treatment as corroboration. Still, it should be remembered that when statements admissible under a traditional hearsay exception are in and of themselves sufficient to establish abuse or neglect, corroboration is not required. *Matter of Lydia K.*, 112 A.D.2d 306 (2d Dept. 1985), *aff'd* 67 N.Y.2d 681 (1986) (seven-year-old child's statement admitted as spontaneous declaration); *see also Matter of E.H.*, 209 A.D.3d 582 (1st Dept. 2022) (child's statements to hospital staff and doctor did not require corroboration because they were relevant to treatment, diagnosis and discharge); *Matter of Taveon J.*, 209 A.D.3d 417 (1st Dept. 2022) (child's report of domestic violence on tape of 911 call was properly admitted as excited utterance where child was crying during call and at police station after incident, and thus tape did not require corroboration).

* * *

ABUSE/NEGLECT - Hearsay/Statements Relevant To Treatment, Diagnosis And Discharge
- Corroboration

The First Department upholds findings that respondent sexually abused the eldest child and derivatively abused the younger child, concluding that the child's statements to the hospital staff and a doctor were independently admissible and did not require corroboration because they were relevant to her treatment, diagnosis and discharge.

Matter of E.H.
(1st Dept., 10/25/22)

* * *

ABUSE/NEGLECT - Corroboration
- Excessive Corporal Punishment

The First Department upholds findings of sexual abuse and derivative abuse, concluding that the victimized child's out-of-court statements were adequately corroborated where the consistency, detail, and specificity of the statements over time enhanced their reliability; the statements reflected age inappropriate knowledge of sexual behavior and the use of sex toys; the non-respondent father and the caseworker observed the child's fear of the mother and crying; and a sibling who testified described respondent engaging in other sexually inappropriate conduct, such as getting into bed with the child without wearing underwear.

The Family Court also properly found that respondent neglected each of the four children through the infliction of excessive corporal punishment. The mother would smack the children across the face, leaving red handprints on their faces, would hit her two sons with a belt, and on one occasion dragged the older son by his hair and banged his head against the toilet bowl.

Matter of Jolieanna G.
(1st Dept., 2/24/22)

* * *

ABUSE/NEGLECT - Corroboration Of Out-of-Court Statements

The Third Department upholds findings of sexual abuse and derivative abuse, concluding that the child Jacob's out-of-court statements in a videotaped interview and to an agency caseworker were corroborated by the testimony of respondent's adult daughter, who disclosed that she too was sexually abused by respondent several times over the course of two years when she was Jacob's age; and respondent's guilty plea in a criminal prosecution involving a sexual offense against another child.

Matter of Jacob V.
(3d Dept., 5/5/22)

* * *

EVIDENCE - Prior Testimony

The Second Department finds no error where the family court incorporated into the record of the custody and parental access proceeding the testimony of the witness who had testified at the hearing in the family offense proceeding.

A witness's testimony may be incorporated into a later proceeding if it was given under oath, referred to the same subject-matter, and was heard in a tribunal where the other side was represented and allowed to cross-examine. Here, the prior testimony referred to the same subject matter, and the mother was allowed to cross-examine the witness at the earlier hearing, but declined to avail herself of that opportunity when she voluntarily absented herself from that hearing. In addition, the mother had the opportunity to call the witness to testify at the hearing in the custody and parental access proceeding, and, if necessary, to request that the court deem her to be a hostile witness so that the mother could impeach her.

Matter of Aponte v. Jagnarain
(2d Dept., 5/11/22)

Practice Note: CPLR 4517(a) states that "[i]n a civil action, at the trial or upon the hearing of a motion or an interlocutory proceeding, [of] all or any part of the testimony of a witness that was taken at a prior trial in the same action or at a prior trial involving the same parties or their representatives and arising from the same subject matter, so far as admissible under the rules of evidence, may be used" as follows:
(1) by any party for the purpose of contradicting or impeaching the testimony of the same witness;
(2) for any purpose by any party who is adversely interested when the evidence offered is the prior trial testimony of a party, any person who was a party when the testimony was given, or any person who at the time the testimony was given was an officer, director, member, employee, or managing or authorized agent of a party;
(3) by any party for any purpose against any other party, provided the court finds:
(i) that the witness is dead; or
(ii) that the witness is at a greater distance than one hundred miles from the place of trial or is out of the state, unless it appears that the absence of the witness was procured by the party offering the testimony; or
(iii) that the witness is unable to attend or testify because of age, sickness, infirmity, or imprisonment; or
(iv) that the party offering the testimony has been unable to procure the attendance of the witness by diligent efforts; or
(v) upon motion on notice, that such exceptional circumstances exist as to make its use desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court;
(4) the prior trial testimony of a person authorized to practice medicine may be used by any party without the necessity of showing unavailability or special circumstances subject to the right of any party to move for preclusion upon the ground that admission of the prior testimony would be prejudicial under the circumstances.

If only part of the prior trial testimony of a witness is read at the trial by a party, any other party may read any other part of the prior testimony of that witness that ought in fairness to be considered in connection with the part read. CPLR § 4517(b).

In *Aponte*, the court cited *Fleury v Edwards*, 14 N.Y.2d 334 (1964), where the Court of Appeals, adopting a common law rule, asserted that "[e]verything seems to favor a holding that such former testimony of a now deceased witness should be taken when it was given under oath, referred to the same subject-matter, and was heard in a tribunal where the other side was represented and allowed to cross-examine." *See also Guide to New York Evidence*, Article 8, § 8.36 ("At a hearing or trial in a civil proceeding, the testimony of a witness that was taken at a prior hearing or trial or other legal proceeding before a tribunal may be admitted, provided the witness is unavailable due to death or otherwise as a court may determine; the testimony referred to the same subject matter and was given under oath against the party contesting its admission; and the contesting party had the opportunity to be represented by counsel and cross-examine the witness.").

The witness in *Aponte* had not died, and so the Second Department's decision seems to authorize the admission of testimony not covered by a close reading of CPLR § 4517 or the common law rule from *Fleury*. If so, this does not appear to be a problem, since, under *Fleury*, a common-law rule may provide a basis for the admission of former testimony where the statute does not.

* * *

ABUSE/NEGLECT - Corroboration
- Excessive Corporal Punishment

The petition alleges, inter alia, that respondent mother grabbed the child B. by the neck, pushed her against the wall and punched her in the face during an argument; that non-respondent father walked into the living room and saw B. kneeling on the floor and crying; and that respondent stated that she pulled B. by the arm out of her adult sibling's bedroom during an argument with the adult sibling's girlfriend.

Upon a virtual hearing, the Court dismisses the petition, concluding that B.'s out-of-court statements are not corroborated. The statements made by non-respondent father to law enforcement officers, as detailed in police records, are hearsay statements that do not fall under a hearsay exception. The child J.'s out-of-court statements do not cross-corroborate B.'s statements since J. stated only that he heard his sister crying and then found her in the living room crying. The criminal complaint that includes out-of-court statements provided by B. under oath does not corroborate her statements, and repetition by a child of out-of-court statement is not sufficient corroboration. Police records contain two black and white photographs, but the Court cannot see any injuries, marks or bruises in the photographs. Respondent's testimony that she took B. out of her sibling's room while grabbing her by her arm does not corroborate B.'s account.

The Court also concludes that grabbing a child by the arm to take her out of a room after asking the child approximately five times to leave the room does not exceed the physical force parents are entitled to use to promote discipline.

Matter of J.E. and B.E.
(Fam. Ct., Bronx Co., 2/7/22)
https://nycourts.gov/reporter/3dseries/2022/2022_50090.htm

* * *

ABUSE/NEGLECT - Domestic Violence
- Evidence/Sealed Criminal Records
- Central Register/Agency Investigation

In this Article 78 proceeding, the Third Department upholds a finding of maltreatment by the agency where, regardless of whether petitioner actually choked the child's mother, he engaged in a physical altercation with her in front of the children while he was attempting to get a baby out of the car seat. He also threw the mother's keys across the street, prompting the mother's six-year-old child to cross the street, unsupervised, to retrieve them. The children witnessed and were in close proximity to the altercation and the two older children were "screaming and crying."

The Court rejects petitioner's assertion that his due process rights were violated by consideration of criminal charges that were sealed. Petitioner placed the underlying conduct at issue by bringing this proceeding and relying on the fact that the criminal charges were dismissed, and thus waived for purposes of this proceeding any protections afforded by CPL § 160.50.

The Court also rejects petitioner's argument that his due process rights were violated by the six-month delay in finalizing the indicated report. Under SSL § 424(7), the agency has sixty days to determine whether a report of abuse or maltreatment is indicated or unfounded. However, this time limit is directory, not mandatory, and a petitioner is not entitled to have the agency's determination vacated because of delay absent a showing of substantial prejudice. A caseworker indicated that the delay was attributable to high caseloads, and petitioner has not established any prejudice.

Matter of Jeffrey O. v. New York State Office of Children and Family Services
(3d Dept., 7/14/22)

Presumption Of Abuse/Neglect

ABUSE/NEGLECT - Presumption Of Abuse

The then six-month-old child was brought to the hospital in respiratory distress and was found to have injuries consistent with abusive head trauma. The child's chest X ray also showed that she had multiple healing rib fractures. DSS commenced these FCA Article Ten proceedings alleging, inter alia, that the mother abused the child and derivatively neglected her other seven children. At a fact-finding hearing, a case worker testified that the mother and her boyfriend were the child's only two custodians. In response to DSS's case, the mother testified on her own behalf and asserted that her boyfriend had shaken the child, and denied doing anything she believed would cause the child to sustain multiple rib fractures. The family court found that the mother had abused the child and derivatively neglected the other seven children.

The Second Department affirms. The mother did not present any evidence to rebut the presumption of culpability.

Matter of Amaris A.A.
(2d Dept., 11/30/22)

* * *

ABUSE/NEGLECT - Presumption Of Abuse/Fractures And Other Injuries

The two-year-old child presented to the hospital with serious illness resulting from an esophageal perforation, and with healing or healed left rib fractures, older healing or healed right rib fractures, thoracic vertebral abnormality, bruising, and a right wrist fracture. The family court found insufficient evidence that the wrist fracture occurred prior to the child's hospitalization, but found that the evidence concerning the other injuries established abuse.

The First Department affirms. The mother's broad testimony that the child's three-year-old brother played roughly with him was not sufficiently specific to establish that the rib fractures, sustained in more than one incident, or the vertebral condition, were accidental. Respondents' expert testified that the perforated esophagus was more likely than not caused by accidental trauma, such as ingestion of a sharp object, but no such object was found.

Each of the child's conditions would have caused pain, according to petitioner's expert, but medical treatment was not sought.

Matter of Jacob V.
(1st Dept., 3/3/22)

Findings Of Fact

ADOPTION - Findings Of Fact

The Third Department upholds an adoption, noting, inter alia, that the Family Court did not improperly delegate its responsibility to make factual findings when it adopted petitioners' proposed findings of fact in total.

The court directed the parties to submit their own proposed findings of fact, and it was permitted to receive them and pass upon them. The mere fact that the court adopted petitioners' proposed findings of fact does not establish that it did not undertake an independent evaluation of the record.

However, "a court's wholesale copying of the prevailing party's proposal, although occasionally allowable, is rarely advisable, particularly in such a delicate case. The better practice is for a court to craft its own decision 'stat[ing] the facts it deems essential' (CPLR 4213 [b]), even if it incorporates many of the findings submitted by one party…."

Matter of Baby S.
(3d Dept., 2/24/22)\

Disposition/Post-Disposition/Permanency/Court-Ordered Services/Reasonable Efforts

PERMANENCY HEARINGS

The First Department affirms an order which, after a permanency hearing, continued the kinship foster care placement of the child.

This neglect proceeding arose when the then thirteen-year-old child's stepfather allegedly engaged in an exchange of electronic messages which appeared to involve discussion of soliciting oral sex from the child and threats of rape or harm to the mother. When the child told respondent mother about the sexual advances, the mother initially reported it to authorities, but later accepted the stepfather's claim that the matter was just a "misunderstanding" and declined to exclude him from the family home.

At the time of the order of disposition, respondent stepfather, who had consented to a finding of neglect without admission pursuant to FCA § 1051(a), had taken very limited responsibility for his conduct and had not begun to participate in a sex offender program, which was a condition of the order, and, at the time of the permanency hearing, still had not meaningfully engaged in or completed a sex offender program. The mother had demonstrated little insight into the incident that precipitated this case and led to the child's removal, and claimed not to know the basis of the neglect finding against the stepfather and that his conduct had not emotionally harmed the child.

Matter of N.V.
(1st Dept., 3/15/22)

* * *

ABUSE/NEGLECT - Reasonable Efforts

A Nevada state statute relieves a child welfare services agency from its duty to provide reasonable efforts to reunify a child with his or her parent if a court finds that the parental rights of that parent were involuntarily terminated with respect to a sibling of the child. The trial court found that this statute violates due process because it could lead to a presumption that the parent is unfit, for purposes of terminating the parent-child relationship, without any consideration of present circumstances.

The Nevada Supreme Court holds that the statute, insofar as it relieves an agency of making reunification efforts, does not infringe on the fundamental liberty interest a parent has in the care and custody of his or her child and therefore does not violate due process. The statute involves neither the removal of a child from a parent's custody or the termination of parental rights.

Washoe County Human Services Agency v. Second Judicial District Court
2022 WL 17998020 (Nev., 12/29/22)

* * *

ABUSE/NEGLECT - Disposition/Modification

The Department of Social Services moves pursuant to FCA § 1061 to modify the dispositional order from a release to the non-respondent father to a supervision order and a return of the infant child to respondent mother. DSS alleges that the mother successfully completed the required parent educator classes and substance abuse treatment; is currently participating in parenting classes; has stable housing suitable for the child; and is currently attending mental health treatment.

The father alleges in conclusory fashion that the child has been in his sole care and custody for the last twelve months and is currently thriving in his home; that the mother was recently adjudicated for neglecting the child and, while she has taken steps to remedy the situation which created the neglect, she has not fully addressed all of those concerns; and that despite an order of protection, she is still in contact with a named respondent would be unwilling or unable to ensure he has no contact with the child.

The Court grants the motion, finding good cause.

Matter of A.B.
(Fam. Ct., Oswego Co., 4/8/22)
https://nycourts.gov/reporter/3dseries/2022/2022_50251.htm

* * *

ABUSE/NEGLECT - Motion To Vacate Dispositional/Fact-Finding Orders

The Second Department reverses an order that, in effect, denied the mother's motion pursuant to FCA § 1061 to modify an order of disposition so as to grant a suspended judgment and vacate an order finding that she neglected the children, and grants the motion.

The mother demonstrated her lack of a prior child protective history, her remorse and insight into how her actions affected the children, her commitment to ameliorating the issues that led to the finding of neglect, and her compliance with court-ordered services and treatment.

Matter of Nila S.
(2d Dept., 2/2/22)

* * *

ABUSE/NEGLECT - Disposition/Orders Of Protection

The Fourth Department concludes that the dispositional orders of protection issued against respondent stepmother in favor of the children with a duration of five years violate both FCA § 1056(1) because no other dispositional orders were issued, and § 1056(4) since the stepmother, although no longer living in the home, remains married to the children's mother. Moreover, the court erred in issuing the orders of protection without first holding a dispositional hearing.

Matter of Kayla K.
(4th Dept., 4/22/22)

Appeals

ABUSE/NEGLECT - Appeal/Mootness

The Fourth Department dismisses as moot the mother's appeal from an order that temporarily removed two children and modified a prior order temporarily removing a third child, and placed all three children in petitioner's custody during the pendency of the neglect proceeding, where the Family Court has since entered an order determining that respondents neglected the children and placing the children in petitioner's custody.

Since a temporary order of removal is not a finding of wrongdoing, the exception to the mootness doctrine does not apply.

Matter of Destiny F.
(4th Dept., 11/10/22)

Practice Note: If, as in *Destiny F.*, the family court has issued a fact-finding order and an appeal has been rendered moot because the challenged removal order has been superseded, it also makes sense for the appellate court to decline to invoke an exception to mootness, since the suggestion of misconduct that flows from a temporary removal order is no more likely to affect future custodial determinations than the fact-finding order. *See also Matter of Makayleigh A.*, 146 A.D.3d 1103 (3d Dept. 2017); *Matter of Maiea P.*, 49 A.D.3d 291 (1st Dept. 2008).
However, in declining to invoke the mootness exception in *Destiny F.* and in *Makayleigh A.*, the courts stated more broadly that the removal did not constitute a finding of wrongdoing. At least in cases in which there has been no fact-finding, the Second Department does not agree. In Matter of C. Children, 249 A.D.2d 540 (2d Dept. 1998), the court noted that although the parents' appeal from the order would ordinarily have to be dismissed as academic because the children were subsequently returned to their home, the underlying imminent risk finding constituted a permanent and significant stigma which might indirectly affect the parents' status in potential future proceedings. *See also Matter of Emmanuela B.*, 147 A.D.3d 935 (2d Dept. 2017) (father's appeal from FCA § 1027 order not academic where child had been returned to father).
Apparently, it did not matter to the Second Department that an order returning a child could negate or at least mitigate the negative impact of the removal order in another proceeding. In contrast, in *Matter of Javier R.*, 43 A.D.3d 1 (1st Dept. 2007), the First Department, declining to follow *Matter of C. Children*, concluded that it was not enough that there might be a future proceeding against the father in which the judge, for some unexplained reason, might hold it against the father that an application to return the child was denied even though the same application was subsequently granted. Similarly, in *Matter of Cali L.*, 61 A.D.3d 1131 (3d Dept. 2009), where the neglect petition had been dismissed after a hearing, the Third Department stated that removal does not constitute a finding of wrongdoing, but added that any aspersion cast upon the mother's parenting abilities by temporary removal would be mitigated, if not eliminated, by the family court's finding that there was insufficient evidence of neglect.

* * *

APPEAL - Record On Appeal/Gaps In Transcript
FAMILY OFFENSES

In this family offense proceeding, the Third Department concludes that gaps in the record make meaningful review on appeal an impossibility where the transcript of the hearing reflects that respondent's counsel posed over 80 questions to respondent's mother and that the parties and the court could hear her answers, the transcript provides the witness's answer to only four of those questions, with 77 answers reported as "[i]naudible."

The family court should use a court reporter upon remittal in order to avoid the unintended results that arose from the electronic recording of the first hearing.

Matter of Jereline Z. v. Joseph AA.
(3d Dept., 4/28/22)

Foster Care Re-Entry

FOSTER CARE - Motion Seeking Foster Care Re-Entry

The First Department finds no error in the family court's denial of the attorney for the child's motion seeking the youth's return to foster care pursuant to FCA § 1091.

The family court, noting the supreme court's decision in a criminal prosecution not to grant youthful offender status, concluded that it had no information indicating that the youth could be released from incarceration if ordered to return to foster care. The family court noted that even taking into account that the youth had been incarcerated since May 2019, the mandatory sentencing guidelines might still require him to be incarcerated beyond his 21st birthday.

Although the AFC makes sound arguments as to why a return to foster care would be in the youth's best interests once he is released from incarceration - foster care would provide him with the prospect of stable housing, educational and vocational support, services and mental health medication and treatment - but the AFC can only speculate when the youth might be released.

Matter of Kamonie U.
(1st Dept., 4/5/22)

III. FOSTER CARE/TERMINATION OF PARENTAL RIGHTS/ADOPTION

TPR: Surrenders

TERMINATION OF PARENTAL RIGHTS - Conditional Surrender/Motion To Vacate

The Second Department concludes that the child Elizabeth lacked standing to file a petition seeking to vacate a judicial surrender of her two siblings because of a failure of a material condition. Under FCA § 1055-a(a), such a petition may be filed by the relevant agency, by the parent, and by the "attorney for the child." The reference to "the child" means the child who is the subject of the judicial surrender that is under review. Elizabeth had standing pursuant to Domestic Relations Law § 71 to apply for sibling visitation, and was granted such visitation.

Matter of Elizabeth W.
(2d Dept., 8/24/22)

TPR: Petition And Mandatory Filing

TERMINATION OF PARENTAL RIGHTS - Mandatory Filing/Permanency Goal

In this termination of parental rights proceeding, the Court grants the mother's motion to dismiss as to the three younger children, noting that although Social Services Law § 384-b(7) directs the filing of a petition based upon permanent neglect when the children have been in care for 15 of the most recent 22 months, it is improper to proceed when the permanency goal is return to parent. The Department remains obligated to work with respondent mother towards the goal of returning the three younger children to her. The Department cannot be deemed to be reasonably working toward the stated goal of returning the children to the mother while at the same time prosecuting a termination proceeding.

The motion to dismiss is denied as to the older children. At the culmination of the most recent permanency hearing, the Court changed the permanency goal for the older two children to placement for adoption and the filing of a termination of parental rights petition.

Matter of SM
(Fam. Ct., Albany Co., 10/26/22)
https://nycourts.gov/reporter/3dseries/2022/2022_51157.htm

TPR: Right To Counsel

TERMINATION OF PARENTAL RIGHTS - Right To Counsel

In this termination of parental rights proceeding, the Fourth Department concludes that the mother was not deprived of effective assistance of counsel by her attorney's failure to present her as a witness. The mother failed to demonstrate the absence of strategic or other legitimate explanations for counsel's alleged shortcoming.

Matter of Faith K.
(4th Dept., 3/11/22)

* * *

TERMINATION OF PARENTAL RIGHTS - Motion To Vacate/Right To Hearing
- Right To Counsel

In this permanent neglect proceeding, respondent mother moved in the family court to vacate the order of disposition, arguing, among other things, that her admission was legally insufficient to support a finding, and that she received ineffective assistance of counsel in that she was not made aware of the burdens or standard of proof at trial before she entered her admission and that she "made the statements … because [she] was advised that it was necessary in order to have [her] children returned." The court, without a hearing, denied the motion.

The Second Department reverses and remits for an evidentiary hearing. The right to a hearing upon a motion to vacate made pursuant to CPLR 5015 is predicated upon the existence of a fact not appearing on the face of the record which, if true, would entitle the party to the relief sought.

Here, the family court did not ameliorate counsel's alleged deficiencies in its colloquy with the mother, and also omitted any reference to the possible consequences of the finding, including termination of the mother's parental rights. Without information regarding the off-the-record communication between the mother and her counsel, it is impossible for this Court to determine whether the mother has a viable claim for ineffective assistance of counsel.

Matter of Skylar P. J.
(2d Dept., 4/27/22)

Hearings/Right To Be Present

TERMINATION OF PARENTAL RIGHTS - COVID-19 Virtual Hearing

The Massachusetts Supreme Judicial Court orders a new trial in this termination of parental rights proceeding, concluding that the virtual hearing conducted via Zoom during the COVID-19 pandemic violated the self-represented mother's right to due process under the Federal and State Constitutions.

The government's significant interest in protecting the public health during the pandemic, combined with the interest in timely providing permanency and stability for children, would, in many instances, outweigh a self-represented parent's interest in appearing in person so long as safeguards are in place and monitored by the judge to minimize the risk of an erroneous deprivation. Accordingly, if necessary safeguards are provided and monitored, a termination trial conducted via an Internet-based video conferencing platform when, because of the COVID-19 pandemic, in-person proceedings are not possible without jeopardizing the health and safety of the public, is not a per se violation of a parent's right to meaningfully participate, even where the parent is self-represented and only able to participate by telephone.

Here, it appears that no steps were taken in advance to determine whether the mother possessed the technology necessary to connect to Zoom, by video or otherwise. When it was determined on the first day of trial that she did not have video capacity, the judge immediately defaulted to having her participate by telephone. At the very least, the judge should have determined what technology she might have available that would allow her to connect by video and, if she did not have any, whether it was possible to assist her in obtaining access to such technology.

It is not clear whether the Zoom video conferencing platform had a private "breakout room" function that would have allowed the mother to consult with stand-by counsel, and, in any event, the record does not reflect that the judge provided an explanation of what a breakout room is and how it can be requested and used during a trial, which should be part of the instructions provided before the commencement of a virtual trial.

The record also does not reflect any consideration as to how documents and exhibits would be shared with the mother. The platform typically has a "share screen" function, which permits participants to show electronic documents to the other participants. If a participant does not wish to or cannot use this function, he or she can hold a physical document in front of the camera to display it to the other participants. Documents and other exhibits could have been exchanged in advance, so that everyone had a copy and could follow when a particular document or exhibit was used to question a witness.

The telephone solution did not allow the mother to meaningfully participate. Almost as soon as the first witness started to testify, the mother was disconnected and had to be readmitted from the waiting room by the clerk. Then, she was disconnected from the trial altogether at the direction of the judge when it was her turn to question the first witness and she was unresponsive. Her explanation that her cellular telephone service on the first day was "really bad" stands unchallenged.

A recess of one-half hour was taken after the judge had the mother disconnected, and a clerk attempted to contact her and left a message on her telephone. When the recess was over and the mother had neither reconnected nor responded to the outreach, the judge concluded that he did not "have any choice but to continue" without her. The proper course was to suspend the trial until the cause of the mother's absence could be determined.

On the second day of trial, the judge offered the mother the chance to cross-examine the witnesses from the first day, but she had heard only a portion of the testimony of one of those witnesses, if that. Thus, it was unreasonable to expect her to be in a position to conduct meaningful cross-

examination. The trial could have been suspended for a short time to allow the mother to review the testimony of the three witnesses, and then reconvened to allow her to conduct cross-examination.

Adoption of Patty
2022 WL 1446880 (Mass., 5/9/22)

* * *

TERMINATION OF PARENTAL RIGHTS - Virtual Hearing

In this termination of parental rights proceeding in which a virtual hearing was held, the Connecticut Supreme Court rejects the mother's contention that she has an unqualified state constitutional right to an in-person courtroom trial.

In re Annessa J.
343 Conn. 642 (Conn., 6/20/22)

TPR: Direct Placements

T*ERMINATION OF PARENTAL RIGHTS - Permanent Neglect/Direct Placement*

In this permanent neglect proceeding, the Third Department reverses an order dismissing the petition, and finds sufficient evidence of permanent neglect, where the family court found "overwhelming evidence" but dismissed the petition on the ground that the child had been residing with a "suitable person" and not in the care of an authorized agency. Although petitioner prevailed in an abandonment proceeding commenced while this appeal was pending, the Court applies the exception to the mootness doctrine.

Regarding the phrase "care of an authorized agency," courts have consistently held that a direct placement authorized by the family court falls within the purview of SSL § 384-b. Petitioner evaluated the child's caretaker, performing a background check and interview, before ultimately approving her as a suitable person to care for the child. She agreed to comply with monitoring and petitioner's requests, and submitted to the family court's jurisdiction. There was close involvement and coordination between petitioner and the caretaker.

Matter of Frank Q.
(3d Dept., 4/28/22)

TPR: Abandonment

TERMINATION OF PARENTAL RIGHTS - Abandonment

The Third Department reverses an order terminating parental rights on abandonment grounds, noting that the father filed numerous motions seeking to resume visitation, the return of his children, to intervene in the neglect proceeding against the mother, and to terminate the children's placement; remarked during at least one court appearance that he would continue to "battle" for

the return of his children, which prompted the family court to admit that the father had been an active participant during the entire proceeding; had several visits with the children where he inquired if he could obtain their school records and asked what clothing or supplies they needed; and made several inquiries to the caseworker and the mother, including during the delay caused by the pandemic.

Also, petitioner has acted in a manner that has prevented or discouraged the father from visiting and communicating with the children. The caseworker or the coordinator cancelled scheduled visits due to the father's late confirmation of the visit or arrival, including one incident where the father was three minutes late to confirm an appointment for later that day. Petitioner knew that the father worked during the time he was required to confirm his visits, but the caseworker and the coordinator refused to accommodate his reasonable requests to extend the time within which he had to confirm the visits, which were scheduled to occur several hours later. Although the father cancelled one visit due to illness, attended five visits and had seven visits cancelled on him as described above, the caseworker erroneously reported to the court that the father had attended only four out of twenty scheduled visits, and, as a result, petitioner was successful in obtaining an order suspending the father's visits. The Court "recognize[s] respondent's growing frustration with petitioner's conduct, combined with the chilling effects of the pandemic … and the kinship placement with the maternal grandmother, who notably did not have an amicable relationship with respondent."

Matter of Syri'annah PP.
(3d Dept., 1/19/23)

* * *

TERMINATION OF PARENTAL RIGHTS - Abandonment

The Second Department upholds an order terminating the father's parental rights due to abandonment, concluding that the father failed to demonstrate that injuries he allegedly sustained and the COVID-19 pandemic restrictions so permeated his life that contact with the children was not feasible. He did not submit documentary evidence to substantiate the length, severity, or extent of his injuries, or the effect the pandemic restrictions had upon him.

Matter of Anton T.H.
(2d Dept., 1/11/23)

* * *

TERMINATION OF PARENTAL RIGHTS - Abandonment

The Third Department upholds an order terminating parental rights on grounds of abandonment, noting, inter alia, that even if respondent's counsel advised him not to incriminate himself during the pendency of a related criminal action, and there was an order of protection prohibiting respondent from directly contacting the child, respondent was nonetheless obligated to maintain contact with the petitioning agency.

Matter of Taj'ier W.
(3d Dept., 10/27/22)

* * *

TERMINATION OF PARENTAL RIGHTS - Abandonment

In this termination of parental rights proceeding, the Second Department finds insufficient evidence of abandonment where the mother visited with the children on two occasions and saw the children on at least one additional occasion at a family gathering; purchased clothing for the children; spoke with the case worker on the phone multiple times; and objected to the goal changing to kinship adoption rather than return of the children to the mother.

The Court also notes that there was testimony from a case worker that, during family visits subsequent to the filing of the petitions, the mother's interactions with the children were "very positive." While a parent's conduct outside the abandonment period is not determinative, it may be relevant to assessing parental intent.

Matter of Grace E. W.-F.
(2d Dept., 5/11/22)

TPR: Diligent Efforts

TERMINATION OF PARENTAL RIGHTS - Diligent Efforts

In this termination of parental rights proceeding, the Fourth Department rejects the father's contention that petitioner was required, as part of its diligent efforts obligation, to forgo requiring the father's participation in a sex offender program or to formulate an alternative plan to accommodate his refusal to admit his role in the events that led to the removal of the child.

Matter of Ayden D.
(4th Dept., 2/4/22)

TPR: Disposition/Intervention

TERMINATION OF PARENTAL RIGHTS - Prior Involuntary Termination
- Disposition/Best Interests

The mother's parental rights were terminated pursuant to a statute that provides for termination where "[t]he respondent's parental rights over a sibling of the child who is the subject of the petition [had] been involuntarily terminated in a prior proceeding." The Family Court also found that termination was in the best interests of the child.

The mother argues on appeal that the statute violates her right to due process under the federal and state constitutions because it creates a presumption that she is unfit to parent any child presently solely because her parental rights over older children were previously terminated in North Carolina. The mother also argues, inter alia, that the statutory "best interest" of the child factors do not sufficiently address a parent's present ability to provide adequate care for the child.

The Delaware Supreme Court upholds termination of the mother's parental rights. The mother's claim regarding the statutory presumption was rejected in a previous case, where the Court noted that, by requiring the agency to prove by clear and convincing evidence that termination is in the child's best interests, the statute permits inquiry into a parent's fitness to rear the particular child whose custody is at issue, and thus protects against an erroneous deprivation of parental rights.

With respect to the mother's best interest argument, the Court notes that the statute calls for a broad, flexible inquiry to be made in determining what is in the best interests of a child for purposes of termination of parental rights. The best interests factors give the trial court ample discretion.

Brock v. Department of Services for Children, Youth, and their Families
2022 WL 405911 (Del., 2/10/22)

Adoption: Standing To Adopt/Discrimination

ADOPTION - Unmarried/Same-Sex Couples

In September 2010, New York State amended Domestic Relations Law § 110 to codify the right to adopt by unmarried adult couples and married couples regardless of sexual orientation or gender identity. Subsequently, the OCFS informed authorized adoption agencies in New York that the amendment brought the Domestic Relations Law into compliance with existing case law and was "intended to support fairness and equal treatment of families that are ready, willing and able to provide a child with a loving home." Adoption agencies were advised that discrimination based on sexual orientation in the adoption study assessment process is prohibited. In November 2013, OCFS promulgated 18 NYCRR § 421.3(d), which prohibits "discrimination and harassment against applicants for adoption services on the basis of race, creed, color, national origin, age, sex, sexual orientation, gender identity or expression, marital status, religion, or disability" and requires that agencies authorized by New York to provide adoption services "shall take reasonable steps to prevent such discrimination or harassment by staff and volunteers, promptly investigate incidents of discrimination and harassment, and take reasonable and appropriate corrective or disciplinary action when such incidents occur."

Plaintiff New Hope Family Services, Inc. commenced this civil rights action challenging the constitutionality of the OCFS interpretation and application of 18 NYCRR § 421.3(d). A summary of the Second Circuit's previous decision in this litigation appears below.

The Court now denies OCFS's motion for summary judgment, grants New Hope's motion for summary judgment, and enjoins OCFS from enforcing 18 NYCRR § 421.3(d) insofar as it would compel New Hope to process applications from, or place children for adoption with, same-sex couples or unmarried cohabitating couples, and insofar as it would prevent New Hope from referring such couples to other agencies.

New Hope Family Servs., Inc. v. Poole
(NDNY, 9/6/22)
https://adfmedialegalfiles.blob.core.windows.net/files/NewHopeSJopinion.pdf

* * *

ADOPTION - Same-Sex/Unmarried Couples

On September 6, 2022, in another action commenced by New Hope Family Services, this Court granted New Hope's motion for summary judgment and a permanent injunction enjoining OCFS from enforcing 18 NYCRR § 421.3(d) insofar as it would compel New Hope to process applications from, or place children for adoption with, same-sex couples or unmarried cohabitating couples, and insofar as it would prevent New Hope from referring such couples to other agencies. The Court concluded that § 421.3(d) compelled or prohibited New Hope's speech, and was not narrowly tailored to advance the state's compelling interests.

In this action commenced on September 17, 2021, New Hope challenges, as a violation of the First and Fourteenth Amendments, an active threat by the New York Division of Human Rights to investigate and penalize New Hope for its faith-based choice to devote its private energies and resources to placing infants with couples consisting of a mother and father committed to each other in marriage. New Hope moved for a preliminary injunction enjoining defendants from directly or indirectly enforcing New York Executive Law § 296(2)(a) (Unlawful discriminatory practices) and New York Civil Rights Law § 40-c(2) (Discrimination) against it for publicly explaining its religious beliefs concerning marriage, family, and the best interests of children; or for engaging in or publicly explaining its constitutionally protected practice of working with and placing children with only married couples comprising a mother and a father.

The Court, concluding that New Hope is not a "public accommodation" under the statutes, grants New Hope's motion for a preliminary injunction, and enjoins defendants from directly or indirectly enforcing Executive Law § 296(2)(a)or Civil Rights Law § 40-c(2) against New Hope insofar as they would impose any penalty on New Hope for referring same-sex couples or unmarried cohabitating couples to other agencies rather than providing them adoption services.

New Hope Family Servs. v. James
(NDNY, 9/28/22)
https://casetext.com/case/new-hope-family-servs-v-james?utm_source=ALM&utm_medium=caselaw

IV. CUSTODY/GUARDIANSHIP/VISITATION

Jurisdiction And Venue/Service Of Process

CUSTODY - Hague Convention

Under the Hague Convention on the Civil Aspects of International Child Abduction, if a court finds that a child was wrongfully removed from the child's country of habitual residence, the court ordinarily must order the child's return. Under one of the exceptions to that rule, a court has discretion and is not bound to order a child's return if it finds that return would put the child at a grave risk of physical or psychological harm.

In exercising this discretion, courts often consider whether any "ameliorative measures" undertaken by the parents or by the authorities of the state having jurisdiction over the question of custody could reduce the risk associated with a child's repatriation. The Second Circuit has made this a requirement, mandating that district courts examine the range of options that might make possible the safe return of a child before denying return due to grave risk.

The Supreme Court concludes that the Second Circuit's categorical requirement is inconsistent with the text and other express requirements of the Hague Convention. A district court reasonably may decline to consider ameliorative measures that have not been raised by the parties, are unworkable, draw the court into determinations properly resolved in custodial proceedings, or risk overly prolonging return proceedings, and exercise its discretion to consider ameliorative measures in a manner consistent with its general obligation to address the parties' substantive arguments and its specific obligations under the Convention.

Golan v. Saada
2022 WL 2135489 (U.S. Sup. Ct., 6/15/22)

* * *

SERVICE OF PROCESS

The Second Department holds that service of process upon defendant Bressler at an address that was not actually his dwelling place or usual place of abode was defective, notwithstanding contrary representations made to the process server at the doorstep by defendant's daughter. While the process server's testimony satisfied plaintiff's prima facie burden to prove proper service, Bressler's evidence established that process was not effectuated at a location authorized by CPLR 308(2).

For a defendant to be estopped from raising a claim of defective service, the conduct misleading the process server must be the defendant's conduct, as distinguished from conduct of a third party.

Everbank v. Kelly
(2d Dept., 2/2/22)

* * *

CUSTODY - UCCJEA/Temporary Emergency Jurisdiction

The mother moved to dismiss the father's custody petition on the ground that the Family Court lacked jurisdiction under the UCCJEA, as Michigan is the child's home state. She argued that the father's neglect and abuse allegations had been investigated by the Michigan Department of Health and Human Services, which had found that they were not supported by a preponderance of the evidence. The Family Court stated that it had communicated with the Michigan court and agreed that New York lacked jurisdiction. Relying on the written MDHHS report, the court declined to hold a hearing to determine whether the risk of imminent harm to the child warranted an exercise of temporary emergency jurisdiction.

The Third Department agrees with the AFC and the father that the father's petition alleged sufficient facts to warrant a hearing regarding imminent risk. The Family Court erred in relying on the unsigned and redacted MDHSS report containing vague and contradictory hearsay statements made by an MDHSS caseworker. The MDHSS report reflects a less-than-thorough investigation that failed to address all the father's allegations.

Matter of Chester HH. v. Angela GG.
(3d Dept., 8/18/22)

* * *

CUSTODY - Jurisdiction/Forum Non Conveniens

The First Department upholds the dismissal of the mother's custody petition on grounds of forum non conveniens, noting, inter alia, that while the mother asserts that she lived with the child in New York for eight years, whereas the father has lived in California with the child since March 2020, she does not state what evidence from her years here would be probative of the relief she seeks now, namely the child's relocation to Norway; and that because of the child's living and school situation, and his family and other relationships, the court properly considered that evidence relating to the child's development and emotional well-being lies primarily in California.

Matter of Adam N. v. Darah D.
(1st Dept., 3/22/22)

* * *

VENUE

The parties to this divorce action primarily resided in New York County, while maintaining a seasonal second home in Southampton. In March 2020, during the COVID-19 pandemic, defendant retreated to the Southampton residence along with her pregnant and immunocompromised daughter and began spending more time there in order to assist the daughter during the pregnancy and after the child's birth. Prior to 2020, the parties stayed in the Southampton house on weekends in the summer, with limited exceptions.

In August 2020, the plaintiff commenced this action in Suffolk County, on the ground that the parties were residents of Suffolk County. Defendant moved pursuant to CPLR 510 and 511 for a change of venue from Suffolk County to New York County, and the Supreme Court denied the motion.

The Second Department reverses, concluding that sheltering in place in a seasonal home did not create a sufficient degree of permanence to establish residency at that location under the circumstances of this case.

Fisch v. Davidson
(2d Dept., 3/9/22)

Confidentiality: Public Access To Court And Records

CUSTODY - Discovery/Central Register Records
- Contempt
CONFIDENTIALITY - Central Register Records

Seeking modification of a visitation order, the father alleged that the mother had made numerous false reports of child abuse or neglect against him, which were determined to be unfounded. As the subject, the father is entitled to receive access to the sealed reports (SSL § 422[5][a][iv]). The family court issued a subpoena directing ACS to provide the father with complete investigation progress notes and reports of suspected child abuse or maltreatment. ACS did not challenge the subpoena or move for a protective order, but produced the documents with the name of the source or sources of the reports redacted. The father moved for contempt, and ACS represented that it would produce unredacted documents but then produced the identical redacted documents. When the father again moved for contempt or an order compelling production, the court declined to review the documents in camera and denied the father's motion, finding the documents would not be admissible.

The First Department reverses, concluding that the father made a prima facie showing of the elements of contempt. The issue of whether the documents will be admissible is not relevant to the discovery issue.

Although ACS asserted that SSL § 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," there was no indication that such a determination had been made. The matter is remanded for the court to make determinations regarding redaction and contempt.

Matter of Michael Y. v. Dawn S.
(1st Dept., 1/17/23)

* * *

CONFIDENTIALITY - Records Of Proceeding/First Amendment

The First Department upholds the denial of a motion for access to the parties' motion papers submitted in connection with an order entered in a matrimonial action directing the website Leagle.com to take down an appellate decision that was later recalled and vacated.

The motion papers at issue fall within the ambit of Domestic Relations Law § 235(1). This Court recalled a prior decision originally published under a caption with the parties' full names, and granted plaintiff's motion seeking confidentiality to the extent of reissuing the same decision using only the parties' initials. The Supreme Court directed Leagle.com to take down the recalled decision in furtherance of this Court's order granting the parties limited anonymity. Under these circumstances, there is no "good cause" to grant public access to the underlying motion papers, which were deemed confidential by law (see Domestic Relations Law § 235[1]; 22 NYCRR 1250.1[e][2][ii]).

There is no First Amendment right to access since there was no "gag order" and modification of the case caption is designed to protect the privacy of the parties and their minor child.

F.L. v. J.M.
(1st Dept., 10/6/22)

* * *

CUSTODY - Contempt/"No Talk Order"
- Right Of Press Access/Closure

The Court issued a No Talk Order which directed the wife to "refrain from having any discussions or interviews whatsoever with the press about the parties' children … the custody proceeding pending before the Court or her motivation for giving interviews insofar as it concerns the Children." Within days of issuance of the No Talk Order, the wife engaged in interviews with various media outlets during which she spoke of the children, including where they attend school and by whom and how their tuition is paid; this custody proceeding; and the husband's purported interference with her custodial rights.

The Court grants the husband's civil contempt motion. The Court may decide the motion without a hearing, as the husband expressly requested the subject relief in his motion papers and the wife was afforded an opportunity to be heard and to oppose the motion. The wife's claim that the language of the No Talk Order is "broad" and "unclear" is wholly undermined by her express consent to it. Indeed, she is estopped from now asserting a new position.

The beneficiaries of the No Talk Order are the children. The husband has sole legal and physical custody - albeit temporary - and thus has standing to move for contempt on the children's behalf and is entitled to recover his costs and expenses, consisting of reasonable counsel fees.

The Court also determines that the custody trial should be closed and shielded from press access, and all evidence and testimony related to the proceeding shall be sealed. The children have been directly harmed by the wife's public disclosure of their personal and private information and

relationships. "Any claim that the damage has already been done by Wife's disclosures, and that allowing the press into the custody trial will not further harm the children, callously overlooks that further subjecting these children to public scrutiny and embarrassment will only exacerbate their emotional injuries." The public has little, if any, interest in the private, sensitive information regarding the children. The husband's family relationship with a public figure, although titillating, has nothing to do with the children's physical, mental, and emotional lives and their relationship with their parents.

B.W. v. J.W.
(Sup. Ct., N.Y. Co., 10/10/22)
https://nycourts.gov/reporter/3dseries/2022/2022_51183.htm

Medical And Mental Health Issues/Evaluations/Discovery

CUSTODY - Confidentiality/Court-Ordered Mental Health Evaluations

In connection with his request for joint legal and physical custody of the child, the father quoted from and referenced the contents of a confidential, court-ordered psychological evaluation undertaken during the mother's previous marital dissolution. The court issued sanctions against the father in the amount of $10,000 and his attorney in the amount of $15,000. The attorney challenged the sanctions, and a different court heard and rejected the attorney's challenge.

Upon the attorney's appeal, a California appeals court affirms, rejecting the attorney's claim that the confidentiality statute authorizes sanctions only for parties. If the statute applied only to parties, a party could simply share the information with counsel for the purpose of disclosing it without consequence. This outcome would discourage honesty during a custody evaluation, making it more difficult for the court to determine the best interests of the child.

Shenefield v. Shenefield
2022 WL 573036 (Cal. Ct. App., 4th Dist., 2/25/22)

* * *

CUSTODY - Medical Decision-Making/Covid 19 Vaccination

Pursuant to the terms of the parties' stipulation of settlement, the parties share joint legal and residential custody of the children. The father has received the Covid-19 vaccination, and the mother has not. The father wants all three children to be vaccinated, while the mother does not want the children to receive the Covid-19 vaccination at this time. The children's treating pediatrician has recommended that all three children receive the Covid 19 vaccination.

Upon a hearing, the Court awards the father medical decision-making authority solely and specifically regarding vaccinations. "The court will not debate the efficacy of the vaccine but rather what is in the best interest of the children. The children's pediatrician, selected by both parents over ten years ago endorses and recommends vaccination for the children, as does their counsel."

S.M. v. E.M.
(Sup. Ct., Nassau Co., 6/28/22)
https://images.law.com/contrib/content/uploads/documents/292/123270/S.M.-v.-E.M.-DECISION-AFTER-HEARING.pdf

* * *

CUSTODY - Decision-Making Authority
- Contempt

The Court awards the mother final medical decision-making authority, and holds the father in contempt, where the father obtained a fraudulent COVID-19 vaccination card for the child, who did not receive the vaccine. There were no family issues related to one parent wishing to have the child vaccinated and the other opposing it. Yet, the father took it upon himself to fraudulently obtain the vaccination card despite the existence of a joint decision-making and mediation requirement.

With respect to the civil contempt finding, the Court notes that the father invoked his right against self-incrimination during questioning pertaining to the obtaining of the fraudulent vaccination card; that the mother was not told about the falsified vaccination card until after the father obtained it; and that the child is saddled with the burden of going through life with inaccurate and false medical records and the mother must now find a way to navigate the false medical records for the child.

C.B-C v. W.C.
(Sup. Ct., Nassau Co., 9/14/22)
https://www.law.com/newyorklawjournal/almID/1663331134NYredacted/?download=d5id091922goodstein.pdf

Hearings/Evidence/Witnesses/Lincoln Hearings And Child's Wishes

GUARDIANSHIP - Virtual Hearings

In this guardianship proceeding, the mother raises on appeal an unpreserved claim that she was denied due process of law when the trial court failed to ensure that she appeared by two-way video technology at a virtual trial, conducted via Microsoft Teams. Alternatively, she asks the Connecticut Supreme Court to reverse the decision of the trial court pursuant to the Supreme Court's supervisory authority over the administration of justice. Specifically, she asks the Court to adopt a procedural rule requiring that a trial court, before conducting a virtual trial in a child protection case, ensure that the parties either appear by two-way videoconferencing technology or waive the right to do so.

The Court affirms. Because the record is largely silent regarding the nature of the mother's participation in the virtual trial, the record is inadequate to support review of the unpreserved claim.

The mother has not demonstrated that the inability of parties to meaningfully participate in virtual child protection trials via two-way videoconferencing technology is a pervasive and significant problem requiring the Court's intervention. Also, the trial court was attentive to potential problems regarding the remote technology and took steps to ensure that the virtual format did not negatively impact the mother. For example, the court paused the proceedings several times to allow the mother to confer with her counsel, asked if any party objected to the mother testifying via audio only, paused the proceedings when it could not hear the mother, paused the proceedings to allow the mother's counsel to confer with her guardian ad litem, and repeatedly noted that it would continue the case if the parties did not agree to the maternal grandmother's testifying via audio only.

The Court emphasizes the importance of ensuring equal access to justice when a court undertakes a virtual trial. Equal access to justice is particularly significant in the context of virtual hearings and trials given the digital divide. As the amici curiae note in their brief, "[n]ationwide and in Connecticut, indigent litigants, communities of color, older people, and people with disabilities are more likely to lack access to reliable internet service and devices adequate to participate in remote court proceedings by videoconferencing technology." When parties or witnesses express an inability to participate in virtual proceedings, courts must either provide alternative means of accessing the technology needed to participate - such as at court service centers - or continue the proceeding until it can be conducted in person or until such time as the party or witness has secured the technology needed in order to meaningfully participate. Courts must also ensure that parties have equal access to technology, and, for instance, ensure that both parties participate by either video and audio or audio only. It is also important that courts ensure the proper functioning of technology. If the technology is not functioning properly, the court must take corrective measures to remedy the technological problem, or continue the case until either it can be conducted in person or the technology problem can be resolved.

In re Aisjaha N.
343 Conn. 709 (Conn., 6/20/22)

* * *

CUSTODY - Virtual Hearing

In this custody proceeding, the First Department, citing the court's authority to modify its hearing procedures pursuant to Judiciary Law § 2-b, finds no error where the court conducted the hearing in a virtual courtroom. Because the case had been pending since August 2018, the court decided to proceed with minor limitations in a virtual courtroom rather than wait until court operations returned to "normal."

In a footnote, the Court notes that attorneys for both the mother and the father were strongly admonished in Family Court for their unprofessional behavior and were directed to review the Rules of Professional Conduct, which "remain in effect despite or perhaps because of the frustration that may arise from having to adopt to new court procedures, necessitated in these times by Covid-19."

Matter of Saymone N. v. Joshua A.
(1st Dept., 2/10/22)

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CUSTODY - Hearing Requirement
- Sanction For Misconduct/Dismissal Without Prejudice

In this custody proceeding commenced by the father, the court directed ACS to conduct an investigation and directed supervised visits between the father and the child. The father failed to comply with the investigation, including refusing to provide his address to ACS, and failed to complete the intake process for arranging the visits.

The court awarded sole legal and physical custody to the mother, in whose physical custody the child has been since her birth, and, in effect, dismissed the father's petition without prejudice, stating that the father could refile a custody petition when he was ready to cooperate with the court's directives.

The Second Department concludes that the court erred in making a final custody determination without a hearing and without inquiring into the best interests of the child. However, the court did not err in dismissing the father's petition without prejudice where the father's noncompliance with court directives prevented the matter from proceeding to a best interests hearing.

Matter of Jones v. Rodriguez
(2d Dept., 10/5/22)

* * *

CUSTODY/VISITATION - Hearings/Evidence - Negative Inference/Prima Facie Dismissal Motion

The Third Department affirms an order which granted the mother's motion to dismiss the father's petition seeking parenting time at the close of the father's proof, noting, inter alia, that the family court did err in drawing a negative inference against the father and finding his testimony to be incredible. The court was required to accept the father's testimony as true and afford him every favorable inference that could reasonably be drawn from his testimony.

Matter of Jeremy RR. v. Olivia QQ.
(3d Dept., 6/9/22)

* * *

CUSTODY - Hearing/Scope Of Proof
- Separation Agreements
- Lincoln Hearings

The Third Department finds no error where the court excluded evidence of his relationship with the child before the parties entered into the separation agreement. Even though the father is correct that a court should not unduly restrict proof relevant to the best interests of the child, the court has

broad authority to determine the scope of proof at trial, and the mother, in an offensive posture with respect to custody, relied solely upon recent conduct and/or circumstances as a basis for her challenge to the custody provision in the separation agreement.

The Court also rejects the father's contention that the trial court erred proceeding directly to a best interests analysis without first considering whether a change in circumstances occurred since execution of the separation agreement. The agreement was never memorialized in a court order or otherwise judicially sanctioned, and thus it was only a factor to consider.

The Court also notes that "[a]t the inception of a Lincoln hearing, the court should — as it did here — assure the child that their conversation will be held in strict confidence and not be discussed with the parties. A child, in turn, participates in reliance on that promise. It follows that, in rendering a decision, a court must refrain from revealing, directly or indirectly, the confidential information shared by the child. This includes, for example, commenting on specific trial testimony purportedly corroborated by the child during such a hearing. The same holds true for counsel in writing their briefs."

Matter of Theodore P. v. Debra P.
(3d Dept., 10/20/22)

* * *

CUSTODY - Lincoln Hearing
- Grandparents
- Best Interests/Criminal History Of Parent

The mother and the attorney for the child appeal from an order that, among other things, granted the mother, the maternal grandparents, and the father joint legal custody of the subject child, assigned the grandparents and the father various "zones of influence," and awarded the grandparents and the father shared residential custody with the child splitting her time equally between the two residences.

The Fourth Department affirms. The father has paid for his crimes and turned his life around, obtaining gainful employment and purchasing his own home. Regarding the relationship between the father and the mother, the grandparents testified that they saw no distinction between forcible rape and statutory rape, even when the parents continued the relationship for more than a decade. Without citing evidence to support their fear, the grandparents opined that the father was victimizing and grooming the child for future sexual actions with him, and they denied the father visitation for several months in violation of a court order.

The Court finds no error where a Lincoln hearing did not occur as a result of a snowstorm and a global pandemic. The trial court was able to discern the child's wishes from the AFC's expressed position, and the record indicates that information provided by the child might have been tainted by the obvious disdain the grandparents regularly expressed regarding the father.

Matter of Brady J.S. v. Darla A.B.
(4th Dept., 8/4/22)

Relocation, Travel, And Related Issues

CUSTODY - Relocation

The First Department upholds an order permitting the mother to relocate with the parties' child to Florida where the mother has been the child's primary caregiver and has had sole custody for many years; after suffering a change in financial circumstances because of the COVID-19 pandemic and with no financial support from the father, she has cultivated a party planning business in Florida that allows her to work from home and be available for the child after school; Florida is more affordable, and she demonstrated that a move to Florida would improve the child's quality of life; and, given the child's age, his strong desire to relocate is significant, as is the fact that his younger brother, with whom he has a close relationship, lives in Florida.

During the brief period the child stayed with the father, his schooling and physical safety suffered, as the father left him alone for periods of time and physically abused him.

Matter of Nancy A. v. Juan A. B.
(1st Dept., 2/2/23)

* * *

CUSTODY - Relocation
VISITATION - Contempt/Violations

The Third Department upholds a determination permitting the father to relocate with the children to Portland, Oregon, noting, inter alia, that the mother's opposition was primarily due to the physical distance, but, as a result of her struggles with alcohol addiction, the mother has been absent from the children's lives for extended periods and, when she has been present, has placed the children in uncomfortable and unsafe situations; that the father has been the primary custodian since 2013; that when the father's wife completed a doctoral program in psychology, she was offered a job in Portland, and the father, who has never received financial assistance from the mother to support the children, received a job offer in Portland that would double his salary; and that despite the children's hesitation about spending time with the mother, the father encouraged electronic communication, and facilitated visits whenever the children desired them, including transporting the children and paying for a supervisor.

The Court also concludes that the father did not willfully violate an order granting the mother parenting time when he planned a vacation that led to the mother missing parenting time. Although the father could have done a better job communicating with the mother to reach an agreed-upon deviation from the order, the mother was notified of the planned vacation, and was immediately offered make-up time to accommodate for the time she would miss.

Matter of Megan NN. v. Michael NN.
(3d Dept., 11/23/22)

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CUSTODY - Relocation
VISITATION - Schedule

The Second Department finds no error in the family court's determination permitting the mother to relocate with the parties' child, who was eleven years old at the time of the hearing, to Georgia. The mother presented evidence that, since the custody order was issued, the safety in her neighborhood had declined, requiring her to move to protect the child's safety and take on a drastic increase in her living expenses; and presented evidence that she had a job opportunity in Georgia with a higher salary than what she could earn in New York and that her living expenses would be lower in Georgia than they were in New York.

The mother was the primary caregiver. The father was not involved in the child's day-to-day life, education, or healthcare, and kept in contact with the child more through phone and FaceTime calls than through in-person visits, which he could continue if the child moved to Georgia.

The child liked the area where the mother sought to move and had extended family in Georgia. Several of the mother's family members who saw the child regularly in New York were also moving to Georgia, and the child could visit the father during school breaks.

The matter is remitted to the family court for the setting of a more detailed schedule for parental access, which shall specify how the parties are to pay for the travel associated with such schedule. As the distance between New York and Georgia will prevent the parties from continuing their current practice of spontaneous visits when the father or the child wants to visit, the court should have provided them with a specific schedule for parental access to allow them to plan their travel and visits in advance.

Matter of Thomas v. Mobley
(2d Dept., 6/8/22)

* * *

CUSTODY - Relocation

The Third Department finds no error where the mother was permitted to relocate with the child to Pennsylvania, where they live with the mother's husband. The mother and the stepfather had decided to move because the stepfather had a job opportunity that carried the possibility of a significantly higher salary. The mother had started a job as a substitute teacher at the child's new school in Pennsylvania, which paid more than her previous job and allowed her to spend more time with the child. She testified that her new home was only approximately 15 minutes farther away from the father than her previous home. The father testified as to the increased driving distance and the fact that he was unsure if he would be able to continue to coach the child's T-ball team, but the Family Court correctly found that that the move would not have a significant impact on the father's parenting time.

Matter of Thomas SS. v. Alicia TT.
(3d Dept., 6/30/22)

* * *

CUSTODY - Military Personnel/Housing Issues
ADOPTION - Consent/Unwed Father

The Fourth Department, with one judge dissenting, upholds a determination that the father's consent to adoption was required, and that he is entitled to custody.

The father publicly acknowledged his paternity from the outset of the pregnancy, and, although he did not pay any expenses in connection with the pregnancy or the birth, he testified that all of those expenses were paid by the military. Prior to the child's birth, he pursued paternity testing and requested and received from the mother a commitment that he could have custody of the child, and actively began purchasing "items" in anticipation of obtaining custody of the child upon birth. He enlisted the help of his military commanding officers in attempting to obtain custody of his child, and made plans for relatives or family friends to help care for the child until his enlistment in the military ended.

The father reasonably and sincerely believed that the mother would not surrender the child for adoption, and she frustrated his efforts to become involved with the child. She lied to the father, telling him that she would give him custody of the child; misled petitioners into believing that the father did not want the child, even though she knew that he was aggressively pursuing custody; and misled the courts by filing a false affidavit stating that no one was holding himself out as the father.

A parent who lacks housing for a child is not legally precluded from obtaining custody. Many parents enlist the aid of family members to help them provide housing, including single parents who serve in the military. That temporary inability to provide housing should not preclude them from asserting their custodial rights to the children where, as here, they have established their intent to embrace their parental responsibility.

Matter of Adoption of William
(4th Dept., 6/10/22)

Violations/Contempt/Interference With Parent-Child Relationship

VISITATION - Grandparents
- Violations

The Second Department concludes that, contrary to the Family Court's determination, the mother's refusal to consent to any visitation between the child and the paternal grandmother constituted a sufficient change in circumstances permitting the court to determine whether modification of the previous order was in the child's best interests. Although there is some history of animosity between the parties, there is no indication in the record that the poor relationship had any adverse effect on the child. The matter is remitted to the Family Court to establish an appropriate visitation schedule.

The Family Court properly concluded that the mother's refusal to agree to visitation was not a violation, as the previous order provided for visitation "as arranged between [the parties]."

Matter of Dubose v. Jackson
(2d Dept., 7/27/22)

* * *

VISITATION - Violations

The Third Department finds no willful violation of a court order, rejecting the mother's contention that the grandmother used the COVID-19 pandemic as a pretext for depriving her of visitation where the Family Court credited the grandmother's belief that bringing the child to the mother during the onset of the COVID-19 pandemic was not considered essential travel and was, therefore, prohibited. The Court takes into account that the grandmother provided the mother with additional visitation to make up for the missed parental time.

Matter of Jennie BB. v. Anne CC.
(3d Dept., 11/23/22)

* * *

VISITATION - Violations

The Third Department concludes that the mother's withholding of visitation between early-March 2020 and mid-May 2020 was not in willful disregard of the visitation orders where it was aimed at protecting the health of her children.

"Not to be overlooked is that these events took place at the inception of the pandemic when great uncertainty affected us all. Moreover, access to the court was restricted to essential matters during this period, making it difficult to fault the mother for not attempting to seek judicial intervention…."

Matter of Nelson UU. v. Carmen VV.
(3d Dept., 2/24/22)

* * *

VISITATION - Interference With Contacts/Phone Access
- Violations

The family court found that the mother willfully violated the provisions of a visitation order by failing to ensure that the children were able to speak with the father every other day while in the mother's care and failing to respond to the father's communications regarding the children within a reasonable period of time. The court ordered, among other things, that the children be permitted to use their cell phones at the mother's house for the purpose of communicating with the father.

The Third Department affirms. The mother's belief that the children, born in 2005 and 2008, should not be allowed to own cell phones at their age has limited the father's means of contacting the children, when in her care, to the home's landline or the mother's cell phone. Whenever the father attempts to call the children at either of these phone numbers, the mother consistently refuses to answer or otherwise ignores his calls.

Matter of Timothy RR. v. Peggy SS.
(3d Dept., 6/2/22)

* * *

CUSTODY - Change In Circumstances
- Interference With Parent-Child Contact
- Child's Wishes
- Education Decisions

In a 3-2 decision, the Second Department reverses an order awarding the father sole legal and physical custody, and reinstates the April 2018 award of sole legal and physical custody to the mother, concluding that the father failed to establish a change in circumstances.

The majority notes, inter alia, that although in August 2018 the child was removed from the mother's care during a neglect proceeding (the child has lived with the father since 2018), in March 2020 the ACS attorney submitted a progress report indicating that the mother had successfully completed all required services, including substance abuse counseling, that visits to the mother's home revealed "no concerns or issues," and that the mother "display[ed] a positive and a nurturing relationship" with the child; that the ACS attorney stated that ACS had no objections to the mother having sole custody of the child; that the family court placed undue weight on an alleged suicide attempt by the mother in 2013; that the father did not allow the mother to speak to the child by phone, Facetime, or other means while the child was at the father's home; that the father did not add the mother to the child's "blue card" at school for emergency contact information, despite the mother's repeated requests that he do so, and neglected to advise the mother of which school he had selected for the child to attend during the 2018-2019 school year; and that the child wished to reside with the mother and the child's half-siblings.

The dissenting judges assert that the circumstances leading to the finding of neglect established a change in circumstances; and that while the mother may have made strides in improving her circumstances, the father fosters a safe and stable environment for the child.

Matter of Paige v. Paige
(2d Dept., 2/9/22)

Grandparents, Siblings and Other Relatives/Extraordinary Circumstances/Best Interests

VISITATION - Grandparents

The Third Department concludes that the maternal grandparents established standing to seek visitation with their granddaughter where, during the child's infancy, the grandparents saw her

approximately every other Sunday when the family would gather for dinner, and also celebrated with the family on special occasions such as holidays; and, after the parents stopped the visits when the child was about a year and a half old, the grandmother made numerous attempts to contact the children through telephone calls, text messages and emails, and also sent them a number of packages.

However, with respect to their granddaughter and grandson, the grandparents did not overcome the strong presumption that the parents' wishes represent the children's best interests, and thus the family court erred in awarding visitation.

The parents, who were separated at the time of the hearing but were united in opposition to visitation, offered testimony detailing the negative effects that visitation had on the grandson, who is autistic and has ADHD. These difficulties, which manifest upon transitions in general, and interactions with the grandparents in particular, were not properly taken into account by the court. Also, it does not appear that the court took into account the animosity between the parents and the grandparents.

The matter is remitted for a new hearing before a different judge.

Matter of Virginia HH. v. Elijah II.
(3d Dept., 12/8/22)

* * *

CUSTODY - Extraordinary Circumstances

The Fourth Department affirms an order granting custody to the non-parent petition, concluding that a neglect finding against the mother supplied the threshold showing of extraordinary circumstances.

Matter of Kennell v. Trusty
(4th Dept., 6/3/22)

* * *

VISITATION - Grandparents
- Visiting Schedule

The Third Department concludes that the maternal grandparents have standing to seek visitation pursuant to Domestic Relations Law § 72 where the grandparents, the mother and the child resided together in Massachusetts from August 2015 to December 2015; in December 2015, the mother and the child moved to a nearby apartment to live with the father following his release from prison, and, between December 2015 and April 2017, the grandparents cared for the child several days every week; the parties gathered together for holidays, birthdays and other family events; following an argument in April 2017, the mother and the father moved from Massachusetts to New York with the child, and the grandparents did not have contact with the child until February 2018, but the grandparents attempted to contact the mother numerous times by telephone, email and

through Facebook; the grandparents have a loving relationship with the child, spent substantial time with her, and have appropriately cared for her; and although the grandparents did not have contact with the child for almost one year prior to filing the petitions, due to the mother ceasing all communication with them, they made repeated efforts to continue their relationship with the child.

The family court properly found that visitation is warranted, but the extensive visitation ordered lacks a sound and substantial basis. The grandparents have visitation with the child every weekend from Friday evening until Sunday during the school year and every Thursday until Sunday during the summer. The grandparents' residence is located in Massachusetts, four hours from the mother's residence. This schedule is extremely disruptive, deprives the mother of significant quality time with the child, and does not allow the child to become involved in activities which take place on the weekend. The matter must be remitted for a hearing to determine an appropriate visitation schedule.

Matter of Anne MM. v. Vasiliki NN.
(3d Dept., 3/31/22)

* * *

CUSTODY - Extraordinary Circumstances
FAMILY OFFENSES/DISORDERLY CONDUCT

The Third Department upholds an order awarding sole legal and residential custody to the mother, concluding that the family court properly found that the grandmother did not meet her burden of proving that there had been an extended disruption of custody.

The child has primarily resided with the grandmother, but the mother has maintained a continuous presence in the child's life. The mother sought residential custody within a year of a 2018 order that awarded the parties joint legal custody with primary residential custody to the grandmother; a 2019 order continued joint legal custody and awarded the parties shared residential custody. The mother exercised control of important decision-making matters, including medical care, enrollment in Head Start and communication with Head Start staff.

The Court, with one judge dissenting, also concludes that the family court properly found that the grandmother failed to establish the family offense of disorderly conduct. The mother had left the Head Start building, moved away from the line of parents picking up their children, and engaged in cursing at the grandmother in front of the grandmother's vehicle, which was parked on the road. There was no proof as to the number of people in the vicinity or that any were drawn to the situation.

Matter of Linda UU. v. Dana VV.
(3d Dept., 1/5/23)

* * *

CUSTODY - Extraordinary Circumstances

Noting that where, as here, a parent makes a voluntary custodial arrangement for his or her child, the courts may not permit a nonparent to interfere with that arrangement in the absence of extraordinary circumstances, the Third Department concludes that extraordinary circumstances were not established where the father consistently paid child support and saw his son frequently (as often as two to three times a week) while the mother was alive; the father is unable to assume custody because he has physical disabilities and lives in public housing that does not allow children, and thus, following the mother's death, he formulated a plan for the boy to live with the grandmother and his sister; the father currently visits with the boy every weekend and attends all of his athletic events; the children have been the only constant in each other's lives and are very close; and, although petitioners offered testimony as to their close bond with the boy, extraordinary circumstances may not be established merely by showing that the child has bonded psychologically with the nonparent.

Matter of Leslie LL. v. Robert NN.
(3d Dept., 9/15/22)

Visit Denial, Supervision And Scheduling

VISITATION - Denial Of Visitation
- Improper Delegation Of Court's Authority

The First Department upholds a determination that in-person visitation with the father would be detrimental to the child's emotional and psychological well-being where the child was suffering from acute psychiatric symptoms; the father's testimony revealed disdain for the mother, whom he called a bad parent, his lack of understanding of the severity of the child's physical and mental health issues, including her threats of self-harm, and his belittlement of the mother's efforts to seek better educational opportunities for the child; the father continually disparaged the mother to the child, pressured the child to agree with him that the mother was mentally ill, and told the child that he wished the mother were dead; and he exhibited a lack of understanding of how his conduct caused or contributed to the child's mental health struggles and discounted her acute psychiatric symptoms, and, instead, blamed and vilified the mother for the problems in the father-daughter relationship.

The court improperly delegated to a mental health professional the court's authority to determine issues involving the child's best interests - namely, when visits could resume and whether they should be supervised.

Matter of M.K. v. Harolyn M.
(1st Dept., 10/11/22)

Post-Adoption Visits

VISITATION - Post-Adoption Contact Agreement

In this proceeding seeking enforcement of a post-adoption contact agreement, the Third Department first concludes that although petitioners moved for a preliminary injunction, which is available only in the context of a pending action or proceeding (see CPLR 6301), the family court apparently recognized that petitioners should have proceeded via a petition for enforcement of the post-adoption contact agreement pursuant to Domestic Relations Law § 112-b(4), and, indeed, petitioners met the underlying statutory requirements and respondent's due process rights were protected. Accordingly, the Court deems petitioners' filings to be an application for enforcement of the post-adoption contact agreement.

The Court upholds the family court's determination that the child's best interests would be served by prohibiting respondent from contacting the child and that an order of protection was necessary. As respondent was attempting to inappropriately initiate contact with the child and repeatedly posting her pictures in public spaces despite the stated objections of petitioners, the family court also did not err in refusing to enforce the condition of the agreement requiring petitioners to provide respondent with pictures and updates.

Matter of Riley XX.
(3d Dept., 4/28/22)

* * *

VISITATION - Post-Adoption

In 2017, the biological mother surrendered her parental rights to her son and her daughter, who were then adopted. The biological mother and the adoptive mother entered into a post-adoption contact agreement for each child allowing the biological mother to have two supervised visits per year and to receive photographs of the children twice per year. The agreements were incorporated into the order of adoption. In June 2019, the adoptive mother filed petitions to modify the agreements. In August 2019, the biological mother filed a cross petition alleging, among other things, that the adoptive mother refused to bring the son to a July 2019 visit. Following a hearing, the family court terminated visitation.

The Third Department affirms, with two judges dissenting as to the daughter. The majority notes that the adoptive mother testified that after a December 2017 visit, the son destroyed rooms in the house and was completely out of control for close to a month; that after a July 2018 visit, the son "climb[ed] the walls in [his] classroom," hit his friend, hurt his sister and had difficulties regulating his behavior for several months; that a December 2018 visit did not occur because the mother was incarcerated for assaulting her husband with a knife; and that after a December 2017 visit, the daughter began banging her head and had nightmares, that this behavior was repeated after a July 2018 visit, and that, after a July 2019 visit, she had nightmares. The majority "cannot agree that enforcing visitation with respect to one sibling but not the other serves the best interests of either."

The dissenting judges assert that any correlation between the brief, supervised visits and the daughter's harmful behavior is tenuous at best. Courts should adopt a careful and restrained approach in reviewing post-adoption contact agreements, as the resulting deprivation from a lack of enforcement is significant and substantial. Such agreements may encourage or induce parents to consent to a voluntary surrender of their parental rights, and a parent is entitled to rely upon the conditions being met, and not being readily extinguished or set aside. Finally, the family court did not address the biological mother's entitlement to photos and an update twice a year if requested from the local social services agency a month in advance, and thus she remains entitled to the benefits of those conditions.

Matter of Jennifer JJ. v. Jessica JJ.
(3d Dept., 3/24/22)

Appeals

CUSTODY - Appeal

In this FCA Article Six proceeding, the family court granted the attorney for the children's motion to direct the maternal grandfather to produce the children for a meeting at the AFC's office. The grandfather, citing fears over the ongoing COVID-19 pandemic, had refused requests by the AFC to meet with the children in person.

The Third Department dismisses the grandfather's appeal, noting that no appeal as of right lies from this non-dispositional order, that the grandfather did not seek permission to appeal and the Court declines to treat the notice of appeal as a request for permission to appeal; that the grandfather and the mother have withdrawn the underlying custody petitions; and that the narrow exception to the mootness doctrine is inapplicable since the issue presented - whether the court appropriately ordered an in-person meeting between the AFC and the children during a global pandemic - is not likely to recur.

Matter of Donald OO. v. Tiffany OO.
(3d Dept., 1/12/23)

* * *

CUSTODY - Appeal/Record On Appeal

The Third Department, while upholding the family court's determination awarding primary physical custody to the father, rejects the attorney for the child's assertion that the record is no longer sufficient where the AFC was advised of a subsequent incident in which the police responded to a mental health complaint made by the paternal grandfather against the father.

Although the Court may take notice of new facts and allegations to the extent that they indicate that the record is no longer sufficient for determining the father's fitness and right to custody, the Court was advised at oral argument that no further proceedings were initiated based upon this alleged incident, and thus there is no reason to remit the matter for consideration of the new allegation.

Matter of Andrea II. v. Joseph HH.
(3d Dept., 3/10/22)

Special Immigrant Juveniles

SPECIAL IMMIGRANT JUVENILE STATUS

In this guardianship proceeding, the Second Department upholds an order dismissing the petition to appoint petitioner as the guardian and denying petitioner's motion for the issuance of an order making special immigrant juvenile status-related findings. Although the child is under twenty-one years of age, she was married and did not meet the criteria for SIJS.

Matter of Elena G.R. v. Oscar D.H.
(2d Dept., 1/11/23)

V. PATERNITY/CHILD SUPPORT

ABUSE/NEGLECT - Paternity Issues/DNA Testing

In 2020, ACS filed an abuse petition against respondent P.D. A finding of abuse and neglect was entered against P.D. on behalf of all the children in 2022. In 2022, ACS filed an abuse petition against P.D. and respondent mother T.M. Subsequently, the attorney for the child B.M. and the attorney for the child D.M. filed applications for DNA testing to determine if P.D. is the biological father of those children. ACS filed a separate application for DNA testing. P.D. and T.M. oppose the applications.

The Court, citing FCA § 1038-a and Matter of Abe A. (56 N.Y.2d 288), and noting that the parties have made conflicting claims about paternity, finds probable cause and orders DNA testing of P.D. and the children D.M. and B.M.

Determining paternity is in the children's best interests, and will guide the Court in further abuse proceedings. If P.D. is determined to be the father, he will have certain rights and standing to participate at hearings. Although T.M. argues that ACS does not have complete authority to make determinations for her children, as her rights are still intact and there is currently no finding of wrongdoing by her, ACS has the right to seek to override a parent's refusal to consent when it is in the children's best interest. The Court also notes that T.M. may be opposing testing in an effort to cover up sex crimes committed against her by P.D.

Matter of I.M.
(Fam. Ct., Bronx Co., 11/1/22)
https://nycourts.gov/reporter/3dseries/2022/2022_22398.htm

* * *

PATERNITY - Equitable Estoppel
- Appeal
- Motion To Vacate/Newly Discovered Evidence

The Fourth Department upholds orders that adjudicated respondent to be the father, and denied his motion to vacate the paternity adjudication under CPLR 5015(a) on grounds of fraud and newly discovered evidence.

The Support Magistrate did not err in ordering genetic testing before respondent was represented by counsel. Although a court should consider paternity by estoppel before it decides whether to test for biological paternity, where, as here, testing has already been conducted when a court holds a hearing on equitable estoppel, reversal of an order determining paternity is not required. Respondent had a full and fair opportunity to litigate his equitable defense.

The order denying respondent's motion to vacate is not appealable as of right because it is not an "order of disposition" within the meaning of FCA § 1112(a), but this Court deems the notice of appeal to be an application for leave to appeal and, in its discretion, grants leave to appeal.

The evidence that petitioner and a man who was her boyfriend at the time of the hearing became joint owners of a home approximately six months after the hearing ended, and that they were married later that year, is not newly discovered. In any event, respondent's claim of estoppel was based on the nature and extent of the relationship between the boyfriend and the child, and there was insufficient evidence that the boyfriend held himself out as the child's father.

Matter of Danielle E.P. v. Christopher N.
(4th Dept., 8/4/22)

* * *

PATERNITY - Equitable Estoppel

In this paternity proceeding commenced by petitioner John D., the Third Department rejects the equitable estoppel claim raised by respondent mother and the attorney for the child, who assert that a genetic maker test will cause the child, who is now over seven years old, irreparable harm, particularly as respondent John E. has held himself out as the child's father her whole life.

Although John E. has had a relationship with the child since birth, it does not equate to an operative parent-child relationship, particularly after the child moved out of John E.'s residence in the spring of 2016. The child knows that John E. is not her father and does not refer to him as dad, and has been told that petitioner is her father and calls him daddy and a parent-child relationship has evolved since their initial contact in early January 2020. Aside from John E.'s identification as the father on the birth certificate, there is no evidence in the record that he has been held out to the public as the father.

John E. was unable to testify to any fatherly activities related to the child's care or well-being, and testified only that he plays with her, colors with her and watches cartoons with her. The family court correctly concluded that he transitioned from a fatherly role to a friendly role upon discovering that he was not the biological father, but the court may have placed undue reliance on the appearance of John E.'s name on the birth certificate, his acknowledgment of paternity, his presence at the hospital when the child was born, and his significant participation in the care of the child for the first year and a half of her life.

Matter of John D. v. Carrie C.
(3d Dept., 2/17/22)

* * *

PATERNITY - Equitable Estoppel

The First Department concludes that there was no clear and convincing evidence supporting application of equitable estoppel against petitioner where respondent's current husband has assumed the role of the child's father and executed an acknowledgement of paternity, but petitioner has was in close communication with respondent and planned for the child before the child was born; after the child was born, respondent and the child lived with petitioner for a time, and he cared for and provided for the child; when respondent unilaterally terminated contact with him,

petitioner filed the paternity petition promptly when the child was only four months old; petitioner testified that the first time he became aware of the child's relationship with the husband was at an early court appearance; petitioner credited the husband for his role as a father figure to the child and testified that DNA test results establishing his paternity would not affect the child's relationship with the husband; and the husband testified that his relationship with the child would not change if petitioner proved to be the biological father.

The likelihood of any disruption to the child's life is also minimized by the child's young age.

Matter of Mark R. v. Kimberly
(1st Dept., 4/12/22)

VI. ETHICAL ISSUES AND ROLE OF ATTORNEY FOR THE CHILD AND JUDGE

CUSTODY - Settlements
- Right To Counsel/Child

After the court determined that there had been a change in circumstances warranting modification of the prior custody order, the parents entered into a settlement agreement, which the court incorporated into a modified custody order over the objection by the attorney for the older child.

The First Department notes that although the attorney for the child in a custody proceeding has authority to pursue an appeal on behalf of the child, the child does not have full-party status and cannot veto a settlement reached by the parents and force a trial after the attorney for the child had a full a fair opportunity to be heard.

Matter of Kylie P.
(1st Dept., 2/9/23)

* * *

CUSTODY - Extraordinary Circumstances
- Appeal/AFC Standing

The Third Department upholds a determination that the grandmother did not prove extraordinary circumstances where, although the child has primarily resided with the grandmother since he was approximately one year old, the mother has maintained a continuous presence in the child's life by retaining control of important decision-making, including the child's medical care, health insurance and enrollment in school.

The AFC is authorized to take this appeal. Although the grandmother did not appeal, she has submitted a letter brief in support of the AFC's position.

Matter of Amber B. v. Scott C.
(3d Dept., 7/7/22)

* * *

CUSTODY - Right To Counsel/Conflict Arising From AFC's Previous Activity As Judge
ETHICS/JUDGES

In this custody proceeding in which the family court awarded the parties joint legal custody with the father having primary physical custody and the mother having parenting time, the Third Department, in a 3-2 decision, concludes that automatic disqualification of the attorney for the children was not required where the AFC was previously a judge who, in 2014, decided a custody case involving the mother.

A former judge is automatically prohibited, as a matter of law, from acting as an attorney "in any action, claim, matter, motion or proceeding, which has been before him [or her] in his [or her]

official character." Here, the instant proceedings had not been before the AFC when he was a judge. The custody case noted by the mother neither involved the subject children nor the children's father. Rather, it was an entirely separate proceeding involving different children and a different father. The mother does not allege any factual ties between the instant proceedings and the prior custody case; the only common tie is that the mother was a litigant, and only the mother, and not her present custody claim, had been before the AFC during his tenure as a judge. Although the mother's fitness as the custodial parent presumably was an issue in her prior custody case, equating a discrete issue with a "matter" as that term is used in Judiciary Law § 17 impermissibly stretches the meaning of "matter."

The dissenting judges would remit the matter for development of the record to resolve the question of whether the "matter" over which the AFC presided in his judicial capacity is the same "matter" presently before this Court. In determining whether two matters are the same for purposes of disqualification, a variety of factors may be considered, including the extent to which the matters involve the same basic facts or the same or related parties and the time that has elapsed between the matters. Family Court judges are privy to all sorts of information about the families that appear before them irrespective of the nature of the petition before them, and this Court cannot know the full extent of the AFC's prior knowledge regarding all of the children and the mother. Given the overarching goal of Judiciary Law § 17, it is significant that the AFC decided the prior custody matter adversely to the mother in his former judicial capacity and, here, while duty-bound to advocate for the children's wishes, again takes a position adverse to her both at trial and on appeal.

Matter of Corey O. v. Angela P.
(3d Dept., 3/24/22)

* * *

CUSTODY - Hearing Requirement
JUDGES - Bias

After concluding that the mother established a change in circumstances and that the court should have denied the father's motion to dismiss and continued the fact-finding hearing, the Third Department agrees with the mother and the child's appellate attorney that the matter should be remitted to a different judge.

At the first appearance, the court indicated that it was inclined to dismiss the mother's modification petition without a hearing, and the court had, sua sponte, earlier dismissed several petitions filed by the mother. At the next appearance, the court again indicated that it was disinclined to modify the custody order and later - referring to the mother - stated that "the boy who cried wolf is very large and in charge of this case." At the opening of the fact-finding hearing, after noting that it had already held several hearings regarding this child, the court stated that if it "g[o]t the feeling as we go through that the burden of that change [in circumstances] is not going to happen … [the court is] going to cut things off." At the close of the mother's proof, the court prompted the father to make a motion to dismiss the mother's petition, and granted the motion.

Matter of Nicole B. v. Franklin A.
(3d Dept., 11/23/22)

* * *

JUDGES - Bias
CUSTODY - Right To Fair Hearing

In this custody proceeding, the Third Department holds that the family court judge erred when he denied the father's motion to disqualify the judge where a November 2012 order listed the judge as the mother's counsel.

"A judge shall not sit as such in, or take any part in the decision of, an action, claim, matter, motion or proceeding … in which he [or she] has been attorney or counsel." Judiciary Law § 14. This prohibition is absolute and establishes a bright-line disqualification rule.

Although the judge explained that he did not recall the representation from eight to nine years earlier, and the Court does not question the judge's recollection, the November 2012 default order and the order on appeal both deal with the custodial arrangement between the same two parents regarding the same three children, and thus, under Judiciary Law § 14, involve the same claim of custody, guardianship, or visitation for the same children.

Matter of John II. v. Kristen JJ.
(3d Dept., 9/8/22)

* * *

TERMINATION OF PARENTAL RIGHTS - Right To Counsel/Child
- Appeal - Standing/Harmless Error

In this termination of parental; rights proceeding, the mother claims that the children, in addition to their statutory right to conflict-free counsel, also had a procedural due process right to such counsel under the state and federal constitutions, and that the trial court violated this right by failing to inquire into whether the children's attorney had a conflict of interest due to the children's conflicting goals regarding reunification.

The Court previously has held that parents in a termination of parental rights proceeding have standing to assert a claim that their children were denied their constitutional right to conflict-free representation, but has not yet decided whether such a right exists. The Court declines to decide that question here because, even if such a right exists, and the children's conflicting goals triggered the trial court's duty to inquire into their attorney's ability to advocate effectively on behalf of each child, any violation of that right was harmless beyond a reasonable doubt.

One child's desire to return to her parents' care was contingent on her parents being together as a couple. If they were not together, she preferred to remain with her foster family. It is clear from the record that there is no possibility that the trial court would have allowed the children to return to respondent's care, especially if she was living with the children's father given the court's concern that she either could not or would not protect the children from him. It is equally apparent that the trial court would not have allowed the children to live with the father given his steadfast

refusal, in the three years he was apart from them, to address the myriad problems that precipitated the children's removal from the family home.

The Court has never found structural error, and applied a per se reversible error rule, in the child dependency context. The significant differences between child dependency proceedings and other judicial proceedings militate decisively against applying a per se reversible error rule in dependency cases. Dependent children have a critical interest in avoiding unnecessary delays to their long-term placement.

In re Amias I.
2022 WL 2350213 (Conn., 6/29/22)

* * *

CUSTODY - Right To Counsel/Child
- Lincoln Hearing

In this custody proceeding, the Third Department concludes that the attorney for the children gave a reasonable explanation as to why she was not requesting an in camera interview with the children. She advised the court that the children were quite young (born in 2014 and 2015) and that she was satisfied that they could not add anything of value to the extensive proof already presented.

Matter of Marcello OO. v. Jayne PP.
(3d Dept., 2/24/22)

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RIGHT TO COUNSEL - AFC Counsel Fees/Retainer

In this divorce action, the attorney for the child moves for an order directing that a trial retainer of $15,000.00 be paid to her by the parties.

The Court orders that a $10,000.00 trial retainer shall be advanced by the parties and paid directly to the AFC within fourteen (14) days of the Court's decision and order. The Court notes, inter alia, that the parties' conduct leads the Court to the inescapable conclusion that a trial is inevitable; that the AFC will have to take an active role during (and even before) trial; that the AFC has made an unrefuted assertion that her initial retainer has not been fully paid and that defendant has failed to pay his full share of that retainer; that the parties' conduct has led the Court to the conclusion that either party, if dissatisfied with the Court's trial decision, may not remit payment to the AFC;

JM v. RM
(Sup. Ct., Nassau Co., 11/1/22)
https://nycourts.gov/reporter/3dseries/2022/2022_22339.htm