CUSTODY AND VISITATION

Selected Statues and Cases

Introduction to Effective Representation of Children

April 28, 2021

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McKinney's CPLR Rule 3217

Rule 3217. Voluntary discontinuance

Effective: January 1, 2012
Currentness

(a) Without an order. Any party asserting a claim may discontinue it without an order

1. by serving upon all parties to the action a notice of discontinuance at any time before a responsive pleading is served or, if no responsive pleading is required, within twenty days after service of the pleading asserting the claim and filing the notice with proof of service with the clerk of the court; or

2. by filing with the clerk of the court before the case has been submitted to the court or jury a stipulation in writing signed by the attorneys of record for all parties, provided that no party is an infant, incompetent person for whom a committee has been appointed or conservatee and no person not a party has an interest in the subject matter of the action; or

3. by filing with the clerk of the court before the case has been submitted to the court or jury a certificate or notice of discontinuance stating that any parcel of land which is the subject matter of the action is to be excluded pursuant to title three of article eleven of the real property tax law.

(b) By order of court. Except as provided in subdivision (a), an action shall not be discontinued by a party asserting a claim except upon order of the court and upon terms and conditions, as the court deems proper. After the cause has been submitted to the court or jury to determine the facts the court may not order an action discontinued except upon the stipulation of all parties appearing in the action.

(c) Effect of discontinuance. Unless otherwise stated in the notice, stipulation or order of discontinuance, the discontinuance is without prejudice, except that a discontinuance by means of notice operates as an adjudication on the merits if the party has once before discontinued by any method an action based on or including the same cause of action in a court of any state or the United States.

(d) All notices, stipulations, or certificates pursuant to this rule shall be filed with the county clerk by the defendant.

Credits
(Formerly § 3217, L.1962, c. 308. Redesignated rule 3217, L.1962, c. 318, § 19. Amended L.1981, c. 115, § 27; L.1989, c. 736, § 1; L.1999, c. 278, § 1, eff. July 20, 1999; L.2003, c. 62, pt. J, § 29, eff. July 14, 2003; L.2011, c. 473, § 4, eff. Jan. 1, 2012.)

121 A.D.3d 1221
Supreme Court, Appellate Division, Third Department, New York.

In the Matter of STARLA D., Respondent,
v.
JEREMY E., Appellant.

Oct. 16, 2014.

Synopsis
Background: Putative father appealed from orders of the Family Court, Saratoga County, Howley, S.M., which granted mother's application to determine paternity and for award of child support and denying putative father's objections.

[Holding:] The Supreme Court, Appellate Division, Egan Jr., J., held that prior paternity proceeding in Alabama was res judicata precluding relitigation of paternity.

Affirmed.

West Headnotes (2)

[1] **Judgment** Nature and requisites of former recovery as bar in general

In New York, res judicata, or claim preclusion, bars successive litigation based upon the same transaction or series of connected transactions if: (1) there is a judgment on the merits rendered by a court of competent jurisdiction, and (2) the party against whom the doctrine is invoked was a party to the previous action or proceeding, or in privity with a party who was.

1 Cases that cite this headnote

[2] **Children Out–Of–Wedlock** Operation and effect

Prior paternity proceeding in Alabama court, which was dismissed with prejudice upon mother's motion, was res judicata precluding relitigation of paternity in New York court, where cases involved same parties, same issue, and putative father had consented to personal jurisdiction in Alabama.

Cases that cite this headnote

Attorneys and Law Firms

***702** Jeremy Bogosian, Clifton Park, for appellant.

Stephen M. Dorsey, County Attorney, Ballston Spa (Michael J. Hartnett of counsel), for respondent.

Heather Corey–Mongue, Ballston Spa, attorney for the child.

Before: PETERS, P.J., STEIN, GARRY, EGAN JR. and CLARK, JJ.

Opinion

EGAN JR., J.

Appeals (1) from two orders of the Family Court of Saratoga County (Howley, S.M.), entered August 22, 2013, which granted petitioner's application, in a proceeding pursuant to Family Ct. Act article 5–B, to determine paternity of a child born to petitioner and for an award of child support, and (2) from an order of said court (Jensen, J.), entered October 11, 2013, which denied respondent's objections to said orders.

In December 2001, petitioner, a resident of Alabama, commenced a proceeding in the Juvenile Division of the District Court of Colbert County, Alabama (hereinafter the Alabama court) against respondent, a New York resident, alleging that respondent was the biological father of the subject child (born in 2001) and seeking an award of child support. Respondent, appearing pro se, answered and thereafter underwent DNA testing. Petitioner, who did not complete her portion of the DNA testing, subsequently moved to dismiss the proceeding "with prejudice" and, in July 2004, the Alabama court granted her request.

Thereafter, in January 2011, petitioner commenced the instant proceeding against respondent pursuant to the Uniform Interstate Family Support Act (*see* Family Ct. Act art. 5–B), seeking to establish paternity and, in conjunction therewith, an award ***703** of child support. Respondent moved to dismiss the petition contending, among other things, that the proceeding was barred by res judicata and/or equitable estoppel. A Support Magistrate transferred the matter to Family Court for a hearing as to the equitable estoppel defense and, at the conclusion thereof, Family Court, among other things, dismissed respondent's equitable estoppel defense. Upon respondent's appeal from that order, this Court affirmed (95 A.D.3d 1605, 945 N.Y.S.2d 779 [2012], *lv. dismissed* 19 N.Y.3d 1015, 951 N.Y.S.2d 711, 976 N.E.2d 239 [2012]).

Following another unsuccessful motion to dismiss based upon similar grounds, respondent answered and moved for summary judgment, again contending that this proceeding was barred by res judicata and equitable estoppel. When a Support Magistrate denied respondent's motion, respondent unsuccessfully moved for reconsideration and thereafter filed objections to the Support Magistrate's order. Family Court denied respondent's objections and sanctioned respondent's counsel in the amount of $1,000 for frivolous motion practice.

In the interim, a hearing upon the underlying petition commenced. Thereafter, by orders entered August 22, 2013, the Support Magistrate rejected respondent's affirmative defenses and, based upon the evidence adduced at the hearing, issued the requested order of filiation and awarded child support. Respondent filed objections to the Support Magistrate's orders and, by order entered October 11, 2013, Family Court dismissed such objections and affirmed the Support Magistrate's orders in their entirety. These appeals by respondent ensued.

[1] The crux of respondent's argument upon appeal is that Family Court erred in failing to apply the Full Faith and Credit Clause (*see* U.S. Const., art. IV, § 1) and principles of res judicata to bar petitioner from maintaining the instant proceeding. "In New York, res judicata, or claim preclusion, bars successive litigation based upon the same transaction or series of connected transactions if: (i) there is a judgment on the merits rendered by a court of competent jurisdiction, and (ii) the party against whom the doctrine is invoked was a party to the previous action [or proceeding], or in privity with a party who was" (*Matter of People v. Applied Card Sys., Inc.*, 11 N.Y.3d 105, 122, 863 N.Y.S.2d 615, 894 N.E.2d 1 [2008], *cert. denied* 555 U.S. 1136, 129 S.Ct. 999, 173 L.Ed.2d 292 [2009] [internal quotation marks and citations omitted]; *see Gomez v. Brill Sec., Inc.*, 95 A.D.3d 32, 35, 943 N.Y.S.2d 400 [2012]). [1]

Here, there is no dispute that the Alabama proceeding involved the same parties and underlying issues, i.e., paternity and child support. Additionally, under both Alabama and New York law, a dismissal "with prejudice" indeed constitutes an adjudication "on the merits" (*see Matter of Coleman v. Coleman*, 1 A.D.3d 833, 834, 767 N.Y.S.2d 169 [2003]; *Gonzalez, LLC v. DiVincenti*,

844 So.2d 1196, 1203 [Ala.2002]). Further, there is no question that the Alabama court had subject matter jurisdiction over the paternity and support proceeding. Accordingly, the only remaining issue is whether the Alabama court acquired personal jurisdiction over respondent.

[2] Personal jurisdiction is—under both New York and Alabama law—a waivable ***704** defense (*see* CPLR 3211[a][8]; [e]; Alabama Rules of Civ. Proc. rule 12[h][1]). In this regard, although respondent raised lack of personal jurisdiction in his pro se answer, respondent testified at the paternity hearing that he did so only to avoid entry of a default judgment against him, and that he expressly advised the Alabama court that if there was going to be "a hearing with genetic testing that [he] would be a full participant." Respondent further testified that when the Alabama court declined to dismiss the proceeding for improper service, he affirmatively requested that he be allowed to undergo genetic testing in New York, that the Alabama court granted his request and that he subsequently underwent such testing. Under these circumstances, we are satisfied that respondent not only waived his right to assert that the Alabama court lacked personal jurisdiction over him but, indeed, expressly consented thereto. Accordingly, as all of the elements of res judicata are present, Family Court erred in failing to dismiss petitioner's application upon this ground.

As a final matter, we agree that respondent's counsel was not afforded adequate notice and opportunity to be heard prior to Family Court imposing sanctions.[2] In light of our conclusion that the Alabama court proceeding is entitled to preclusive effect here, the imposition of sanctions was unwarranted in any event.

ORDERED that the orders are reversed, on the law, without costs, and petition dismissed.

PETERS, P.J., STEIN, GARRY and CLARK, JJ., concur.

Parallel Citations

121 A.D.3d 1221, 994 N.Y.S.2d 702, 2014 N.Y. Slip Op. 07033

Footnotes

1 Although we are of the view that New York law applies here (*see* Family Ct. Act §§ 580–101[16], [17]; 580–303[1]; 580–701[b]), the choice of law issue need not detain us, as the elements of the doctrine of res judicata are the same under New York and Alabama law (*see e.g. Bradberry v. Carrier Corp.*, 86 So.3d 973, 986 [Ala.2011]).

2 The appeal from Family Court's October 11, 2013 order brings up for review the propriety of the sanctions imposed in the prior intermediate order.

124 A.D.3d 1396
Supreme Court, Appellate Division, Fourth Department, New York.

In the Matter of Dana P. **BROWN**, Petitioner–Appellant,
v.
Vicki L. **HEUBUSCH**, Respondent–Respondent.

Jan. 2, 2015.

Appeal from an order of the Family Court, Wyoming County (Michael F. Griffith, J.), entered November 26, 2013 in a proceeding pursuant to Family Court Act article 8. The order dismissed the petition.

Attorneys and Law Firms

Wyoming County–Attica Legal Aid Bureau, Warsaw (Adam W. Koch of Counsel), for Petitioner–Appellant.

William D. Broderick, Jr., Attorney for the Children, Elma.

PRESENT: SCUDDER, P.J., CENTRA, CARNI, AND SCONIERS, JJ.

Opinion

MEMORANDUM:

***1** In this proceeding pursuant to article 8 of the Family Court Act, petitioner father appeals from an order that dismissed his petition for lack of jurisdiction. We affirm. The father concedes that respondent mother moved with the children to Florida more than six months before the filing of the petition, and there is no evidence that they ever returned to New York. The record establishes that the children no longer "have a significant connection" with New York and that "substantial evidence is no longer available in this [S]tate concerning the child[ren]'s care, protection, training, and personal relationships" (Domestic Relations Law § 76–a [1][a]), and the father failed to submit any evidence to the contrary. We therefore conclude that Family Court properly dismissed the petition for lack of jurisdiction (*see Matter of Maida v. Capraro,* 86 AD3d 924, 924; *Matter of Zippo v. Zippo,* 41 AD3d 915, 916).

We have considered the father's remaining contention and conclude that it is without merit.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs.

Parallel Citations

2015 WL 33728 (N.Y.A.D. 4 Dept.), 2015 N.Y. Slip Op. 00158

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141 A.D.3d 1145
Supreme Court, Appellate Division, Fourth Department, New York.

In the Matter of BRIAN S., Katie S., and Alyssa S.
Cayuga County Department of Social Services, Petitioner–Respondent,
Scott S., Respondent,
and
Tanya S., Respondent–Appellant.
Susan James, Esq., Attorney for the Child Katie S., Appellant.
Marybeth D. Barnet, Esq., Attorney for the Child Alyssa S., Appellant.
Theodore W. Stenuf, Esq., Attorney for the Child Brian S., Appellant.

July 8, 2016.

Synopsis

Background: County department of social services brought neglect proceeding against mother and father. The Family Court, Cayuga County, Thomas G. Leone, J., determined that mother neglected children and entered order of neglect against father following his admission of neglect. Mother appealed.

Holdings: The Supreme Court, Appellate Division, held that:

[1] children's hearsay statements together with negative inference drawn from mother's failure to testify were sufficient to support finding of neglect;

[2] attorney rendered ineffective assistance for teenage child who expressed living preference; and

[3] children were entitled to appointment of separate attorneys to represent their conflicting interests.

Reversed and remitted.

Centra, J.P., and Nemoyer, J., filed dissenting opinion.

West Headnotes (6)

[1] **Infants** Deprivation, Neglect, or Abuse

Infants Child statements and testimony;sufficiency and corroboration

Children's hearsay statements to caseworker, together with the negative inference drawn from mother's failure to testify, were sufficient to support family court's finding of neglect; children's statements were adequately corroborated by other evidence tending to establish their reliability, and statements cross-corroborated each other. McKinney's Family Court Act § 1046(a)(vi), (b)(i).

Cases that cite this headnote

[2] **Infants** Children in general

Children in a neglect proceeding are entitled to effective assistance of counsel. U.S.C.A. Const.Amend. 14.

Cases that cite this headnote

[3] **Infants** Record

Issue of whether child's trial-level attorney, who also represented child's siblings, rendered ineffective assistance in neglect proceeding by not consulting with child was not properly before appellate court, where there was no indication in the record whether attorney consulted with child. U.S.C.A. Const.Amend. 14; N.Y.Ct.Rules, § 7.1 et seq.

1 Cases that cite this headnote

[4] **Infants** Trial or adjudication;instructions

Attorney for teenage child rendered ineffective assistance in neglect proceeding by failing to advocate child's position that he wanted to live with either mother or father, who was not a custodial option, where attorney asked questions designed to elicit unfavorable testimony regarding mother, who might have occasionally used drugs in the house and might have once hit another child with a belt, attorney opposed mother's motion to dismiss based on insufficient evidence of neglect, and attorney's most serious concern about child was that he frequently skipped school. U.S.C.A. Const.Amend. 14; N.Y.Ct.Rules, § 7.2(d)(3).

1 Cases that cite this headnote

[5] **Infants** Eligibility and qualifications of counsel;conflicts of interest

Children were entitled to appointment of separate attorneys to represent their conflicting interests in neglect proceeding; it was impossible for children's attorney to advocate zealously their unharmonious positions.

Cases that cite this headnote

[6] **Infants** Parties entitled to allege error;estoppel

Issue of whether there was insufficient evidence of neglect against father was not reviewable on appeal of order determining that mother neglected children, where father entered an admission of neglect, and the resulting order concerning father was thereby entered upon consent of the parties.

Cases that cite this headnote

Attorneys and Law Firms

****852** Karpinski, Stapleton & Tehan, P.C., Auburn (Adam H. Vanbuskirk of Counsel), for Respondent–Appellant.

Susan James, Attorney for the Child, Waterloo, Appellant Pro Se.

Marybeth D. Barnet, Attorney for the Child, Canandaigua, Appellant Pro Se.

Theodore W. Stenuf, Attorney for the Child, Minoa, Appellant Pro Se.

Harris Beach PLLC, Buffalo (Allison A. Bosworth of Counsel), for Petitioner–Respondent.

PRESENT: CENTRA, J.P., PERADOTTO, LINDLEY, DeJOSEPH, and NEMOYER, JJ.

Opinion

MEMORANDUM:

[1] ***1146** In this proceeding pursuant to Family Court Act article 10, respondent mother and each Attorney for the Child assigned to the three subject children (appellate AFC) appeal from an order that, inter alia, determined that the mother neglected the children and placed the children in the custody of petitioner. Initially, we reject the contentions of the mother and the appellate AFCs that petitioner failed to meet its burden of establishing neglect by a preponderance of the evidence (*see* Family Ct. Act § 1046[b][i]). Although the evidence of neglect at the fact-finding hearing consisted largely of hearsay statements made by the children to a caseworker employed by petitioner, those statements were adequately corroborated by other evidence tending to establish their reliability (*see* § 1046[a][vi]; *Matter of Gabriel J. [Stacey J.],* 127 A.D.3d 667, 667, 8 N.Y.S.3d 189; *Matter of Tristan R.,* 63 A.D.3d 1075, 1076–1077, 883 N.Y.S.2d 229). Moreover, the children's out-of-court statements to the caseworker cross-corroborated each other (*see Gabriel J.,* 127 A.D.3d at 667, 8 N.Y.S.3d 189; *Tristan R.,* 63 A.D.3d at 1076–1077, 883 N.Y.S.2d 229). In sum, we conclude that ****853** the children's statements, "together with [the] negative inference drawn from the [mother's] failure to testify, [were] sufficient to support [Family Court's] finding of neglect" (*Matter of Imman H.,* 49 A.D.3d 879, 880, 854 N.Y.S.2d 517).

The mother failed to preserve her further contention that her attorney was improperly excluded from an in camera examination of two of the subject children (*see Matter of Jennifer WW.,* 274 A.D.2d 778, 779, 710 N.Y.S.2d 733, *lv. denied* 95 N.Y.2d 764, 716 N.Y.S.2d 39, 739 N.E.2d 295). In any event, it appears that the limited purpose of the examination was for the court to determine where the children would live during the pendency of the proceeding, and the court did not consider the children's statements at the examination as evidence of the mother's neglect.

[2] **[3]** ***1147** Children in a neglect proceeding are entitled to effective assistance of counsel (*see Matter of Jamie TT.,* 191 A.D.2d 132, 136–137, 599 N.Y.S.2d 892). Here, the appellate AFC for Katie and the appellate AFC for Brian contend that Katie and Brian were deprived of effective assistance of counsel by the Attorney for the Children who jointly represented them as well as their sister Alyssa during the proceeding (trial AFC). Katie's appellate AFC contends that the trial AFC never met with or spoke to Katie. Although an AFC is obligated to "consult with and advise the child to the extent of and in a manner consistent with the child's capacities" (22 NYCRR 7.2[d][1]; *see Matter of Lamarcus E. [Jonathan E.],* 90 A.D.3d 1095, 1096, 934 N.Y.S.2d 553), there is no indication in the record whether the trial AFC consulted with Katie. The contention of Katie's appellate AFC is therefore based on matters outside the record and is not properly before us (*see Matter of Gridley v. Syrko,* 50 A.D.3d 1560, 1561, 857 N.Y.S.2d 838; *Matter of Harry P. v. Cindy W.,* 48 A.D.3d 1100, 1100, 850 N.Y.S.2d 783).

[4] We agree with Brian's appellate AFC, however, that Brian was deprived of effective assistance of counsel because the trial AFC failed to advocate his position. The Rules of the Chief Judge provide that an AFC "must zealously advocate the child's position" (22 NYCRR 7.2[d]), even if the AFC "believes that what the child wants is not in the child's best interests" (22 NYCRR 7.2 [d][2]; *see Matter of Mark T. v. Joyanna U.,* 64 A.D.3d 1092, 1093–1094, 882 N.Y.S.2d 773). There are two exceptions to this rule: (1) where the AFC is convinced that the "child lacks the capacity for knowing, voluntary and considered judgment"; or (2) where the AFC is convinced that "following the child's wishes is likely to result in a substantial risk of imminent, serious harm to the child" (22 NYCRR 7.2[d][3]; *see Matter of Viscuso v. Viscuso,* 129 A.D.3d 1679, 1680, 12 N.Y.S.3d 684; *Matter of Lopez v. Lugo,* 115 A.D.3d 1237, 1238, 982 N.Y.S.2d 640). Here, there is no dispute that the trial AFC took a position contrary to the position of two of the subject children, Brian and Alyssa, both of whom maintained that Katie was lying with respect to her allegations against the mother. Alyssa expressed a strong desire to continue living with the mother, while Brian said that he wanted to live with either the mother or his father, who entered an admission of neglect prior to the hearing and was thus not a custodial option. Nevertheless, when

the mother moved to dismiss the petition at the close of petitioner's case based on insufficient evidence of neglect, the trial AFC opposed the motion, stating that, although this was "probably not a very strong case," petitioner had met its burden of proof. Also, during his "cross-examination" of petitioner's sole witness, the trial AFC asked questions designed to ****854** elicit unfavorable testimony ***1148** regarding the mother, thus undercutting Brian and Alyssa's position.

Inasmuch as the trial AFC failed to advocate Brian and Alyssa's position at the fact-finding hearing, he was required to determine that one of the two exceptions to the Rules of the Chief Judge applied, as well as "[to] inform the court of the child[ren]'s articulated wishes" (22 NYCRR 7.2[d][3]). Here, the trial AFC did not fulfill either obligation (*cf. Matter of Alyson J. [Laurie J.],* 88 A.D.3d 1201, 1203, 931 N.Y.S.2d 741). Indeed, the record establishes that neither of the two exceptions applied. Because all three children were teenagers at the time of the hearing, there was no basis for the trial AFC to conclude that they lacked the capacity for knowing, voluntary and considered judgment, and there is no evidence in the record that following the children's wishes was "likely to result in a substantial risk of imminent, serious harm to the child[ren]" (22 NYCRR 7.2[d][3]). According to the trial AFC, the most serious concern he had about the children was that they frequently skipped school which, although certainly not in their long-term best interests, did not pose a substantial risk of *imminent* and serious harm to them. Similarly, the fact that the mother may have occasionally used drugs in the house, and was thus unable to care for the children, does not establish a substantial risk of imminent and serious harm to Brian or Alyssa. Finally, the fact that the mother, on a single occasion, may have struck Katie on the arm with a belt, leaving a small mark, did not establish a substantial risk of imminent and serious harm to Brian or Alyssa if they continued living with the mother.

[5] We note that, although the record does not reveal whether the trial AFC consulted with Katie, it is clear that Katie's position with respect to the neglect proceeding differed from that of her siblings. Under the circumstances, it was impossible for the trial AFC to advocate zealously the children's unharmonious positions and, thus, "the children were entitled to appointment of separate attorneys to represent their conflicting interests" (*Matter of James I. [Jennifer I.],* 128 A.D.3d 1285, 1286, 9 N.Y.S.3d 745; *see Corigliano v. Corigliano,* 297 A.D.2d 328, 329, 746 N.Y.S.2d 313; *Gary D.B. v. Elizabeth C.B.,* 281 A.D.2d 969, 971–972, 722 N.Y.S.2d 323). We therefore remit the matter to Family Court for appointment of new counsel for the children and a new fact-finding hearing.

[6] Finally, the contention of Brian's appellate AFC that there was insufficient evidence of neglect against respondent father is not reviewable on appeal because, among other reasons, the father entered an admission of neglect, and the resulting order ***1149** was thereby entered upon consent of the parties (*see Matter of Martha S. [Linda M.S.],* 126 A.D.3d 1496, 1497, 6 N.Y.S.3d 373; *Matter of Violette K. [Sheila E.K.],* 96 A.D.3d 1499, 1499, 946 N.Y.S.2d 519; *Matter of Carmella J.,* 254 A.D.2d 70, 70, 678 N.Y.S.2d 329).

It is hereby ORDERED that the order so appealed from is reversed on the law without costs and the matter is remitted to Family Court, Cayuga County, for further proceedings.

All concur except CENTRA, J.P., and NEMOYER, J., who dissent and vote to affirm in the following memorandum: We respectfully dissent because, in our view, the children received effective assistance of counsel, and we would therefore affirm the order. Respondent mother and respondent father are the parents of Alyssa, Brian, and Katie, who were 15, 13, and 12 years old at the time petitioner filed the ****855** neglect petition herein against the parents. The parents lived in separate homes and, at the time of the filing of the petition, the girls lived with the mother and Brian lived with the father. One attorney was assigned to represent the children as Attorney for the Children (trial AFC), as he had done in prior proceedings involving the parents. On this appeal, the three children are each represented by a different attorney (appellate AFC), and only the appellate AFCs for Brian and Katie contend that they were denied the effective assistance of counsel by the trial AFC.

As a preliminary matter, we agree with the majority that petitioner established by a preponderance of the evidence that the children were neglected by the parents. The evidence established educational neglect by the mother inasmuch as Brian's and Alyssa's school attendance was poor while they were in the mother's custody (*see* Family Ct. Act § 1012[f][i][A]; *Matter of Cunntrel A. [Jermaine D.A.],* 70 A.D.3d 1308, 1308, 894 N.Y.S.2d 800, *lv. dismissed* 14 N.Y.3d 866, 903 N.Y.S.2d 325, 929 N.E.2d 388). In fact, the school made a PINS referral for Alyssa based on her excessive absences, but the mother did not follow through with the referral. The evidence also established that the mother inadequately supervised the children inasmuch as she remained in her bedroom for excessive periods of time and was oblivious to the fact that the children were leaving the home to drink alcohol and smoke marihuana (*see* § 1012[f][i][B]). Finally, there was evidence that the mother snorted crushed "hydros, oxies," thus supporting the determination that the mother neglected the children by misusing drugs (*see id.; Matter of Edward J. Mc. [Edward J. Mc.],* 92 A.D.3d 887, 887–888, 940 N.Y.S.2d 516). With respect to the father, he admitted that he inappropriately abused alcohol, which was sufficient to establish that he repeatedly misused alcohol "to the extent that it has or would ordinarily have the effect of producing in the user thereof a substantial state of ... intoxication" (§ 1046[a][iii]), and that he thereby ***1150** neglected the children (*see* § 1012[f][i][B]; *Matter of Samantha R. [Laurie R.],* 116 A.D.3d 867, 868, 983 N.Y.S.2d 415, *lv. denied* 23 N.Y.3d 909, 2014 WL 4236280; *Matter of Tyler J. [David M.],* 111 A.D.3d 1361, 1362, 974 N.Y.S.2d 840).

Children who are the subject of a Family Court Act article 10 proceeding are entitled to the assignment of counsel to represent them (§ 249[a]; § 1016), and the children are entitled to the effective assistance of counsel, or meaningful representation (*see Matter of Dwayne G.,* 264 A.D.2d 522, 523, 695 N.Y.S.2d 293; *Matter of Jamie TT.,* 191 A.D.2d 132, 135–136, 599 N.Y.S.2d 892). As the above evidence shows, the children were neglected by the parents, and the trial AFC understandably argued in summation that petitioner had proven its case. Although the trial AFC did not set forth the wishes of the children, Family Court was aware that Alyssa wanted to live with the mother, that Brian wanted to live with the mother or the father, and that Katie wanted to live with an aunt. Nevertheless, the appellate AFCs for Brian and Katie contend that Brian and Katie were denied effective assistance of counsel because the trial AFC advocated a finding of neglect, which was against the apparent wishes of his clients.

The appellate AFCs and the majority rely on 22 NYCRR 7.2(d), which provides that the AFC "must zealously advocate the child's position," and 22 NYCRR 7.2(d)(2), which provides that, "[i]f the child is capable of knowing, voluntary and considered judgment, the [AFC] should be directed by the wishes of the child, even if the [AFC] believes that what the child wants is not in the child's best interests." If an AFC is convinced, however, "that following the ****856** child's wishes is likely to result in a substantial risk of imminent, serious harm to the child, the [AFC] would be justified in advocating a position that is contrary to the child's wishes" (22 NYCRR 7.2[d][3]). We conclude that the trial AFC was reasonably of the view, in light of the evidence supporting a finding of neglect, that there was a substantial risk of imminent, serious harm to the children if they remained in the custody of the parents, and was not ineffective for advocating a finding of neglect (*see generally Matter of Lopez v. Lugo,* 115 A.D.3d 1237, 1238, 982 N.Y.S.2d 640). Indeed, we note that in cases where an AFC has been found to have rendered ineffective assistance of counsel to his or her client in a Family Court Act article 10 proceeding, the reason is that the AFC did not do *enough* to establish that the child had been abused or neglected (*see Matter of Colleen CC.,* 232 A.D.2d 787, 788–789, 648 N.Y.S.2d 754; *Jamie TT.,* 191 A.D.2d at 137, 599 N.Y.S.2d 892). In addition, even assuming, arguendo, that the exception set forth in 22 NYCRR 7.2(d)(3) does not apply to the circumstances of this case, we ***1151** nevertheless would conclude, under all the circumstances presented, that Brian and Katie received meaningful representation (*cf. Jamie TT.,* 191 A.D.2d at 137, 599 N.Y.S.2d 892; *see generally People v. Baldi,* 54 N.Y.2d 137, 147, 444 N.Y.S.2d 893, 429 N.E.2d 400).

All Citations

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McKinney's Consolidated Laws of New York Annotated
Domestic Relations Law (Refs & Annos)
Chapter 14. Of the Consolidated Laws (Refs & Annos)
Article 5. The Custody and Wages of Children (Refs & Annos)

McKinney's DRL § 70

§ 70. Habeas corpus for child detained by parent

Currentness

(a) Where a minor child is residing within this state, either parent may apply to the supreme court for a writ of habeas corpus to have such minor child brought before such court; and on the return thereof, the court, on due consideration, may award the natural guardianship, charge and custody of such child to either parent for such time, under such regulations and restrictions, and with such provisions and directions, as the case may require, and may at any time thereafter vacate or modify such order. In all cases there shall be no prima facie right to the custody of the child in either parent, but the court shall determine solely what is for the best interest of the child, and what will best promote its welfare and happiness, and make award accordingly.

(b) Any order under this section which applies to rights of visitation with a child remanded or placed in the care of a person, official, agency or institution pursuant to article ten of the family court act or pursuant to an instrument approved under section three hundred fifty-eight-a of the social services law, shall be enforceable pursuant to the provisions of part eight of article ten of such act, sections three hundred fifty-eight-a and three hundred eighty-four-a of the social services law and other applicable provisions of law against any person or official having care and custody, or temporary care and custody, of such child.

Credits
(L.1909, c. 19. Amended L.1923, c. 235, § 1; L.1964, c. 564, § 1; L.1988, c. 457, § 7.)

McKinney's D. R. L. § 70, NY DOM REL § 70
Current through L.2019, chapter 144. Some statute sections may be more current, see credits for details.

End of Document

McKinney's Consolidated Laws of New York Annotated
Domestic Relations Law (Refs & Annos)
Chapter 14. Of the Consolidated Laws (Refs & Annos)
Article 13. Provisions Applicable to More than One Type of Matrimonial Action (Refs & Annos)

McKinney's DRL § 240

§ 240. Custody and child support; orders of protection

Effective: July 19, 2017
Currentness

1. (a) In any action or proceeding brought (1) to annul a marriage or to declare the nullity of a void marriage, or (2) for a separation, or (3) for a divorce, or (4) to obtain, by a writ of habeas corpus or by petition and order to show cause, the custody of or right to visitation with any child of a marriage, the court shall require verification of the status of any child of the marriage with respect to such child's custody and support, including any prior orders, and shall enter orders for custody and support as, in the court's discretion, justice requires, having regard to the circumstances of the case and of the respective parties and to the best interests of the child and subject to the provisions of subdivision one-c of this section. Where either party to an action concerning custody of or a right to visitation with a child alleges in a sworn petition or complaint or sworn answer, cross-petition, counterclaim or other sworn responsive pleading that the other party has committed an act of domestic violence against the party making the allegation or a family or household member of either party, as such family or household member is defined in article eight of the family court act, and such allegations are proven by a preponderance of the evidence, the court must consider the effect of such domestic violence upon the best interests of the child, together with such other facts and circumstances as the court deems relevant in making a direction pursuant to this section and state on the record how such findings, facts and circumstances factored into the direction. If a parent makes a good faith allegation based on a reasonable belief supported by facts that the child is the victim of child abuse, child neglect, or the effects of domestic violence, and if that parent acts lawfully and in good faith in response to that reasonable belief to protect the child or seek treatment for the child, then that parent shall not be deprived of custody, visitation or contact with the child, or restricted in custody, visitation or contact, based solely on that belief or the reasonable actions taken based on that belief. If an allegation that a child is abused is supported by a preponderance of the evidence, then the court shall consider such evidence of abuse in determining the visitation arrangement that is in the best interest of the child, and the court shall not place a child in the custody of a parent who presents a substantial risk of harm to that child, and shall state on the record how such findings were factored into the determination. Where a proceeding filed pursuant to article ten or ten-A of the family court act is pending at the same time as a proceeding brought in the supreme court involving the custody of, or right to visitation with, any child of a marriage, the court presiding over the proceeding under article ten or ten-A of the family court act may jointly hear the dispositional hearing on the petition under article ten or the permanency hearing under article ten-A of the family court act and, upon referral from the supreme court, the hearing to resolve the matter of custody or visitation in the proceeding pending in the supreme court; provided however, the court must determine custody or visitation in accordance with the terms of this section.

An order directing the payment of child support shall contain the social security numbers of the named parties. In all cases there shall be no prima facie right to the custody of the child in either parent. Such direction shall make provision for child support out of the property of either or both parents. The court shall make its award for child support pursuant to subdivision one-b of this section. Such direction may provide for reasonable visitation rights to the maternal and/or paternal grandparents of any child of the parties. Such direction as it applies to rights of visitation with a child remanded or placed in the care of a person, official, agency or institution pursuant to article ten of the family court act, or pursuant to an instrument approved under section three hundred fifty-eight-a of the social services law, shall be enforceable pursuant to part eight of article ten of the family court act and sections three hundred fifty-eight-a and three hundred eighty-four-a of the social services law and other applicable

provisions of law against any person having care and custody, or temporary care and custody, of the child. Notwithstanding any other provision of law, any written application or motion to the court for the establishment, modification or enforcement of a child support obligation for persons not in receipt of public assistance and care must contain either a request for child support enforcement services which would authorize the collection of the support obligation by the immediate issuance of an income execution for support enforcement as provided for by this chapter, completed in the manner specified in section one hundred eleven-g of the social services law; or a statement that the applicant has applied for or is in receipt of such services; or a statement that the applicant knows of the availability of such services, has declined them at this time and where support enforcement services pursuant to section one hundred eleven-g of the social services law have been declined that the applicant understands that an income deduction order may be issued pursuant to subdivision (c) of section fifty-two hundred forty-two of the civil practice law and rules without other child support enforcement services and that payment of an administrative fee may be required. The court shall provide a copy of any such request for child support enforcement services to the support collection unit of the appropriate social services district any time it directs payments to be made to such support collection unit. Additionally, the copy of any such request shall be accompanied by the name, address and social security number of the parties; the date and place of the parties' marriage; the name and date of birth of the child or children; and the name and address of the employers and income payors of the party from whom child support is sought or from the party ordered to pay child support to the other party. Such direction may require the payment of a sum or sums of money either directly to the custodial parent or to third persons for goods or services furnished for such child, or for both payments to the custodial parent and to such third persons; provided, however, that unless the party seeking or receiving child support has applied for or is receiving such services, the court shall not direct such payments to be made to the support collection unit, as established in section one hundred eleven-h of the social services law. Every order directing the payment of support shall require that if either parent currently, or at any time in the future, has health insurance benefits available that may be extended or obtained to cover the child, such parent is required to exercise the option of additional coverage in favor of such child and execute and deliver to such person any forms, notices, documents or instruments necessary to assure timely payment of any health insurance claims for such child.

(a-1)(1) Permanent and initial temporary orders of custody or visitation. Prior to the issuance of any permanent or initial temporary order of custody or visitation, the court shall conduct a review of the decisions and reports listed in subparagraph three of this paragraph.

(2) Successive temporary orders of custody or visitation. Prior to the issuance of any successive temporary order of custody or visitation, the court shall conduct a review of the decisions and reports listed in subparagraph three of this paragraph, unless such a review has been conducted within ninety days prior to the issuance of such order.

(3) Decisions and reports for review. The court shall conduct a review of the following:

(i) related decisions in court proceedings initiated pursuant to article ten of the family court act, and all warrants issued under the family court act; and

(ii) reports of the statewide computerized registry of orders of protection established and maintained pursuant to section two hundred twenty-one-a of the executive law, and reports of the sex offender registry established and maintained pursuant to section one hundred sixty-eight-b of the correction law.

(4) Notifying counsel and issuing orders. Upon consideration of decisions pursuant to article ten of the family court act, and registry reports and notifying counsel involved in the proceeding, or in the event of a self-represented party, notifying such party of the results thereof, including any court appointed attorney for children, the court may issue a temporary, successive temporary or final order of custody or visitation.

(5) Temporary emergency order. Notwithstanding any other provision of the law, upon emergency situations, including computer malfunctions, to serve the best interest of the child, the court may issue a temporary emergency order for custody or visitation in the event that it is not possible to timely review decisions and reports on registries as required pursuant to subparagraph three of this paragraph.

(6) After issuing a temporary emergency order. After issuing a temporary emergency order of custody or visitation, the court shall conduct reviews of the decisions and reports on registries as required pursuant to subparagraph three of this paragraph within twenty-four hours of the issuance of such temporary emergency order. Should such twenty-four hour period fall on a day when court is not in session, then the required reviews shall take place the next day the court is in session. Upon reviewing decisions and reports the court shall notify associated counsel, self-represented parties and attorneys for children pursuant to subparagraph four of this paragraph and may issue temporary or permanent custody or visitation orders.

(7) Feasibility study. The commissioner of the office of children and family services, in conjunction with the office of court administration, is hereby authorized and directed to examine, study, evaluate and make recommendations concerning the feasibility of the utilization of computers in courts which are connected to the statewide central register of child abuse and maltreatment established and maintained pursuant to section four hundred twenty-two of the social services law, as a means of providing courts with information regarding parties requesting orders of custody or visitation. Such commissioner shall make a preliminary report to the governor and the legislature of findings, conclusions and recommendations not later than January first, two thousand nine, and a final report of findings, conclusions and recommendations not later than June first, two thousand nine, and shall submit with the reports such legislative proposals as are deemed necessary to implement the commissioner's recommendations.

(a-2) Military service by parent; effect on child custody orders. (1) During the period of time that a parent is activated, deployed or temporarily assigned to military service, such that the parent's ability to continue as a joint caretaker or the primary caretaker of a minor child is materially affected by such military service, any orders issued pursuant to this section, based on the fact that the parent is activated, deployed or temporarily assigned to military service, which would materially affect or change a previous judgment or order regarding custody of that parent's child or children as such judgment or order existed on the date the parent was activated, deployed, or temporarily assigned to military service, shall be subject to review pursuant to subparagraph three of this paragraph. Any relevant provisions of the Service Member's Civil Relief Act [1] shall apply to all proceedings governed by this section.

(2) During such period, the court may enter an order to modify custody if there is clear and convincing evidence that the modification is in the best interests of the child. An attorney for the child shall be appointed in all cases where a modification is sought during such military service. Such order shall be subject to review pursuant to subparagraph three of this paragraph. When entering an order pursuant to this section, the court shall consider and provide for, if feasible and if in the best interests of the child, contact between the military service member and his or her child, including, but not limited to, electronic communication by e-mail, webcam, telephone, or other available means. During the period of the parent's leave from military service, the court shall consider the best interests of the child when establishing a parenting schedule, including visiting and other contact. For such purposes, a “leave from military service” shall be a period of not more than three months.

(3) Unless the parties have otherwise stipulated or agreed, if an order is issued pursuant to this paragraph, the return of the parent from active military service, deployment or temporary assignment shall be considered a substantial change in circumstances. Upon the request of either parent, the court shall determine on the basis of the child's best interests whether the custody judgment or order previously in effect should be modified.

(4) This paragraph shall not apply to assignments to permanent duty stations or permanent changes of station.

(b) As used in this section, the following terms shall have the following meanings:

(1) “Health insurance benefits” means any medical, dental, optical and prescription drugs and health care services or other health care benefits that may be provided for a dependent through an employer or organization, including such employers or organizations which are self insured, or through other available health insurance or health care coverage plans.

(2) “Available health insurance benefits” means any health insurance benefits that are reasonable in cost and that are reasonably accessible to the person on whose behalf the petition is brought. Health insurance benefits that are not reasonable in cost or whose services are not reasonably accessible to such person, shall be considered unavailable.

(3) When the person on whose behalf the petition is brought is a child in accordance with paragraph (c) of this subdivision, health insurance benefits shall be considered “reasonable in cost” if the cost of health insurance benefits does not exceed five percent of the combined parental gross income. The cost of health insurance benefits shall refer to the cost of the premium and deductible attributable to adding the child or children to existing coverage or the difference between such costs for self-only and family coverage. Provided, however, the presumption that the health insurance benefits are reasonable in cost may be rebutted upon a finding that the cost is unjust or inappropriate which finding shall be based on the circumstances of the case, the cost and comprehensiveness of the health insurance benefits for which the child or children may otherwise be eligible, and the best interests of the child or children. In no instance shall health insurance benefits be considered “reasonable in cost” if a parent's share of the cost of extending such coverage would reduce the income of that parent below the self-support reserve. Health insurance benefits are “reasonably accessible” if the child lives within the geographic area covered by the plan or lives within thirty minutes or thirty miles of travel time from the child's residence to the services covered by the health insurance benefits or through benefits provided under a reciprocal agreement; provided, however, this presumption may be rebutted for good cause shown including, but not limited to, the special health needs of the child. The court shall set forth such finding and the reasons therefor in the order of support.

(c) When the person on whose behalf the petition is brought is a child, the court shall consider the availability of health insurance benefits to all parties and shall take the following action to ensure that health insurance benefits are provided for the benefit of the child:

(1) Where the child is presently covered by health insurance benefits, the court shall direct in the order of support that such coverage be maintained, unless either parent requests the court to make a direction for health insurance benefits coverage pursuant to paragraph two of this subdivision.

(2) Where the child is not presently covered by health insurance benefits, the court shall make a determination as follows:

(i) If only one parent has available health insurance benefits, the court shall direct in the order of support that such parent provide health insurance benefits.

(ii) If both parents have available health insurance benefits the court shall direct in the order of support that either parent or both parents provide such health insurance. The court shall make such determination based on the circumstances of the case, including, but not limited to, the cost and comprehensiveness of the respective health insurance benefits and the best interests of the child.

(iii) If neither parent has available health insurance benefits, the court shall direct in the order of support that the custodial parent apply for the state's child health insurance plan pursuant to title one-A of article twenty-five of the public health law and the medical assistance program established pursuant to title eleven of article five of the social services law. A direction issued under this subdivision shall not limit or alter either parent's obligation to obtain health insurance benefits at such time as they become available, as required pursuant to paragraph (a) of this subdivision. Nothing in this subdivision shall alter or limit the authority of the medical assistance program to determine when it is considered cost effective to require a custodial parent to enroll a child in an available group health insurance plan pursuant to paragraphs (b) and (c) of subdivision one of section three hundred sixty-seven-a of the social services law.

(d) The cost of providing health insurance benefits or benefits under the state's child health insurance plan or the medical assistance program, pursuant to paragraph (c) of this subdivision, shall be deemed cash medical support, and the court shall determine the obligation of either or both parents to contribute to the cost thereof pursuant to subparagraph five of paragraph (c) of subdivision one-b of this section.

(e) The court shall provide in the order of support that the legally responsible relative immediately notify the other party, or the other party and the support collection unit when the order is issued on behalf of a child in receipt of public assistance and care or in receipt of services pursuant to section one hundred eleven-g of the social services law, of any change in health insurance benefits, including any termination of benefits, change in the health insurance benefit carrier, premium, or extent and availability of existing or new benefits.

(f) Where the court determines that health insurance benefits are available, the court shall provide in the order of support that the legally responsible relative immediately enroll the eligible dependents named in the order who are otherwise eligible for such benefits without regard to any seasonal enrollment restrictions. Such order shall further direct the legally responsible relative to maintain such benefits as long as they remain available to such relative. Such order shall further direct the legally responsible relative to assign all insurance reimbursement payments for health care expenses incurred for his or her eligible dependents to the provider of such services or the party actually having incurred and satisfied such expenses, as appropriate.

(g) When the court issues an order of child support or combined child and spousal support on behalf of persons in receipt of public assistance and care or in receipt of services pursuant to section one hundred eleven-g of the social services law, such order shall further direct that the provision of health care benefits shall be immediately enforced pursuant to section fifty-two hundred forty-one of the civil practice law and rules.

(h) When the court issues an order of child support or combined child and spousal support on behalf of persons other than those in receipt of public assistance and care or in receipt of services pursuant to section one hundred eleven-g of the social services law, the court shall also issue a separate order which shall include the necessary direction to ensure the order's characterization as a qualified medical child support order as defined by section six hundred nine of the employee retirement income security act of 1974 (29 USC 1169). Such order shall: (i) clearly state that it creates or recognizes the existence of the right of the named dependent to be enrolled and to receive benefits for which the legally responsible relative is eligible under the available group health plans, and shall clearly specify the name, social security number and mailing address of the legally responsible relative,

and of each dependent to be covered by the order; (ii) provide a clear description of the type of coverage to be provided by the group health plan to each such dependent or the manner in which the type of coverage is to be determined; and (iii) specify the period of time to which the order applies. The court shall not require the group health plan to provide any type or form of benefit or option not otherwise provided under the group health plan except to the extent necessary to meet the requirements of a law relating to medical child support described in section one thousand three hundred and ninety-six g of title forty-two of the United States code.

(i) Upon a finding that a legally responsible relative wilfully failed to obtain health insurance benefits in violation of a court order, such relative will be presumptively liable for all health care expenses incurred on behalf of such dependents from the first date such dependents were eligible to be enrolled to receive health insurance benefits after the issuance of the order of support directing the acquisition of such coverage.

(j) The order shall be effective as of the date of the application therefor, and any retroactive amount of child support due shall be support arrears/past due support and shall, except as provided for herein, be paid in one lump sum or periodic sums, as the court shall direct, taking into account any amount of temporary support which has been paid. In addition, such retroactive child support shall be enforceable in any manner provided by law including, but not limited to, an execution for support enforcement pursuant to subdivision (b) of section fifty-two hundred forty-one of the civil practice law and rules. When a child receiving support is a public assistance recipient, or the order of support is being enforced or is to be enforced pursuant to section one hundred eleven-g of the social services law, the court shall establish the amount of retroactive child support and notify the parties that such amount shall be enforced by the support collection unit pursuant to an execution for support enforcement as provided for in subdivision (b) of section fifty-two hundred forty-one of the civil practice law and rules, or in such periodic payments as would have been authorized had such an execution been issued. In such case, the courts shall not direct the schedule of repayment of retroactive support. Where such direction is for child support and paternity has been established by a voluntary acknowledgement of paternity as defined in section forty-one hundred thirty-five-b of the public health law, the court shall inquire of the parties whether the acknowledgement has been duly filed, and unless satisfied that it has been so filed shall require the clerk of the court to file such acknowledgement with the appropriate registrar within five business days. Such direction may be made in the final judgment in such action or proceeding, or by one or more orders from time to time before or subsequent to final judgment, or by both such order or orders and the final judgment. Such direction may be made notwithstanding that the court for any reason whatsoever, other than lack of jurisdiction, refuses to grant the relief requested in the action or proceeding. Any order or judgment made as in this section provided may combine in one lump sum any amount payable to the custodial parent under this section with any amount payable to such parent under section two hundred thirty-six of this article. Upon the application of either parent, or of any other person or party having the care, custody and control of such child pursuant to such judgment or order, after such notice to the other party, parties or persons having such care, custody and control and given in such manner as the court shall direct, the court may annul or modify any such direction, whether made by order or final judgment, or in case no such direction shall have been made in the final judgment may, with respect to any judgment of annulment or declaring the nullity of a void marriage rendered on or after September first, nineteen hundred forty, or any judgment of separation or divorce whenever rendered, amend the judgment by inserting such direction. Subject to the provisions of section two hundred forty-four of this article, no such modification or annulment shall reduce or annul arrears accrued prior to the making of such application unless the defaulting party shows good cause for failure to make application for relief from the judgment or order directing such payment prior to the accrual of such arrears. Such modification may increase such child support nunc pro tunc as of the date of application based on newly discovered evidence. Any retroactive amount of child support due shall be support arrears/past due support and shall be paid in one lump sum or periodic sums, as the court shall direct, taking into account any amount of temporary child support which has been paid. In addition, such retroactive child support shall be enforceable in any manner provided by law including, but not limited to, an execution for support enforcement pursuant to subdivision (b) of section fifty-two hundred forty-one of the civil practice law and rules.

1-a. In any proceeding brought pursuant to this section to determine the custody or visitation of minors, a report made to the statewide central register of child abuse and maltreatment, pursuant to title six of article six of the social services law, or a portion thereof, which is otherwise admissible as a business record pursuant to rule forty-five hundred eighteen of the civil practice law and rules shall not be admissible in evidence, notwithstanding such rule, unless an investigation of such report conducted pursuant to title six of article six of the social services law has determined that there is some credible evidence of the alleged abuse or maltreatment and that the subject of the report has been notified that the report is indicated. In addition, if such report has been reviewed by the state commissioner of social services or his designee and has been determined to be unfounded, it shall not be admissible in evidence. If such report has been so reviewed and has been amended to delete any finding, each such deleted finding shall not be admissible. If the state commissioner of social services or his designee has amended the report to add any new finding, each such new finding, together with any portion of the original report not deleted by the commissioner or his designee, shall be admissible if it meets the other requirements of this subdivision and is otherwise admissible as a business record. If such a report, or portion thereof, is admissible in evidence but is uncorroborated, it shall not be sufficient to make a fact finding of abuse or maltreatment in such proceeding. Any other evidence tending to support the reliability of such report shall be sufficient corroboration.

1-b. (a) The court shall make its award for child support pursuant to the provisions of this subdivision. The court may vary from the amount of the basic child support obligation determined pursuant to paragraph (c) of this subdivision only in accordance with paragraph (f) of this subdivision.

(b) For purposes of this subdivision, the following definitions shall be used:

(1) “Basic child support obligation” shall mean the sum derived by adding the amounts determined by the application of subparagraphs two and three of paragraph (c) of this subdivision except as increased pursuant to subparagraphs four, five, six and seven of such paragraph.

(2) “Child support” shall mean a sum to be paid pursuant to court order or decree by either or both parents or pursuant to a valid agreement between the parties for care, maintenance and education of any unemancipated child under the age of twenty-one years.

(3) “Child support percentage” shall mean:

(i) seventeen percent of the combined parental income for one child;

(ii) twenty-five percent of the combined parental income for two children;

(iii) twenty-nine percent of the combined parental income for three children;

(iv) thirty-one percent of the combined parental income for four children; and

(v) no less than thirty-five percent of the combined parental income for five or more children.

(4) “Combined parental income” shall mean the sum of the income of both parents.

(5) “Income” shall mean, but shall not be limited to, the sum of the amounts determined by the application of clauses (i), (ii), (iii), (iv), (v) and (vi) of this subparagraph reduced by the amount determined by the application of clause (vii) of this subparagraph:

(i) gross (total) income as should have been or should be reported in the most recent federal income tax return. If an individual files his/her federal income tax return as a married person filing jointly, such person shall be required to prepare a form, sworn to under penalty of law, disclosing his/her gross income individually;

(ii) to the extent not already included in gross income in clause (i) of this subparagraph, investment income reduced by sums expended in connection with such investment;

(iii) to the extent not already included in gross income in clauses (i) and (ii) of this subparagraph, the amount of income or compensation voluntarily deferred and income received, if any, from the following sources:

(A) workers' compensation,

(B) disability benefits,

(C) unemployment insurance benefits,

(D) social security benefits,

(E) veterans benefits,

(F) pensions and retirement benefits,

(G) fellowships and stipends,

(H) annuity payments, and

(I) alimony or maintenance actually paid or to be paid to a spouse who is a party to the instant action pursuant to an existing court order or contained in the order to be entered by the court, or pursuant to a validly executed written agreement, in which event the order or agreement shall provide for a specific adjustment, in accordance with this subdivision, in the amount of child support payable upon the termination of alimony or maintenance to such spouse; provided, however, that the specific adjustment in the amount of child support is without prejudice to either party's right to seek a modification in accordance with subparagraph two of paragraph b of subdivision nine of part B of section two hundred thirty-six of this article. In an action or proceeding to modify an order of child support, including an order incorporating without merging an agreement, issued prior to the effective

date of this subclause, the provisions of this subclause shall not, by themselves, constitute a substantial change of circumstances pursuant to paragraph b of subdivision nine of part B of section two hundred thirty-six of this article.

(iv) at the discretion of the court, the court may attribute or impute income from, such other resources as may be available to the parent, including, but not limited to:

(A) non-income producing assets,

(B) meals, lodging, memberships, automobiles or other perquisites that are provided as part of compensation for employment to the extent that such perquisites constitute expenditures for personal use, or which expenditures directly or indirecly [2] confer personal economic benefits,

(C) fringe benefits provided as part of compensation for employment, and

(D) money, goods, or services provided by relatives and friends;

(v) an amount imputed as income based upon the parent's former resources or income, if the court determines that a parent has reduced resources or income in order to reduce or avoid the parent's obligation for child support;

(vi) to the extent not already included in gross income in clauses (i) and (ii) of this subparagraph, the following self-employment deductions attributable to self-employment carried on by the taxpayer:

(A) any depreciation deduction greater than depreciation calculated on a straight-line basis for the purpose of determining business income or investment credits, and

(B) entertainment and travel allowances deducted from business income to the extent said allowances reduce personal expenditures;

(vii) the following shall be deducted from income prior to applying the provisions of paragraph (c) of this subdivision:

(A) unreimbursed employee business expenses except to the extent said expenses reduce personal expenditures,

(B) alimony or maintenance actually paid to a spouse not a party to the instant action pursuant to court order or validly executed written agreement,

(C) alimony or maintenance actually paid or to be paid to a spouse who is a party to the instant action pursuant to an existing court order or contained in the order to be entered by the court, or pursuant to a validly executed written agreement, in which event the order or agreement shall provide for a specific adjustment, in accordance with this subdivision, in the amount of child support payable upon the termination of alimony or maintenance to such spouse; provided, however, that the specific adjustment in the amount of child support is without prejudice to either party's right to seek a modification in accordance with subparagraph

two of paragraph b of subdivision nine of part B of section two hundred thirty-six of this article. In an action or proceeding to modify an order of child support, including an order incorporating without merging an agreement, issued prior to the effective date of this subclause, the provisions of this subclause shall not, by themselves, constitute a substantial change of circumstances pursuant to paragraph b of subdivision nine of part B of section two hundred thirty-six of this article.

(D) child support actually paid pursuant to court order or written agreement on behalf of any child for whom the parent has a legal duty of support and who is not subject to the instant action,

(E) public assistance,

(F) supplemental security income,

(G) New York city or Yonkers income or earnings taxes actually paid, and

(H) federal insurance contributions act (FICA) taxes actually paid.

(6) “Self-support reserve” shall mean one hundred thirty-five percent of the poverty income guidelines amount for a single person as reported by the federal department of health and human services. For the calendar year nineteen hundred eighty-nine, the self-support reserve shall be eight thousand sixty-five dollars. On March first of each year, the self-support reserve shall be revised to reflect the annual updating of the poverty income guidelines as reported by the federal department of health and human services for a single person household.

(c) The amount of the basic child support obligation shall be determined in accordance with the provision of this paragraph:

(1) The court shall determine the combined parental income.

(2) The court shall multiply the combined parental income up to the amount set forth in paragraph (b) of subdivision two of section one hundred eleven-i of the social services law by the appropriate child support percentage and such amount shall be prorated in the same proportion as each parent's income is to the combined parental income.

(3) Where the combined parental income exceeds the dollar amount set forth in subparagraph two of this paragraph, the court shall determine the amount of child support for the amount of the combined parental income in excess of such dollar amount through consideration of the factors set forth in paragraph (f) of this subdivision and/or the child support percentage.

(4) Where the custodial parent is working, or receiving elementary or secondary education, or higher education or vocational training which the court determines will lead to employment, and incurs child care expenses as a result thereof, the court shall determine reasonable child care expenses and such child care expenses, where incurred, shall be prorated in the same proportion as each parent's income is to the combined parental income. Each parent's pro rata share of the child care expenses shall be separately stated and added to the sum of subparagraphs two and three of this paragraph.

(5) the court shall determine the parties' obligation to provide health insurance benefits pursuant to this section and to pay cash medical support as provided under this subparagraph.

(i) “Cash medical support” means an amount ordered to be paid toward the cost of health insurance provided by a public entity or by a parent through an employer or organization, including such employers or organizations which are self insured, or through other available health insurance or health care coverage plans, and/or for other health care expenses not covered by insurance.

(ii) Where health insurance benefits pursuant to subparagraph one and clauses (i) and (ii) of subparagraph two of paragraph (c) of subdivision one of this section are determined by the court to be available, the cost of providing health insurance benefits shall be prorated between the parties in the same proportion as each parent's income is to the combined parental income. If the custodial parent is ordered to provide such benefits, the non-custodial parent's pro rata share of such costs shall be added to the basic support obligation. If the non-custodial parent is ordered to provide such benefits, the custodial parent's pro rata share of such costs shall be deducted from the basic support obligation.

(iii) Where health insurance benefits pursuant to subparagraph one and clauses (i) and (ii) of subparagraph two of paragraph (c) of subdivision one of this section are determined by the court to be unavailable, if the child or children are determined eligible for coverage under the medical assistance program established pursuant to title eleven of article five of the social services law, the court shall order the non-custodial parent to pay cash medical support as follows:

(A) In the case of a child or children authorized for managed care coverage under the medical assistance program, the lesser of the amount that would be required as a family contribution under the state's child health insurance plan pursuant to title one-A of article twenty-five of the public health law for the child or children if they were in a two-parent household with income equal to the combined income of the non-custodial and custodial parents or the premium paid by the medical assistance program on behalf of the child or children to the managed care plan. The court shall separately state the non-custodial parent's monthly obligation. The non-custodial parent's cash medical support obligation under this clause shall not exceed five percent of his or her gross income, or the difference between the non-custodial parent's income and the self-support reserve, whichever is less.

(B) In the case of a child or children authorized for fee-for-service coverage under the medical assistance program other than a child or children described in item (A) of this clause, the court shall determine the non-custodial parent's maximum annual cash medical support obligation, which shall be equal to the lesser of the monthly amount that would be required as a family contribution under the state's child health insurance plan pursuant to title one-A of article twenty-five of the public health law for the child or children if they were in a two-parent household with income equal to the combined income of the non-custodial and custodial parents times twelve months or the number of months that the child or children are authorized for fee-for-service coverage during any year. The court shall separately state in the order the non-custodial parent's maximum annual cash medical support obligation and, upon proof to the court that the non-custodial parent, after notice of the amount due, has failed to pay the public entity for incurred health care expenses, the court shall order the non-custodial parent to pay such incurred health care expenses up to the maximum annual cash medical support obligation. Such amounts shall be support arrears/past due support and shall be subject to any remedies as provided by law for the enforcement of support arrears/past due support. The total annual amount that the non-custodial parent is ordered to pay under this clause shall not exceed five percent of his or her gross income or the difference between the non-custodial parent's income and the self-support reserve, whichever is less.

(C) The court shall order cash medical support to be paid by the non-custodial parent for health care expenses of the child or children paid by the medical assistance program prior to the issuance of the court's order. The amount of such support shall be calculated as provided under item (A) or (B) of this clause, provided that the amount that the non-custodial parent is ordered

to pay under this item shall not exceed five percent of his or her gross income or the difference between the non-custodial parent's income and the self-support reserve, whichever is less, for the year when the expense was incurred. Such amounts shall be support arrears/past due support and shall be subject to any remedies as provided by law for the enforcement of support arrears/past due support.

(iv) Where health insurance benefits pursuant to subparagraph one and clauses (i) and (ii) of subparagraph two of paragraph (c) of subdivision one of this section are determined by the court to be unavailable, and the child or children are determined eligible for coverage under the state's child health insurance plan pursuant to title one-A of article twenty-five of the public health law, the court shall prorate each parent's share of the cost of the family contribution required under such child health insurance plan in the same proportion as each parent's income is to the combined parental income, and state the amount of the non-custodial parent's share in the order. The total amount of cash medical support that the non-custodial parent is ordered to pay under this clause shall not exceed five percent of his or her gross income, or the difference between the non-custodial parent's income and the self-support reserve, whichever is less.

(v) In addition to the amounts ordered under clause (ii), (iii), or (iv), the court shall pro rate each parent's share of reasonable health care expenses not reimbursed or paid by insurance, the medical assistance program established pursuant to title eleven of article five of the social services law, or the state's child health insurance plan pursuant to title one-A of article twenty-five of the public health law, in the same proportion as each parent's income is to the combined parental income, and state the non-custodial parent's share as a percentage in the order. The non-custodial parent's pro rata share of such health care expenses determined by the court to be due and owing shall be support arrears/past due support and shall be subject to any remedies provided by law for the enforcement of support arrears/past due support. In addition, the court may direct that the non-custodial parent's pro rata share of such health care expenses be paid in one sum or in periodic sums, including direct payment to the health care provider.

(vi) Upon proof by either party that cash medical support pursuant to clause (ii), (iii), (iv), or (v) of this subparagraph would be unjust or inappropriate pursuant to paragraph (f) of this subdivision, the court shall:

(A) order the parties to pay cash medical support as the court finds just and appropriate, considering the best interests of the child; and

(B) set forth in the order the factors it considered, the amount calculated under this subparagraph, the reason or reasons the court did not order such amount, and the basis for the amount awarded.

(6) Where the court determines that the custodial parent is seeking work and incurs child care expenses as a result thereof, the court may determine reasonable child care expenses and may apportion the same between the custodial and non-custodial parent. The non-custodial parent's share of such expenses shall be separately stated and paid in a manner determined by the court.

(7) Where the court determines, having regard for the circumstances of the case and of the respective parties and in the best interests of the child, and as justice requires, that the present or future provision of post-secondary, private, special, or enriched education for the child is appropriate, the court may award educational expenses. The non-custodial parent shall pay educational expenses, as awarded, in a manner determined by the court, including direct payment to the educational provider.

(d) Notwithstanding the provisions of paragraph (c) of this subdivision, where the annual amount of the basic child support obligation would reduce the non-custodial parent's income below the poverty income guidelines amount for a single person as

reported by the federal department of health and human services, the basic child support obligation shall be twenty-five dollars per month, provided, however, that if the court finds that such basic child support obligation is unjust or inappropriate, which finding shall be based upon considerations of the factors set forth in paragraph (f) of this subdivision, the court shall order the non-custodial parent to pay such amount of the child support as the court finds just and appropriate. Notwithstanding the provisions of paragraph (c) of this subdivision, where the annual amount of the basic child support obligation would reduce the non-custodial parent's income below the self-support reserve but not below the poverty income guidelines amount for a single person as reported by the federal department of health and human services, the basic child support obligation shall be fifty dollars per month or the difference between the non-custodial parent's income and the self-support reserve, whichever is greater, in addition to any amounts that the court may, in its discretion, order in accordance with subparagraphs four, five, six and/or seven of paragraph (c) of this subdivision.

(e) Where a parent is or may be entitled to receive non-recurring payments from extraordinary sources not otherwise considered as income pursuant to this section, including but not limited to:

(1) Life insurance policies;

(2) Discharges of indebtedness;

(3) Recovery of bad debts and delinquency amounts;

(4) Gifts and inheritances; and

(5) Lottery winnings,

the court, in accordance with paragraphs (c), (d) and (f) of this subdivision may allocate a proportion of the same to child support, and such amount shall be paid in a manner determined by the court.

(f) The court shall calculate the basic child support obligation, and the non-custodial parent's pro rata share of the basic child support obligation. Unless the court finds that the non-custodial parents's [2] pro-rata share of the basic child support obligation is unjust or inappropriate, which finding shall be based upon consideration of the following factors:

(1) The financial resources of the custodial and non-custodial parent, and those of the child;

(2) The physical and emotional health of the child and his/her special needs and aptitudes;

(3) The standard of living the child would have enjoyed had the marriage or household not been dissolved;

(4) The tax consequences to the parties;

(5) The non-monetary contributions that the parents will make toward the care and well-being of the child;

(6) The educational needs of either parent;

(7) A determination that the gross income of one parent is substantially less than the other parent's gross income;

(8) The needs of the children of the non-custodial parent for whom the non-custodial parent is providing support who are not subject to the instant action and whose support has not been deducted from income pursuant to subclause (D) of clause (vii) of subparagraph five of paragraph (b) of this subdivision, and the financial resources of any person obligated to support such children, provided, however, that this factor may apply only if the resources available to support such children are less than the resources available to support the children who are subject to the instant action;

(9) Provided that the child is not on public assistance (i) extraordinary expenses incurred by the non-custodial parent in exercising visitation, or (ii) expenses incurred by the non-custodial parent in extended visitation provided that the custodial parent's expenses are substantially reduced as a result thereof; and

(10) Any other factors the court determines are relevant in each case, the court shall order the non-custodial parent to pay his or her pro rata share of the basic child support obligation, and may order the non-custodial parent to pay an amount pursuant to paragraph (e) of this subdivision.

(g) Where the court finds that the non-custodial parent's pro rata share of the basic child support obligation is unjust or inappropriate, the court shall order the non-custodial parent to pay such amount of child support as the court finds just and appropriate, and the court shall set forth, in a written order, the factors it considered; the amount of each party's pro rata share of the basic child support obligation; and the reasons that the court did not order the basic child support obligation. Such written order may not be waived by either party or counsel; provided, however, and notwithstanding any other provision of law, the court shall not find that the non-custodial parent's pro rata share of such obligation is unjust or inappropriate on the basis that such share exceeds the portion of a public assistance grant which is attributable to a child or children. Where the non-custodial parent's income is less than or equal to the poverty income guidelines amount for a single person as reported by the federal department of health and human services, unpaid child support arrears in excess of five hundred dollars shall not accrue.

(h) A validly executed agreement or stipulation voluntarily entered into between the parties after the effective date of this subdivision presented to the court for incorporation in an order or judgment shall include a provision stating that the parties have been advised of the provisions of this subdivision, and that the basic child support obligation provided for therein would presumptively result in the correct amount of child support to be awarded. In the event that such agreement or stipulation deviates from the basic child support obligation, the agreement or stipulation must specify the amount that such basic child support obligation would have been and the reason or reasons that such agreement or stipulation does not provide for payment of that amount. Such provision may not be waived by either party or counsel. Nothing contained in this subdivision shall be construed to alter the rights of the parties to voluntarily enter into validly executed agreements or stipulations which deviate from the basic child support obligation provided such agreements or stipulations comply with the provisions of this paragraph. The court shall, however, retain discretion with respect to child support pursuant to this section. Any court order or judgment incorporating a validly executed agreement or stipulation which deviates from the basic child support obligation shall set forth the court's reasons for such deviation.

(i) Where either or both parties are unrepresented, the court shall not enter an order or judgment other than a temporary order pursuant to section two hundred thirty-seven of this article, that includes a provision for child support unless the unrepresented party or parties have received a copy of the child support standards chart promulgated by the commissioner of the office of temporary and disability assistance pursuant to subdivision two of section one hundred eleven-i of the social services law. Where either party is in receipt of child support enforcement services through the local social services district, the local social services district child support enforcement unit shall advise such party of the amount derived from application of the child support percentage and that such amount serves as a starting point for the determination of the child support award, and shall provide such party with a copy of the child support standards chart.

(j) In addition to financial disclosure required in section two hundred thirty-six of this article, the court may require that the income and/or expenses of either party be verified with documentation including, but not limited to, past and present income tax returns, employer statements, pay stubs, corporate, business, or partnership books and records, corporate and business tax returns, and receipts for expenses or such other means of verification as the court determines appropriate. Nothing herein shall affect any party's right to pursue discovery pursuant to this chapter, the civil practice law and rules, or the family court act.

(k) When a party has defaulted and/or the court is otherwise presented with insufficient evidence to determine gross income, the court shall order child support based upon the needs or standard of living of the child, whichever is greater. Such order may be retroactively modified upward, without a showing of change in circumstances.

(*l*) In any action or proceeding for modification of an order of child support existing prior to the effective date of this paragraph, brought pursuant to this article, the child support standards set forth in this subdivision shall not constitute a change of circumstances warranting modification of such support order; provided, however, that (1) where the circumstances warrant modification of such order, or (2) where any party objects to an adjusted child support order made or proposed at the direction of the support collection unit pursuant to section one hundred eleven-h or one hundred eleven-n of the social services law, and the court is reviewing the current order of child support, such standards shall be applied by the court in its determination with regard to the request for modification, or disposition of an objection to an adjusted child support order made or proposed by a support collection unit. In applying such standards, when the order to be modified incorporates by reference or merges with a validly executed separation agreement or stipulation of settlement, the court may consider, in addition to the factors set forth in paragraph (f) of this subdivision, the provisions of such agreement or stipulation concerning property distribution, distributive award and/or maintenance in determining whether the amount calculated by using the standards would be unjust or inappropriate.

1-c. (a) Notwithstanding any other provision of this chapter to the contrary, no court shall make an order providing for visitation or custody to a person who has been convicted of murder in the first or second degree in this state, or convicted of an offense in another jurisdiction which, if committed in this state, would constitute either murder in the first or second degree, of a parent, legal custodian, legal guardian, sibling, half-sibling or step-sibling of any child who is the subject of the proceeding. Pending determination of a petition for visitation or custody, such child shall not visit and no person shall visit with such child present, such person who has been convicted of murder in the first or second degree in this state, or convicted of and [3] offense in another jurisdiction which, if committed in this state, would constitute either murder in the first or second degree, of a parent, legal custodian, legal guardian, sibling, half-sibling or step-sibling of a child who is the subject of the proceeding without the consent of such child's custodian or legal guardian.

(b) Notwithstanding any other provision of this chapter to the contrary, there shall be a rebuttable presumption that it is not in the best interests of the child to be placed in the custody of or to visit with a person who has been convicted of one or more of the following sexual offenses in this state or convicted of one or more offenses in another jurisdiction which, if committed

in this state, would constitute one or more of the following offenses, when a child who is the subject of the proceeding was conceived as a result: (A) rape in the first or second degree; (B) course of sexual conduct against a child in the first degree; (C) predatory sexual assault; or (D) predatory sexual assault against a child.

(c) Notwithstanding paragraph (a) or (b) of this subdivision a court may order visitation or custody where:

(i)(A) such child is of suitable age to signify assent and such child assents to such visitation or custody; or

(B) if such child is not of suitable age to signify assent, the child's custodian or legal guardian assents to such order; or

(C) the person who has been convicted of murder in the first or second degree, or an offense in another jurisdiction which if committed in this state, would constitute either murder in the first or second degree, can prove by a preponderance of the evidence that:

(1) he or she, or a family or household member of either party, was a victim of domestic violence by the victim of such murder; and

(2) the domestic violence was causally related to the commission of such murder;

(ii) and the court finds that such visitation or custody is in the best interests of the child.

(d) For the purpose of making a determination pursuant to clause (C) of subparagraph (i) of paragraph (c) of this subdivision, the court shall not be bound by the findings of fact, conclusions of law or ultimate conclusion as determined by the proceedings leading to the conviction of murder in the first or second degree in this state or of an offense in another jurisdiction which, if committed in this state, would constitute murder in either the first or second degree, of a parent, legal guardian, legal custodian, sibling, half-sibling or step-sibling of a child who is the subject of the proceeding. In all proceedings under this section, an attorney shall be appointed for the child.

2. (a) [4] An order directing payment of money for child support shall be enforceable pursuant to section fifty-two hundred forty-one or fifty-two hundred forty-two of the civil practice law and rules or in any other manner provided by law. Such orders or judgments for child support and maintenance shall also be enforceable pursuant to article fifty-two of the civil practice law and rules upon a debtor's default as such term is defined in paragraph seven of subdivision (a) of section fifty-two hundred forty-one of the civil practice law and rules. The establishment of a default shall be subject to the procedures established for the determination of a mistake of fact for income executions pursuant to subdivision (e) of section fifty-two hundred forty-one of the civil practice law and rules. For the purposes of enforcement of child support orders or combined spousal and child support orders pursuant to section five thousand two hundred forty-one of the civil practice law and rules, a “default” shall be deemed to include amounts arising from retroactive support.

b. (1) When a child receiving support is a public assistance recipient, or the order of support is being enforced or is to be enforced pursuant to section one hundred eleven-g of the social services law, the court shall direct that the child support payments be made to the support collection unit. Unless (i) the court finds and sets forth in writing the reasons that there is good cause not to require immediate income withholding; or (ii) when the child is not in receipt of public assistance, a written agreement

providing for an alternative arrangement has been reached between the parties, the support collection unit shall issue an income execution immediately for child support or combined maintenance and child support, and may issue an execution for medical support enforcement in accordance with the provisions of the order of support. Such written agreement may include an oral stipulation made on the record resulting in a written order. For purposes of this paragraph, good cause shall mean substantial harm to the debtor. The absence of an arrearage or the mere issuance of an income execution shall not constitute good cause. When an immediate income execution or an execution for medical support enforcement is issued by the support collection unit, such income execution shall be issued pursuant to section five thousand two hundred forty-one of the civil practice law and rules, except that the provisions thereof relating to mistake of fact, default and any other provisions which are not relevant to the issuance of an income execution pursuant to this paragraph shall not apply; provided, however, that if the support collection unit makes an error in the issuance of an income execution pursuant to this paragraph, and such error is to the detriment of the debtor, the support collection unit shall have thirty days after notification by the debtor to correct the error. Where permitted under federal law and where the record of the proceedings contains such information, such order shall include on its face the social security number and the name and address of the employer, if any, of the person chargeable with support; provided, however, that failure to comply with this requirement shall not invalidate such order. When the court determines that there is good cause not to immediately issue an income execution or when the parties agree to an alternative arrangement as provided in this paragraph, the court shall provide expressly in the order of support that the support collection unit shall not issue an immediate income execution. Notwithstanding any such order, the support collection unit shall issue an income execution for support enforcement when the debtor defaults on the support obligation, as defined in section five thousand two hundred forty-one of the civil practice law and rules.

(2) When the court issues an order of child support or combined child and spousal support on behalf of persons other than those in receipt of public assistance or in receipt of services pursuant to section one hundred eleven-g of the social services law, the court shall issue an income deduction order pursuant to subdivision (c) of section five thousand two hundred forty-two of the civil practice law and rules at the same time it issues the order of support. The court shall enter the income deduction order unless the court finds and sets forth in writing (i) the reasons that there is good cause not to require immediate income withholding; or (ii) that an agreement providing for an alternative arrangement has been reached between the parties. Such agreement may include a written agreement or an oral stipulation, made on the record, that results in a written order. For purposes of this paragraph, good cause shall mean substantial harm to the debtor. The absence of an arrearage or the mere issuance of an income deduction order shall not constitute good cause. Where permitted under federal law and where the record of the proceedings contains such information, such order shall include on its face the social security number and the name and address of the employer, if any, of the person chargeable with support; provided, however, that failure to comply with this requirement shall not invalidate the order. When the court determines that there is good cause not to issue an income deduction order immediately or when the parties agree to an alternative arrangement as provided in this paragraph, the court shall provide expressly in the order of support the basis for its decision and shall not issue an income deduction order.

c. Any order of support issued on behalf of a child in receipt of family assistance or child support enforcement services pursuant to section one hundred eleven-g of the social services law shall be subject to review and adjustment by the support collection unit pursuant to section one hundred eleven-n of the social services law. Such review and adjustment shall be in addition to any other activities undertaken by the support collection unit relating to the establishment, modification, and enforcement of support orders payable to such unit.

3. Order of protection. a. The court may make an order of protection in assistance or as a condition of any other order made under this section. The order of protection may set forth reasonable conditions of behavior to be observed for a specified time by any party. Such an order may require any party:

(1) to stay away from the home, school, business or place of employment of the child, other parent or any other party, and to stay away from any other specific location designated by the court;

(2) to permit a parent, or a person entitled to visitation by a court order or a separation agreement, to visit the child at stated periods;

(3) to refrain from committing a family offense, as defined in subdivision one of section 530.11 of the criminal procedure law, or any criminal offense against the child or against the other parent or against any person to whom custody of the child is awarded or from harassing, intimidating or threatening such persons;

(4) to permit a designated party to enter the residence during a specified period of time in order to remove personal belongings not in issue in a proceeding or action under this chapter or the family court act;

(5) to refrain from acts of commission or omission that create an unreasonable risk to the health, safety or welfare of a child;

(6) to pay the reasonable counsel fees and disbursements involved in obtaining or enforcing the order of the person who is protected by such order if such order is issued or enforced;

(7) to refrain from intentionally injuring or killing, without justification, any companion animal the respondent knows to be owned, possessed, leased, kept or held by the person protected by the order or a minor child residing in such person's household. "Companion animal," as used in this section, shall have the same meaning as in subdivision five of section three hundred fifty of the agriculture and markets law;

(8)(i) to promptly return specified identification documents to the protected party, in whose favor the order of protection or temporary order of protection is issued; provided, however, that such order may: (A) include any appropriate provision designed to ensure that any such document is available for use as evidence in this proceeding, and available if necessary for legitimate use by the party against whom such order is issued; and (B) specify the manner in which such return shall be accomplished.

(ii) For purposes of this subparagraph, "identification document" shall mean any of the following: (A) exclusively in the name of the protected party: birth certificate, passport, social security card, health insurance or other benefits card, a card or document used to access bank, credit or other financial accounts or records, tax returns, any driver's license, and immigration documents including but not limited to a United States permanent resident card and employment authorization document; and (B) upon motion and after notice and an opportunity to be heard, any of the following, including those that may reflect joint use or ownership, that the court determines are necessary and are appropriately transferred to the protected party: any card or document used to access bank, credit or other financial accounts or records, tax returns, and any other identifying cards and documents; and

(9) to observe such other conditions as are necessary to further the purposes of protection.

a-1. Translation and interpretation of orders of protection. The office of court administration shall, in accordance with paragraph (t) of subdivision two of section two hundred twelve of the judiciary law, ensure that a court order of protection and temporary order of protection is translated in writing into the appropriate language for a party to a proceeding where the court has appointed

an interpreter. The office of court administration shall ensure that the standard language of the office of court administration order of protection and temporary order of protection forms shall be translated in writing in the languages most frequently used in the courts of each judicial department in accordance with paragraph (t) of subdivision two of section two hundred twelve of the judiciary law. A copy of the written translation shall be given to each party in the proceeding, along with the original order or temporary order of protection issued in English. A copy of this written translation shall also be included as part of the record of the proceeding. The court shall read the essential terms and conditions of the order aloud on the record and direct the court appointed interpreter to interpret the same terms and conditions. Such written translation or interpretation shall not affect the validity or enforceability of the order. In every case a party to a proceeding shall be provided with an English copy of any court order of protection or temporary order of protection issued. The authority provided herein shall be in addition to and shall not be deemed to diminish or reduce any rights of the parties under existing law.

b. An order of protection entered pursuant to this subdivision shall bear in a conspicuous manner, on the front page of said order, the language “Order of protection issued pursuant to section two hundred forty of the domestic relations law”. The order of protection shall also contain the following notice: “This order of protection will remain in effect even if the protected party has, or consents to have, contact or communication with the party against whom the order is issued. This order of protection can only be modified or terminated by the court. The protected party cannot be held to violate this order nor be arrested for violating this order.”. The absence of such language shall not affect the validity of such order. The presentation of a copy of such an order to any peace officer acting pursuant to his or her special duties, or police officer, shall constitute authority, for that officer to arrest a person when that person has violated the terms of such an order, and bring such person before the court and, otherwise, so far as lies within the officer's power, to aid in securing the protection such order was intended to afford.

c. An order of protection entered pursuant to this subdivision may be made in the final judgment in any matrimonial action or in a proceeding to obtain custody of or visitation with any child under this section, or by one or more orders from time to time before or subsequent to final judgment, or by both such order or orders and the final judgment. The order of protection may remain in effect after entry of a final matrimonial judgment and during the minority of any child whose custody or visitation is the subject of a provision of a final judgment or any order. An order of protection may be entered notwithstanding that the court for any reason whatsoever, other than lack of jurisdiction, refuses to grant the relief requested in the action or proceeding.

d. The chief administrator of the courts shall promulgate appropriate uniform temporary orders of protection and orders of protection forms, applicable to proceedings under this article, to be used throughout the state. Such forms shall be promulgated and developed in a manner to ensure the compatibility of such forms with the statewide computerized registry established pursuant to section two hundred twenty-one-a of the executive law.

e. No order of protection may direct any party to observe conditions of behavior unless: (i) the party requesting the order of protection has served and filed an action, proceeding, counter-claim or written motion and, (ii) the court has made a finding on the record that such party is entitled to issuance of the order of protection which may result from a judicial finding of fact, judicial acceptance of an admission by the party against whom the order was issued or judicial finding that the party against whom the order is issued has given knowing, intelligent and voluntary consent to its issuance. The provisions of this subdivision shall not preclude the court from issuing a temporary order of protection upon the court's own motion or where a motion for such relief is made to the court, for good cause shown. In any proceeding pursuant to this article, a court shall not deny an order of protection, or dismiss an application for such an order, solely on the basis that the acts or events alleged are not relatively contemporaneous with the date of the application or the conclusion of the action. The duration of any temporary order shall not by itself be a factor in determining the length or issuance of any final order.

f. In addition to the foregoing provisions, the court may issue an order, pursuant to section two hundred twenty-seven-c of the real property law, authorizing the party for whose benefit any order of protection has been issued to terminate a lease or rental agreement pursuant to section two hundred twenty-seven-c of the real property law.

g. Any party moving for a temporary order of protection pursuant to this subdivision during hours when the court is open shall be entitled to file such motion or pleading containing such prayer for emergency relief on the same day that such person first appears at such court, and a hearing on the motion or portion of the pleading requesting such emergency relief shall be held on the same day or the next day that the court is in session following the filing of such motion or pleading.

h. Upon issuance of an order of protection or temporary order of protection or upon a violation of such order, the court shall make a determination regarding the suspension and revocation of a license to carry, possess, repair or dispose of a firearm or firearms, ineligibility for such a license and the surrender of firearms in accordance with sections eight hundred forty-two-a and eight hundred forty-six-a of the family court act, as applicable. Upon issuance of an order of protection pursuant to this section or upon a finding of a violation thereof, the court also may direct payment of restitution in an amount not to exceed ten thousand dollars in accordance with subdivision (e) of section eight hundred forty-one of such act; provided, however, that in no case shall an order of restitution be issued where the court determines that the party against whom the order would be issued has already compensated the injured party or where such compensation is incorporated in a final judgment or settlement of the action.

i. The protected party in whose favor the order of protection or temporary order of protection is issued may not be held to violate such an order nor may such protected party be arrested for violating such order.

3-a. [As amended by L.2010, c. 261. See, also, subd. 3-a, below.] Service of order of protection. a. If a temporary order of protection has been issued or an order of protection has been issued upon a default, unless the party requesting the order states on the record that she or he will arrange for other means for service or deliver the order to a peace or police officer directly for service, the court shall immediately deliver a copy of the temporary order of protection or order of protection to a peace officer, acting pursuant to his or her special duties and designated by the court, or to a police officer as defined in paragraph (b) or (d) of subdivision thirty-four of section 1.20 of the criminal procedure law, or, in the city of New York, to a designated representative of the police department of the city of New York. Any peace or police officer or designated person receiving a temporary order of protection or an order of protection as provided hereunder shall serve or provide for the service thereof together with any associated papers that may be served simultaneously, at any address designated therewith, including the summons and petition or complaint if not previously served. Service of such temporary order of protection or order of protection and associated papers shall, insofar as practicable, be achieved promptly. An officer or designated person obliged to perform service pursuant to this subdivision, and his or her employer, shall not be liable for damages resulting from failure to achieve service where, having made a reasonable effort, such officer or designated person is unable to locate and serve the temporary order of protection or order of protection at any address provided by the party requesting the order. A statement subscribed by the officer or designated person, and affirmed by him or her to be true under the penalties of perjury, stating the papers served, the date, time, address or in the event there is no address, place, and manner of service, the name and a brief physical description of the party served, shall be proof of service of the summons, petition and temporary order of protection or order of protection. When the temporary order of protection or order of protection and other papers, if any, have been served, such officer or designated person shall provide the court with an affirmation, certificate or affidavit of service and shall provide notification of the date and time of such service to the statewide computer registry established pursuant to section two hundred twenty-one-a of the executive law.

b. Notwithstanding any other provision of law, all orders of protection and temporary orders of protection filed and entered along with any associated papers that may be served simultaneously may be transmitted by facsimile transmission or electronic means for expedited service in accordance with the provisions of this subdivision. For purposes of this subdivision, “facsimile

transmission" and "electronic means" shall be as defined in subdivision (f) of rule twenty-one hundred three of the civil practice law and rules.

3-a. [As amended by L.2010, c. 446. See, also, subd. 3-a, above.] Service of order of protection. (a) If a temporary order of protection has been issued or an order of protection has been issued upon a default, unless the party requesting the order states on the record that she or he will arrange for other means for service or deliver the order to a peace or police officer directly for service, the court shall immediately deliver a copy of the temporary order of protection or order of protection together with any associated papers that may be served simultaneously including the summons and petition, to a peace officer, acting pursuant to his or her special duties and designated by the court, or to a police officer as defined in paragraph (b) or (d) of subdivision thirty-four of section 1.20 of the criminal procedure law, or, in the city of New York, to a designated representative of the police department of the city of New York. Any peace or police officer or designated person receiving a temporary order of protection or an order of protection as provided in this section shall serve or provide for the service thereof together with any associated papers that may be served simultaneously, at any address designated therewith, including the summons and petition or complaint if not previously served. Service of such temporary order of protection or order of protection and associated papers shall, insofar as practicable, be achieved promptly. An officer or designated person obliged to perform service pursuant to this subdivision, and his or her employer, shall not be liable for damages resulting from failure to achieve service where, having made a reasonable effort, such officer or designated person is unable to locate and serve the temporary order of protection or order of protection at any address provided by the party requesting the order.

(b) When the temporary order of protection or order of protection and associated papers, if any, have been served, such officer or designated person shall provide the court with an affirmation, certificate or affidavit of service when the temporary order of protection or order of protection has been served, and shall provide notification of the date and time of such service to the statewide computer registry established pursuant to section two hundred twenty-one-a of the executive law. A statement subscribed by the officer or designated person, and affirmed by him or her to be true under the penalties of perjury, stating the papers served, the date, time, address or in the event there is no address, place, and manner of service, the name and a brief physical description of the party served, shall be proof of service of the summons, petition and temporary order of protection or order of protection.

(c) Where an officer or designated person obliged to perform service pursuant to this section is unable to complete service of the temporary order of protection or order of protection, such officer or designated person shall provide the court with proof of attempted service of the temporary order of protection or order of protection with information regarding the dates, times, locations and manner of attempted service. An affirmation, certificate or affidavit of service with a statement subscribed by the officer or designated person, and affirmed by him or her to be true under the penalties of perjury, stating the name of the party and the papers attempted to be served on said person, and for each attempted service, the date, time, address or in the event there is no address, place, and manner of attempted service, shall be proof of attempted service.

(d) Any peace or police officer or designated person performing service under this subdivision shall not charge a fee for such service, including, but not limited to, fees as provided under section eight thousand eleven of the civil practice law and rules.

3-b. Emergency powers; local criminal court. If the court that issued an order of protection or temporary order of protection under this section or warrant in connection thereto is not in session when an arrest is made for an alleged violation of the order or upon a warrant issued in connection with such violation, the arrested person shall be brought before a local criminal court in the county of arrest or in the county in which such warrant is returnable pursuant to article one hundred twenty of the criminal procedure law and arraigned by such court. Such local criminal court shall order the commitment of the arrested person to the custody of the sheriff, admit to, fix or accept bail, or release the arrested person on his or her recognizance pending appearance in the court that issued the order of protection, temporary order of protection or warrant. In making such order, such local

criminal court shall consider the bail recommendation, if any, made by the supreme or family court as indicated on the warrant or certificate of warrant. Unless the petitioner or complainant requests otherwise, the court, in addition to scheduling further criminal proceedings, if any, regarding such alleged family offense or violation allegation, shall make such matter returnable in the supreme or family court, as applicable, on the next day such court is in session.

3-c. Orders of protection; filing and enforcement of out-of-state orders. A valid order of protection or temporary order of protection issued by a court of competent jurisdiction in another state, territorial or tribal jurisdiction shall be accorded full faith and credit and enforced as if it were issued by a court within the state for as long as the order remains in effect in the issuing jurisdiction in accordance with sections two thousand two hundred sixty-five and two thousand two hundred sixty-six of title eighteen of the United States Code.

a. An order issued by a court of competent jurisdiction in another state, territorial or tribal jurisdiction shall be deemed valid if:

(1) the issuing court had personal jurisdiction over the parties and over the subject matter under the law of the issuing jurisdiction;

(2) the person against whom the order was issued had reasonable notice and an opportunity to be heard prior to issuance of the order; provided, however, that if the order was a temporary order of protection issued in the absence of such person, that notice had been given and that an opportunity to be heard had been provided within a reasonable period of time after the issuance of the order; and

(3) in the case of orders of protection or temporary orders of protection issued against both a petitioner and respondent, the order or portion thereof sought to be enforced was supported by: (i) a pleading requesting such order, including, but not limited to, a petition, cross-petition or counterclaim; and (ii) a judicial finding that the requesting party is entitled to the issuance of the order, which may result from a judicial finding of fact, judicial acceptance of an admission by the party against whom the order was issued or judicial finding that the party against whom the order was issued had give [5] knowing, intelligent and voluntary consent to its issuance.

b. Notwithstanding the provisions of article fifty-four of the civil practice law and rules, an order of protection or temporary order of protection issued by a court of competent jurisdiction in another state, territorial or tribal jurisdiction, accompanied by a sworn affidavit that upon information and belief such order is in effect as written and has not been vacated or modified, may be filed without fee with the clerk of the court, who shall transmit information regarding such order to the statewide registry of orders of protection and warrants established pursuant to section two hundred twenty-one-a of the executive law; provided, however, that such filing and registry entry shall not be required for enforcement of the order.

4. One-time adjustment of child support orders issued prior to September fifteenth, nineteen hundred eighty-nine. Any party to a child support order issued prior to September fifteenth, nineteen hundred eighty-nine on the behalf of a child in receipt of public assistance or child support services pursuant to section one hundred eleven-g of the social services law may request that the support collection unit undertake one review of the order for adjustment purposes pursuant to section one hundred eleven-h of the social services law. A hearing on the adjustment of such order shall be granted upon the objection of either party pursuant to the provisions of this section. An order shall be adjusted if as of the date of the support collection unit's review of the correct amount of child support as calculated pursuant to the provisions of this section would deviate by at least ten percent from the child support ordered in the current order of support. Additionally, a new order shall be issued upon a showing that the current order of support does not provide for the health care needs of the child through insurance or otherwise. Eligibility of the child for medical assistance shall not relieve any obligation the parties otherwise have to provide for the health care needs of the child.

The support collection unit's review of a child support order shall be made on notice to all parties to the current support order. Nothing herein shall be deemed in any way to limit, restrict, expand or impair the rights of any party to file for a modification of a child support order as is otherwise provided by law.

(1) Upon mailing of an adjustment finding and where appropriate a proposed order in conformity with such finding filed by either party or by the support collection unit, a party shall have thirty-five days from the date of mailing to submit to the court identified thereon specific written objections to such finding and proposed order.

(a) If specific written objections are submitted by either party or by the support collection unit, a hearing shall be scheduled by the court on notice to the parties and the support collection unit, who then shall have the right to be heard by the court and to offer evidence in support of or in opposition to adjustment of the support order.

(b) The party filing the specific written objections shall bear the burden of going forward and the burden of proof; provided, however, that if the support collection unit has failed to provide the documentation and information required by subdivision fourteen of section one hundred eleven-h of the social services law, the court shall first require the support collection unit to furnish such documents and information to the parties and the court.

(c) If the court finds by a preponderance of the evidence that the specific written objections have been proven, the court shall recalculate or readjust the proposed adjusted order accordingly or, for good cause, shall remand the order to the support collection unit for submission of a new proposed adjusted order. Any readjusted order so issued by the court or resubmitted by the support collection unit after a remand by the court shall be effective as of the date the proposed adjusted order would have been effective had no specific written objections been filed.

(d) If the court finds that the specific written objections have not been proven by a preponderance of the evidence, the court shall immediately issue the adjusted order as submitted by the support collection unit, which shall be effective as of the date the order would have been effective had no specific written exceptions been filed.

(e) If the court receives no specific written objections to the support order within thirty-five days of the mailing of the proposed order the clerk of the court shall immediately enter the order without further review, modification, or other prior action by the court or any judge or support magistrate thereof, and the clerk shall immediately transmit copies of the order of support to the parties and to the support collection unit.

(2) A motion to vacate an order of support adjusted pursuant to this section may be made no later than forty-five days after an adjusted support order is executed by the court where no specific written objections to the proposed order have been timely received by the court. Such motion shall be granted only upon a determination by the court issuing such order that personal jurisdiction was not timely obtained over the moving party.

5. [As added by L.1997, c. 398, § 6. See, also, subd. 5 below.] Provision of child support orders to the state case registry. The court shall direct that a copy of any child support or combined child and spousal support order issued by the court on or after the first day of October, nineteen hundred ninety-eight, in any proceeding under this section be provided promptly to the state case registry established pursuant to subdivision four-a of section one hundred eleven-b of the social services law.

5. [As added by L.1997, c. 398, § 103. See, also, subd. 5 above.] On-going cost of living adjustment of child support orders issued prior to September fifteenth, nineteen hundred eighty-nine. Any party to a child support order issued prior to September fifteenth, nineteen hundred eighty-nine on the behalf of a child in receipt of public assistance or child support services pursuant to section one hundred eleven-g of the social services law may request that the support collection unit review the order for a cost of living adjustment in accordance with the provisions of section two hundred forty-c of this article.

Credits

(Added L.1962, c. 313, § 10. Amended L.1963, c. 685, § 9; L.1976, c. 133, § 1; L.1980, c. 281, § 12; L.1980, c. 530, § 11; L.1980, c. 645, § 4; L.1981, c. 416, § 24; L.1981, c. 695, § 3; L.1983, c. 347, § 3; L.1985, c. 809, § 7; L.1986, c. 849, § 1; L.1986, c. 892, § 6; L.1988, c. 452, § 1; L.1988, c. 457, § 9; L.1989, c. 164, § 3; L.1989, c. 567, §§ 6, 7; L.1990, c. 818, §§ 6 to 9; L.1992, c. 41, §§ 141, 145, 146; L.1993, c. 59, §§ 3, 4, 10, 17, 23, 24; L.1993, c. 354, § 1; L.1994, c. 170, §§ 361 to 363; L.1995, c. 81, §§ 237 to 239; L.1995, c. 349, § 3; L.1995, c. 389, § 1; L.1995, c. 429, § 2; L.1995, c. 538, § 2; L.1995, c. 483, §§ 1, 2; L.1996, c. 12, § 17; L.1996, c. 85, § 2; L.1997, c. 186, § 13, eff. July 8, 1997; L.1997, c. 398, § 6, eff. Oct. 1, 1998; L.1997, c. 398, §§ 94, 95, 102, 103, 142, eff. Jan. 1, 1998; L.1998, c. 150, §§ 1, 2, eff. July 7, 1998; L.1998, c. 214, § 57, eff. Nov. 4, 1998; L.1998, c. 597, §§ 1, 2, eff. Dec. 22, 1998; L.1999, c. 378, § 1, eff. July 27, 1999; L.1999, c. 606, § 1; L.2002, c. 624, § 4, eff. Oct. 2, 2002; L.2003, c. 81, § 11, eff. June 18, 2003; L.2007, c. 616, § 3, eff. Oct. 1, 2007; L.2008, c. 532, § 6, eff. Dec. 3, 2008; L.2008, c. 538, § 1, eff. Sept. 4, 2008; L.2008, c. 595, § 1, eff. January 23, 2009; L.2009, c. 215, §§ 2, 4, 6, 8, eff. Oct. 9, 2009; L.2009, c. 295, § 1, eff. Aug. 11, 2009; L.2009, c. 343, § 7, eff. Jan. 31, 2010; L.2009, c. 473, § 2, eff. Nov. 15, 2009; L.2009, c. 476, § 2, eff. Dec. 15, 2009; L.2010, c. 41, § 7, eff. April 14, 2010; L.2010, c. 261, § 2, eff. July 30, 2010; L.2010, c. 341, § 8, eff. Aug. 13, 2010; L.2010, c. 446, § 2, eff. Aug. 30, 2010; L.2011, c. 436, § 1, eff. Nov. 15, 2011; L.2013, c. 1, § 11, eff. March 16, 2013; L.2013, c. 371, § 1, eff. Sept. 27, 2013; L.2013, c. 480, § 1; L.2013, c. 526, § 8, eff. Dec. 18, 2013; L.2015, c. 387, §§ 3, 4, eff. Jan. 24, 2016; L.2015, c. 567, § 12, eff. June 18, 2016; L.2017, c. 55, pt. BB, § 4, eff. July 19, 2017.)

Footnotes

1 50 App. USCA § 501 et seq.

2 So in original.

3 So in original. “and” should be “an”.

4 So in original. Probably should be “a.”.

5 So in original (“give” should be “given”).

McKinney's D. R. L. § 240, NY DOM REL § 240

Current through L.2019, chapter 144. Some statute sections may be more current, see credits for details.

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McKinney's Consolidated Laws of New York Annotated
Family Court Act (Refs & Annos)
Article 6. Permanent Termination of Parental Rights, Adoption, Guardianship and Custody
Part 3. Custody

McKinney's Family Court Act § 651

§ 651. Jurisdiction over habeas corpus proceedings and petitions for custody and visitation of minors

Effective: June 18, 2016
Currentness

(a) When referred from the supreme court or county court to the family court, the family court has jurisdiction to determine, in accordance with subdivision one of section two hundred forty of the domestic relations law and with the same powers possessed by the supreme court in addition to its own powers, habeas corpus proceedings and proceedings brought by petition and order to show cause, for the determination of the custody or visitation of minors.

(b) When initiated in the family court, the family court has jurisdiction to determine, in accordance with subdivision one of section two hundred forty of the domestic relations law and with the same powers possessed by the supreme court in addition to its own powers, habeas corpus proceedings and proceedings brought by petition and order to show cause, for the determination of the custody or visitation of minors, including applications by a grandparent or grandparents for visitation or custody rights pursuant to section seventy-two or two hundred forty of the domestic relations law.

(c) When initiated in the family court pursuant to a petition under part eight of article ten of this act or section three hundred fifty-eight-a of the social services law, the family court has jurisdiction to enforce or modify orders or judgments of the supreme court relating to the visitation of minors in foster care, notwithstanding any limitation contained in subdivision (b) of section four hundred sixty-seven of this act.

(c-1) Where a proceeding filed pursuant to article ten or ten-A of this act is pending at the same time as a proceeding brought in the family court pursuant to this article, the court presiding over the proceeding under article ten or ten-A of this act may jointly hear the hearing on the custody and visitation petition under this article and the dispositional hearing on the petition under article ten or the permanency hearing under article ten-A of this act; provided, however, the court must determine the custody and visitation petition in accordance with the terms of this article.

(d) With respect to applications by a grandparent or grandparents for visitation or custody rights, made pursuant to section seventy-two or two hundred forty of the domestic relations law, with a child remanded or placed in the care of a person, official, agency or institution pursuant to the provisions of article ten of this act, the applicant, in such manner as the court shall prescribe, shall serve a copy of the application upon the social services official having care and custody of such child, and the child's attorney, who shall be afforded an opportunity to be heard thereon.

(e) 1. Permanent and initial temporary orders of custody or visitation. Prior to the issuance of any permanent or initial temporary order of custody or visitation, the court shall conduct a review of the decisions and reports listed in paragraph three of this subdivision.

2. Successive temporary orders of custody or visitation. Prior to the issuance of any successive temporary order of custody or visitation, the court shall conduct a review of the decisions and reports listed in paragraph three of this subdivision, unless such a review has been conducted within ninety days prior to the issuance of such order.

3. Decisions and reports for review. The court shall conduct a review of the following:

(i) related decisions in court proceedings initiated pursuant to article ten of this act, and all warrants issued under this act; and

(ii) reports of the statewide computerized registry of orders of protection established and maintained pursuant to section two hundred twenty-one-a of the executive law, and reports of the sex offender registry established and maintained pursuant to section one hundred sixty-eight-b of the correction law.

4. Notifying counsel and issuing orders. Upon consideration of decisions pursuant to article ten of this act, and registry reports and notifying counsel involved in the proceeding, or in the event of a self-represented party, notifying such party of the results thereof, including any court appointed attorney for children, the court may issue a temporary, successive temporary or final order of custody or visitation.

5. Temporary emergency order. Notwithstanding any other provision of the law, upon emergency situations, including computer malfunctions, to serve the best interest of the child, the court may issue a temporary emergency order for custody or visitation in the event that it is not possible to timely review decisions and reports on registries as required pursuant to paragraph three of this subdivision.

6. After issuing a temporary emergency order. After issuing a temporary emergency order of custody or visitation, the court shall conduct reviews of the decisions and reports on registries as required pursuant to paragraph three of this subdivision within twenty-four hours of the issuance of such temporary emergency order. Should such twenty-four hour period fall on a day when court is not in session, then the required reviews shall take place the next day the court is in session. Upon reviewing decisions and reports the court shall notify associated counsel, self-represented parties and attorneys for children pursuant to paragraph four of this subdivision and may issue temporary or permanent custody or visitation orders.

7. Feasibility study. The commissioner of the office of children and family services, in conjunction with the office of court administration, is hereby authorized and directed to examine, study, evaluate and make recommendations concerning the feasibility of the utilization of computers in family courts which are connected to the statewide central register of child abuse and maltreatment established and maintained pursuant to section four hundred twenty-two of the social services law, as a means of providing family courts with information regarding parties requesting orders of custody or visitation. Such commissioner shall make a preliminary report to the governor and the legislature of findings, conclusions and recommendations not later than January thirty-first, two thousand nine, and a final report of findings, conclusions and recommendations not later than June first, two thousand nine, and shall submit with the reports such legislative proposals as are deemed necessary to implement the commissioner's recommendations.

(f) Military service by parent; effect on child custody orders. 1. During the period of time that a parent is activated, deployed or temporarily assigned to military service, such that the parent's ability to continue as a joint caretaker or the primary caretaker of a minor child is materially affected by such military service, any orders issued pursuant to this section, based on the fact that the parent is activated, deployed or temporarily assigned to military service, which would materially affect or change a

previous judgment or order regarding custody of that parent's child or children as such judgment or order existed on the date the parent was activated, deployed, or temporarily assigned to military service, shall be subject to review pursuant to paragraph three of this subdivision. Any relevant provisions of the Service Member's Civil Relief Act [1] shall apply to all proceedings governed by this section.

2. During such period, the court may enter an order to modify custody if there is clear and convincing evidence that the modification is in the best interests of the child. An attorney for the child shall be appointed in all cases where a modification is sought during such military service. Such order shall be subject to review pursuant to paragraph three of this subdivision. When entering an order pursuant to this section, the court shall consider and provide for, if feasible and if in the best interests of the child, contact between the military service member and his or her child including, but not limited to, electronic communication by e-mail, webcam, telephone, or other available means. During the period of the parent's leave from military service, the court shall consider the best interests of the child when establishing a parenting schedule, including visiting and other contact. For such purpose, a “leave from military service” shall be a period of not more than three months.

3. Unless the parties have otherwise stipulated or agreed, if an order is issued pursuant to this subdivision, the return of the parent from active military service, deployment or temporary assignment shall be considered a substantial change in circumstances. Upon the request of either parent, the court shall determine on the basis of the child's best interests whether the custody judgment or order previously in effect should be modified.

4. This subdivision shall not apply to assignments to permanent duty stations or permanent changes of station.

Credits

(L.1962, c. 686. Amended L.1966, c. 686, § 1; L.1970, c. 913, § 1; L.1972, c. 535, § 1; L.1973, c. 916, § 1; L.1978, c. 443, § 1; L.1983, c. 250, § 1; L.1988, c. 457, §§ 2, 3; L.1996, c. 85, § 6; L.2003, c. 657, § 3, eff. Jan. 5, 2004; L.2008, c. 595, § 2, eff. Jan. 23, 2009; L.2009, c. 295, § 2, eff. Aug. 11, 2009; L.2009, c. 473, § 3, eff. Nov. 15, 2009; L.2010, c. 41, § 44, eff. April 14, 2010; L.2015, c. 567, § 1, eff. June 18, 2016.)

Footnotes

1 50 App. USCA § 501 et seq.

McKinney's Family Court Act § 651, NY FAM CT § 651

Current through L.2019, chapter 144. Some statute sections may be more current, see credits for details.

End of Document

McKinney's Consolidated Laws of New York Annotated
Family Court Act (Refs & Annos)
Article 6. Permanent Termination of Parental Rights, Adoption, Guardianship and Custody
Part 3. Custody

McKinney's Family Court Act § 652

§ 652. Jurisdiction over applications to fix custody in matrimonial actions on referral from supreme court

Currentness

(a) When referred from the supreme court to the family court, the family court has jurisdiction to determine, with the same powers possessed by the supreme court, applications to fix temporary or permanent custody and applications to modify judgments and orders of custody or visitation in actions and proceedings for marital separation, divorce, annulment of marriage and dissolution of marriage. Applications to modify judgments and orders of custody may be granted by the family court under this section only upon the showing to the family court that there has been a subsequent change of circumstances and that modification is required.

(b) In the event no such referral has been made and unless the supreme court provides in the order or judgment awarding custody or visitation in an action for divorce, separation or annulment, that it may be enforced or modified only in the supreme court, the family court may: (i) determine an application to enforce the order or judgment awarding custody or visitation, or (ii) determine an application to modify the order or judgment awarding custody or visitation upon a showing that there has been a subsequent change of circumstances and modification is required.

(c) In any determination of an application pursuant to this section, the family court shall have jurisdiction to determine such applications, in accordance with subdivision one of section two hundred forty of the domestic relations law, with the same powers possessed by the supreme court, and the family court's disposition of any such application is an order of the family court appealable only under article eleven of this act.

Credits
(L.1962, c. 686. Amended L.1981, c. 40, § 2; L.1996, c. 85, § 7.)

McKinney's Family Court Act § 652, NY FAM CT § 652
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56 N.Y.2d 167, 436 N.E.2d 1260, 451 N.Y.S.2d 658

Donald Eschbach, Appellant,
v.
Rita Eschbach, Respondent.

Court of Appeals of New York
Argued March 29, 1982;
decided May 13, 1982

CITE TITLE AS: Eschbach v Eschbach

SUMMARY

Appeal from so much of an order of the Appellate Division of the Supreme Court in the Second Judicial Department, entered August 10, 1981, as modified, on the law and the facts, and, as modified, affirmed a judgment of the Supreme Court at Special Term (Morrie Slifkin, J.), entered in Westchester County, awarding custody of the parties' three infant children to plaintiff. The modification consisted of substituting a provision granting exclusive custody only of the parties' two older children to plaintiff.

Plaintiff father sought custody of his three daughters, who resided with defendant mother pursuant to the terms of a stipulation between the parties, which was incorporated in their judgment of divorce. The relationship between the two older girls and their mother has deteriorated since the time of the parties' divorce and the older girls expressed a strong desire to live with their father. Although the youngest child, Laura, did not express such a preference in favor of one parent, she did express a strong desire to remain with her sisters. The trial court made no specific finding that defendant was an unfit mother for Laura, but it implicitly found that defendant is the less fit parent. The court awarded custody of the three girls to plaintiff. The Appellate Division agreed that the antagonistic relationship of the older children with their mother and their preference for living with their father required a change in custody for the older girls. However, with respect to Laura, the Appellate Division modified the Supreme Court judgment and ordered that she remain with her mother. On this appeal, the question is limited to which parent should have custody of Laura, defendant not having appealed from that part of the Appellate Division order affirming the award of custody of the older children to plaintiff.

The Court of Appeals reversed the Appellate Division order and reinstated the Supreme Court judgment, holding, in an opinion by Judge Jasen, that the trial court properly found that under the totality of the circumstances, Laura's best interests required changing custody of the child from her mother to her father.

Eschbach v Eschbach, 83 AD2d 845, reversed.

HEADNOTES

Parent, Child and Family
Custody
Placement with Siblings

([1]) The trial court's determination that, under the totality of the circumstances, it is in the best interests of the youngest child of the parties to change the custody of the child from defendant mother to plaintiff father, along with her two older sisters, conforms with the weight of the evidence and, accordingly, said judgment is reinstated; although the youngest child did not express the definite preference for living with her father that the older girls did, she expressed a strong desire to remain with

her sisters, and, while the trial court made no specific finding that defendant was an unfit mother for the child, a finding that defendant is the less fit parent is implicit in its order to change custody and is supported by the record.

POINTS OF COUNSEL

Herbert J. Malach and *Robert G. Schneider* for appellant.
I. The trial court had sufficient evidence to transfer custody of Laura to the father and that finding should not have been disturbed. (Matter of Darlene T., 28 NY2d 391; Matter of Ray A. M., 37 NY2d 619; Matter of Jewish Child Care Assn. of N. Y., 5 NY2d 222; People ex rel. Portnoy v Strasser, 303 NY 539; Bunim v Bunim, 298 NY 391; Matter of Ebert v Ebert, 38 NY2d 700; Matter of Irene O., 38 NY2d 776; Bistany v Bistany, 66 AD2d 1026; Kesseler v Kesseler, 10 NY2d 445; Aberbach v Aberbach, 33 NY2d 592.) II. It was error for the court below to separate Laura from her two sisters and this was clearly not in Laura's best interests. (Matter of Ebert v Ebert, 38 NY2d 700; Obey v Degling, 37 NY2d 768; Bistany v Bistany, 66 AD2d 1026; Aberbach v Aberbach, 33 NY2d 592; Lucey v Lucey, 60 AD2d 757.) III. The decision of the trial court specifically found the mother to be unfit and less fit than the father which would warrant a change of custody of Laura. (People ex rel. Sibley v Sheppard, 54 NY2d 320; Aberbach v Aberbach, 33 NY2d 592; Martin v Martin, 74 AD2d 419; Kuleszo v Kuleszo, 59 AD2d 1059; Matter of Goho v Goho, 59 AD2d 1045.)
Edward D. Loughman, Jr., for respondent.
I. In contrast to appellant's distortion of the record, not a shred of evidence shows respondent to be an unfit mother of Laura. (Matter of Henson, 77 Misc 2d 694; ***169** Sandman v Sandman, 64 AD2d 698; Porges v Porges, 63 AD2d 712; People ex rel. Repetti v Repetti, 50 AD2d 913; Matter of Darlene T., 28 NY2d 391; Bunim v Bunim, 298 NY 391; Matter of Ray A. M., 37 NY2d 619; Matter of Susanne U. NN v Rudolf OO, 57 AD2d 653, affd *sub nom.* Matter of Nehra v Uhlar, 43 NY2d 242.) II. Appellant's failure to prove Mrs. Eschbach an unfit mother of Laura required continuation of custody in her mother. (Matter of Nehra v Uhlar, 43 NY2d 242; Corradino v Corradino, 48 NY2d 894; Sandman v Sandman, 64 AD2d 698; Porges v Porges, 63 AD2d 712; Mullins v Mullins, 76 AD2d 914; Bistany v Bistany, 66 AD2d 1026; People ex rl. Selbert v Selbert, 60 AD2d 692; People ex rel. Repetti v Repetti, 50 AD2d 913; Obey v Degling, 37 NY2d 768.)

OPINION OF THE COURT

Jasen, J.

The question to be resolved on this appeal is whether custody of the youngest child of the parties herein should be changed, along with that of her two older sisters, from her mother to her father.

Plaintiff, Donald Eschbach, and defendant, Rita Eschbach, were married on November 23, 1963. Donald Eschbach was granted a divorce on May 28, 1979 on the basis of the couple having lived separate and apart pursuant to a separation agreement for one year. (Domestic Relations Law, § 170, subd [5].) Custody of the three daughters of the marriage was granted to their mother pursuant to an oral stipulation of the parties entered in the minutes of the court at the inquest hearing held on January 16, 1979. The stipulation, which also provided visitation rights for the children's father, was incorporated but not merged in the judgment of divorce.

Events over the course of the next year indicated a progressive deterioration in the mother's relationship with her daughters. On several occasions, the two older girls, Karen and Ellen, ran away from defendant's home, either to their father's residence or to friends' homes. The record also reveals that the mother refused to allow the girls to participate in extracurricular activities at school and imposed severe limitations on what activities they could ***170** participate in and with whom they were allowed to associate. Concerned that the children were being raised in an unhealthy atmosphere which was affecting their emotional and psychological development, the father commenced this action seeking a modification of the judgment of divorce to the extent of awarding him custody of his three daughters.

The trial court took testimony from both parents, representatives of the school, and the two older daughters. Although the youngest daughter, Laura, did not testify, she was interviewed by the court *in camera*, and a transcript of that proceeding is included in the record before us. Additionally, a report was prepared for the court by a probation officer who had interviewed the parties.

The trial court found that the mother's unreasonable demands and restrictions were jeopardizing the older daughters' emotional and intellectual development and that there was a total breakdown of communication between the older children and their mother. Furthermore, the court found that the strong preference to live with their father expressed by these children, who were age 16 and 14 at the time of the hearing, should be given consideration.

Although Laura, who was 10 at the time of the hearing, had not expressed a similarly strong preference to live with her father rather than her mother, the court recognized her strong desire to remain with her sisters. After considering all the factors presented, the court found that her best interests would be served by continuing her close relationship with her sisters and that a change of custody to her father was necessary under these circumstances.

On appeal, the Appellate Division agreed that "the antagonism [of the older] children * * * toward defendant and their strong preference to live with plaintiff" (83 AD2d 845, 846) required a change in custody for Karen and Ellen. That court, however, modified the judgment and ordered that Laura's custody remain with the mother because there was "nothing to suggest that defendant has been anything but a fit parent toward her." (Id.)

On this appeal, the father seeks custody of Laura. The mother has not sought a further appeal from that part of the order which affirmed the judgment awarding custody ***171** of Karen and Ellen to the plaintiff. The question on this appeal is thus limited to which parent should have custody of Laura. We agree with the trial court that Laura's best interests require a change in her custody from her mother to her father.

Any court in considering questions of child custody must make every effort to determine "what is for the best interest of the child, and what will best promote its welfare and happiness". (Domestic Relations Law, § 70; Matter of Ebert v Ebert, 38 NY2d 700, 702; Obey v Degling, 37 NY2d 768, 769; Matter of Lincoln v Lincoln, 24 NY2d 270; Bistany v Bistany, 66 AD2d 1026; Sandman v Sandman, 64 AD2d 698, mot for lv to app den 46 NY2d 705; Matter of Saunders v Saunders, 60 AD2d 701.) As we have recently stated, there are no absolutes in making these determinations; rather, there are policies designed not to bind the courts, but to guide them in determining what is in the best interests of the child. (Friederwitzer v Friederwitzer, 55 NY2d 89, 93-95.)

Where the parties have entered into an agreement as to which parent should have custody, we have stated that "[p]riority, not as an absolute but as a weighty factor, should, in the absence of extraordinary circumstances, be accorded" to that agreement. (Matter of Nehra v Uhlar, 43 NY2d 242, 251.) This priority is afforded the first determination of custody in the belief the stability this policy will assure in the child's life is in the child's best interests. (Friederwitzer v Friederwitzer, supra, at p 94; Corradino v Corradino, 48 NY2d 894; Matter of Nehra v Uhlar, supra.; Obey v Degling, supra.; Dintruff v McGreevy, 34 NY2d 887; Aberbach v Aberbach, 33 NY2d 592; People ex rel. Selbert v Selbert, 60 AD2d 692.) But as this court noted in *Friederwitzer*, "[n]o agreement of the parties can bind the court to a disposition other than that which a weighing of all the factors involved shows to be in the child's best interests (People ex rel. Wasserberger v Wasserberger, 42 AD2d 93, 95, affd on opn below 34 NY2d 660)." (Friederwitzer v Friederwitzer, supra, at p 95.) Thus, an agreement between the parties is but one factor to be weighed by the court in deciding whether a change of custody is warranted. ***172**

The weight to be given the existence of a prior agreement depends on whether the prior disposition resulted from a full hearing by a trial court or was merely incorporated in the court's judgment pursuant to an uncontested stipulation. (Friederwitzer v Friederwitzer, supra, at pp 94-95.) This is particularly true where, as in this case, the rules of the court require that the decree specify that "as to support, custody and visitation, no such agreement or stipulation is binding" (22 NYCRR 699.9 [f] [4]) and that the court retains jurisdiction for the purpose of making such further custody decree "as it finds appropriate under

the circumstances existing at the time application for that purpose is made to it". (22 NYCRR 699.9, Approved Forms, J13.) Since the court was not bound by the existence of the prior agreement, it has the discretion to order custody changed "when the totality of circumstances, including the existence of the prior award, warrants its doing so in the best interests of the child." (Friederwitzer v Friederwitzer, supra, at p 96.)

Primary among those circumstances to be considered is the quality of the home environment and the parental guidance the custodial parent provides for the child. (Matter of Ebert v Ebert, 38 NY2d 700, 702, supra.; Bistany v Bistany, 66 AD2d 1026, supra.; Sandman v Sandman, 64 AD2d 698, mot for lv to app den 46 NY2d 705, supra.; Matter of Saunders v Saunders, 60 AD2d 701, supra.) While concerns such as the financial status and the ability of each parent to provide for the child should not be overlooked by the court, an equally valid concern is the ability of each parent to provide for the child's emotional and intellectual development. (Sandman v Sandman, supra.; Porges v Porges, 63 AD2d 712; Matter of Saunders v Saunders, supra.)

In determining whether the custodial parent can continue to provide for the child's various needs, the court must be cognizant of the individual needs of each child. It is, of course, entirely possible that a circumstance such as a total breakdown in communication between a parent and child that would require a change in custody would be applicable only as to the best interests of one of several children. (Bistany v Bistany, supra.; ***173** Sandman v Sandman, supra.; Porges v Porges, supra.) To this end, it is important for the court to consider the desires of each child. But again, this is but one factor to be considered; as with the other factors, the child's desires should not be considered determinative. (Matter of Ebert v Ebert, supra, at p 702; Obey v Degling, 37 NY2d 768, 770, supra.; Dintruff v McGreevy, 34 NY2d 887, 888, supra.; Sandman v Sandman, supra.) While not determinative, the child's expressed preference is some indication of what is in the child's best interests. Of course, in weighing this factor, the court must consider the age and maturity of the child and the potential for influence having been exerted on the child. (See, e.g., Obey v Degling, supra, at p 770; Dintruff v McGreevy, supra, at p 888.)

Finally, this court has long recognized that it is often in the child's best interests to continue to live with his siblings. While this, too, is not an absolute, the stability and companionship to be gained from keeping the children together is an important factor for the court to consider. "Close familial relationships are much to be encouraged." (Matter of Ebert v Ebert, supra, at p 704.) "Young brothers and sisters need each other's strengths and association in their everyday and often common experiences, and to separate them, unnecessarily, is likely to be traumatic and harmful." (Obey v Degling, supra, at p 771; Matter of Gunderud v Gunderud, 75 AD2d 691; Bistany v Bistany, supra.)

The weighing of these various factors requires an evaluation of the testimony, character and sincerity of all the parties involved in this type of dispute. Generally, such an evaluation can best be made by the trial court which has direct access to the parties and can supplement that information with whatever professionally prepared reports are necessary. "In matters of this character 'the findings of the nisi prius court must be accorded the greatest respect' (Matter of Irene O., 38 NY2d 776, 777)" (Matter of Ebert v Ebert, supra, at p 703; Bistany v Bistany, supra). Appellate courts should be reluctant to substitute their own evaluation of these subjective factors for that of the nisi prius court (People ex rel. Portnoy v Strasser, 303 NY 539, 542; Bistany v Bistany, supra), and if they do, should articulate ***174** the reasons for so doing. Similarly, the existence or absence of any one factor cannot be determinative on appellate review since the court is to consider the totality of the circumstances. (Friederwitzer v Friederwitzer, 55 NY2d 89, supra.)

Turning then to the facts of this case, we hold that the determination of the trial court that the totality of the circumstances warrants awarding custody of Laura to her father conforms to the weight of the evidence. The record indicates that although the mother is not an unfit parent for Laura, she is, under all the circumstances present here, the less fit parent. Thus, the trial court was not bound by the stipulation of the parties, but was free to, and indeed required to, review the totality of the circumstances to determine what would be in Laura's best interests. In doing so, the Trial Judge weighed the testimony of all the parties, including Laura, and considered the testimony of school officials and reports from a probation officer appointed by the court. The court made no specific finding that defendant was an unfit mother for Laura, but a finding that the mother was the less fit parent is implicit in its order to change custody and is supported by the record. Additionally, the trial court, while noting Laura's ambivalence as to which parent she would prefer to live with, gave significant weight to her strong desire to remain with her

older sisters. The record indicates that all relevant factors, including the mother's ability to cope with raising children as they approach maturity and the father's desire to provide a fuller and more enriched environment for his daughters were considered. It is abundantly clear from the record that the trial court, in this case, made a careful and studied review of all the relevant factors. As the determination of the nisi prius court, we believe this holding should be accorded great deference on review.

Accordingly, the order of the Appellate Division should be reversed, without costs, and the judgment of Supreme Court, Westchester County, reinstated.

Chief Judge Cooke and Judges Gabrielli, Jones, Wachtler, Fuchsberg and Meyer concur.
Order reversed, etc. ***175**

55 N.Y.2d 89, 432 N.E.2d 765, 447 N.Y.S.2d 893

Sharon Friederwitzer, Appellant,
v.
Elliot Friederwitzer, Respondent.

Court of Appeals of New York
Argued January 4, 1982;
decided February 16, 1982

CITE TITLE AS: Friederwitzer v Friederwitzer

SUMMARY

Appeal from an order of the Appellate Division of the Supreme Court in the Second Judicial Department, entered April 13, 1981, which, by a divided court, (1) modified, and, as modified, affirmed an order of the Supreme Court at Special Term (Vincent R. Balletta, J.), entered in Nassau County, modifying the judgment of divorce by inserting directions that defendant shall have custody and control of the infant issue of the marriage and that plaintiff shall have visitation rights, and (2) remitted the matter to the Supreme Court to determine the visitation rights of the plaintiff. The modification consisted of deleting so much of the order as specified the visiting rights of the plaintiff.

An uncontested divorce was awarded plaintiff wife by judgment dated July 24, 1979. The separation agreement entered into by them provided that as to the two children of the marriage the husband and wife would have joint custody with the children residing with the wife and reasonable visitation rights to the husband. It provided further that the terms of the agreement would survive a judgment of divorce "without merging, other than child support which shall merge in said decree." The judgment of divorce provided that the parties have joint custody of the children, the father to have visitation as provided in the separation agreement, and that the agreement should survive and not merge in the judgment. It also contained a retention of jurisdiction provision required by Appellate Division rule. Less than a year after the original judgment, the father moved for modification of the judgment of divorce so as to award him sole custody of the children. The Trial Judge found that the mother, while not unfit, was less fit to have custody than the father because her own best interests and social life appeared to be of "paramount concern to her, to the total exclusion of the best interests of her children". He predicated that conclusion on the mother having frequently left her then 11- and 8-year-old girls alone in the apartment until late at night when she went out for the evening even though the children informed her that they were afraid to stay alone, and on the mother's profession of raising the children in the tenets of Orthodox Judaism while at the same time flagrantly violating those tenets.

The Court of Appeals affirmed the order of the Appellate Division, holding, in an opinion by Judge Meyer, that extraordinary circumstances are not a *sine qua non* of a change in parental custody of a child, whether the original award of custody is made after plenary trial or by adoption of the agreement of the parties, and the standard ultimately to be applied remains the best interests of the children.

Friederwitzer v Friederwitzer, 81 AD2d 605, affirmed.

HEADNOTES

Parent, Child and Family
Custody
Modification of Custody Award

([1]) Extraordinary circumstances are not a *sine qua non* of a change in parental custody of a child, whether the original award of custody is made after plenary trial or by adoption of the agreement of the parties; this is also true with respect to a judgment governed by an Appellate Division rule containing a retention of jurisdiction provision. No agreement of the parties can bind the court to a disposition other than that which a weighing of all the factors involved shows to be in the child's best interest, and the standard ultimately to be applied remains the best interests of the child when all of the applicable factors are considered, not whether there exists one or more circumstances that can be denominated extraordinary; accordingly, where the separation agreement, which survived and did not merge in the judgment of divorce, provided that the parents would have joint custody and the father moved, less than a year after the original judgment, for modification so as to award him sole custody, it was not error to award sole custody to the father, inasmuch as it was found that the mother, while not unfit, was less fit to have custody than the father because her own best interests and social life appeared to be of paramount concern to her, to the total exclusion of the best interests of her children.

POINTS OF COUNSEL

Carl D. Bernstein for appellant.
I. There were no extraordinary changes in circumstances which justified a switch in custody to the father. (Matter of Nehra v Uhlar, 43 NY2d 242; Corradino v Corradino, 48 NY2d 894; La Veglia v La Veglia, 54 AD2d 727; Matter of Austin v Austin, 65 AD2d 903; Matter of Heller v Bartman, 65 AD2d 876; McLaughlin v Mclaughlin, 71 AD2d 738; Martin v Martin, 74 AD2d 419.) II. The wishes of an 11-year-old child are of little weight in determining custody. (Matter of Calder v Woolverton, 50 AD2d 587, 39 NY2d 1042; Pino v Pino, 57 AD2d 919.) III. There has been no showing that the mother was in any sense unfit or that the father was more fit. ***91**
Stanley Lehrer for respondent.
I. The court found sufficient grounds to justify transferring custody from the mother to the father. (Matter of Barkley v Barkley, 60 AD2d 954, 45 NY2d 936; Braiman v Braiman, 44 NY2d 584.) II. The totality of the circumstances justified the custodial change. (Matter of Nehra v Uhlar, 43 NY2d 242; Corradino v Corradino, 48 NY2d 894; Matter of Nierenberg v Nierenberg, 36 NY2d 850; Opferbeck v Opferbeck, 57 AD2d 1074; Papernik v Papernik, 55 AD2d 846; Mantell v Mantell, 45 AD2d 918; Matter of D'Alessandro v Parisi, 60 AD2d 897.) III. The wishes of Lisa Friederwitzer, 11 years and 9 months old at the time of the trial, should be accorded consideration. (Martin v Martin, 308 NY 136; Pact v Pact, 70 Misc 2d 100; Matter of Barry v Glynn, 59 Misc 2d 75.) IV. The trial court was in the best position to fully evaluate the facts. The best interests of the children will not now be served by another uprooting. (Matter of Gloria S. v Richard B., 80 AD2d 72.)

OPINION OF THE COURT

Meyer, J.

Extraordinary circumstances are not a *sine qua non* of a change in parental custody of a child, whether the original award of custody is made after plenary trial or by adoption of the agreement of the parties, without contest, and without merging the agreement in the judgment. The more particularly is this so with respect to a judgment governed as is the judgment in this case by rule 699.9 of the Appellate Division, Second Department (22 NYCRR 699.9), pursuant to which the trial court expressly ”retains jurisdiction * * * for the purpose“ to the extent permitted by law, ”of making such further decree with respect to * * * custody * * * as it finds appropriate under the circumstances existing at the time application for that purpose is made to it“ (22 NYCRR 699.9 [b], Approved Forms For Matrimonial Judgments, J13). The order of the Appellate Division affirming Special Term's order changing custody to the father should, therefore, be affirmed, without costs.

The parties were married in 1968. An uncontested divorce was awarded plaintiff wife after inquest, by judgment dated July 24, 1979. The separation agreement enteredinto ***92** by them provided that as to the two children of the marriage, Lisa and Nicole, the husband and wife would have joint custody * with the children residing with the wife and reasonable visitation rights to

the husband. It provided further that the terms of the agreement would survive a judgment of divorce "without merging, other than child support which shall merge in said decree." The judgment of divorce provided that the parties have joint custody of the children, the father to have visitation as provided in the separation agreement, and that the agreement should survive and not merge in the judgment. It also contained the retention of jurisdiction provision (Approved Forms, J13) required by Appellate Division rule.

In September, 1979, the mother, who had been living with the children on Long Island close to the residence of the father, moved with the children to an apartment on East 93rd Street in Manhattan. Both parties and the children have been reared as Orthodox Jews, strictly observing both the Sabbath and the dietary laws. The children, who had attended a yeshiva on Long Island, were transferred to a yeshiva in Manhattan. Less than a year after the original judgment, in April, 1980, the father moved for modification of the judgment of divorce so as to award him sole custody of his daughters. The mother crossmoved for sole custody. After a trial during which the mother, father and both children testified, the Trial Judge found the father to be "a loving and caring person * * * well qualified as a fit parent." He found that the mother, while not unfit, was less fit to have custody than the father because her own best interests and social life appeared to be of "paramount concern to her, to the total exclusion of the best interests of her children." He predicated that conclusion on the mother having frequently left her then 11-and 8-year-old girls alone in the apartment until late at night when she went out for the evening even though the children informed her that they were afraid to stay alone, and on the mother's profession of raising the children in the tenets of Orthodox Judaism while at the same time flagrantly violating those tenets by permitting a male ***93** friend to stay in the apartment and share her bed to the knowledge of the children, by failing, except rarely, to take the children to Sabbath services, and by permitting the male friend to violate the Sabbath by turning on the television, all of which confused the children and was contrary to their religious beliefs and detrimental to their religious feeling. Noting the older daughter's strong desire to live with her father and the younger child's wish to continue living with her mother but not to be separated from her sister, the Trial Judge acknowledged that the wishes of the children was an element to be considered, but held it controlled in this instance by the overriding considerations above detailed. He therefore modified the judgment to award custody of both children to the father.

The Appellate Division by a divided court modified in a respect not material to our determination and affirmed Special Term's order. The majority found the Trial Judge's conclusion that custody in defendant would serve the best interests of the children to be supported by the evidence. The dissenter, interpreting our decisions in Corradino v Corradino, (48 NY2d 894) and Matter of Nehra v Uhlar (43 NY2d 242) as holding that custody "pursuant to an agreement should not be transferred absent extraordinary circumstances " (81 AD2d, p 606) of which he found no evidence in the record, voted to reverse and deny the father's motion. The mother's appeal to us presents the question of law whether extraordinary circumstances are required as the dissent suggested. We affirm.

The only absolute in the law governing custody of children is that there are no absolutes. The Legislature has so declared in directing that custody be determined by the circumstances of the case and of the parties and the best interests of the child, but then adding "In all cases there shall be no prima facie right to the custody of the child in either parent" (Domestic Relations Law, § 240; see, also, § 70). Because the section speaks to modification as well as to an original matrimonial judgment, "all cases" must be read as including both. That, of course, does not mean that custody may be changed without regard to the circumstances considered by the court when the earlier award was made but rather that no one factor, including the ***94** existence of the earlier decree or agreement, is determinative of whether there should, in the exercise of sound judicial discretion, be a change in custody.

Indeed, in Matter of Nehra v Uhlar (43 NY2d 242, supra), we were at pains to point out many of the factors to be considered and the order of their priority. Thus, we noted that "Paramount in child custody cases, of course, is the ultimate best interest of the child" (p 248), that stability is important but the disruption of change is not necessarily determinative (pp 248, 250), that the desires of the child are to be considered, but can be manipulated and may not be in the child's best interests (p 249), that self- help through abduction by the noncustodial parent must be deterred but even that "must, when necessary, be submerged to the paramount concern in all custody matters: the best interest of the child" (p 250), that the relative fitness of the respective parents as well as length of time the present custody had continued are also to be considered (pp 250-251), that "Priority, not

as an absolute but as a weighty factor, should, in the absence of extraordinary circumstances, be accorded to the first custody awarded in litigation or by voluntary agreement " (p 251), whereas of lesser priority will be the abduction, elopement or other defiance of legal process as well as the preferences of the child (id.).

The priority which is accorded the first award of custody, whether contained in court order or voluntary agreement, results not from the policy considerations involved in *res judicata* (which permits change in custody decrees when warranted by the circumstances, Kunker v Kunker, 230 App Div 641, 645; cf. Matter of Bachman v Mejias, 1 NY2d 575, 581; Goldman v Goldman, 282 NY 296, 304; see Restatement, Judgments 2d [Tent Draft No. 3], § 74, Comment,*d;* and [Tent Draft No. 5], § 61, Comment *f*, illustration 11), so much as from the conceptions that stability in a child's life is in the child's best interests and that the prior determination reflects a considered and experienced judgment concerning all of the factors involved (Martin v Martin, 74 AD2d 419, 427). But the weight to be given the prior award necessarily depends upon whether it results from the Trial Judge's judgment after consideration of all ***95** relevant evidence introduced during a plenary trial or, as here, finds its way into the judgment through agreement of the parties proven as part of a proceeding in which custody was not contested and no evidence contradictory of the agreement's custody provision has been presented. No agreement of the parties can bind the court to a disposition other than that which a weighing of all of the factors involved shows to be in the child's best interest (People ex rel. Wasserberger v Wasserberger, 42 AD2d 93, 95, affd on opn below 34 NY2d 660). Nor is an agreement so contradictory of considered judgment as to determine custody solely upon the basis of the wishes of the young children involved a " 'weighty factor' " for consideration (Martin v Martin, 74 AD2d 419, 426, supra). Thus, *Nehra's* phrase "absence of extraordinary circumstances" is to be read as " absence of countervailing circumstances on consideration of the totality of circumstances, " not that some particular, sudden or unusual event has occurred since the prior award. The standard ultimately to be applied remains the best interests of the child when all of the applicable factors are considered, not whether there exists one or more circumstances that can be denominated extraordinary.

An additional reason for so holding in the instant case exists in rule 699.9 of the Appellate Division, Second Department, to which the decree in the instant case is subject. Custody decrees remain subject to modification because the governing statute so provides (Goldman v Goldman, 282 NY 296, 304, supra.; Domestic Relations Law, § 240; Siegel, 1964 Practice Commentary, McKinney's Cons Laws of NY, Book 14, Domestic Relations Law, § 240,1981-1982 Pocket Part, p 165; Ann., 73 ALR2d 1444). Rule 699.9 expressly states that " as to support, custody and visitation, no such [separation] agreement or stipulation is binding" (22 NYCRR 699.9 [f] [4]) and requires, as earlier noted, that the judgment contain the provision (id., Approved Forms, J13) that the court retains jurisdiction for the purpose of making such further custody decree "as it finds appropriate under the circumstances existing *at the time application for that purpose is made to it*" (italics supplied). Such a modification is, as already noted, permitted by law when authorized by the totality of ***96** circumstances, including the existence of the prior decree. Moreover, the language of the rule makes indelibly clear that it is the circumstances existing at the time of the application for change that governs whether a change should be made, whether or not any of them can be characterized as extraordinary. This, of course, does not mean that a matrimonial court in the Second Department has the authority to change custody simply because change is requested, but that it has the discretion to do so when the totality of circumstances, including the existence of the prior award, warrants its doing so in the best interests of the child.

It thus appears that the standard applied by the courts below was not legally incorrect. Moreover, the record supports the determination of the courts below that the change of custody was warranted by the lesser concern of the mother for the emotional well-being of her children than for her own life style demonstrated after the original award was made, particularly in light of the short period of time it had been in existence when the application for modification was made and the fact that the custody provisions of the divorce judgment were based on the agreement of the parties rather than plenary consideration by the trial court.

For the foregoing reasons, the order of the Appellate Division should be affirmed, without costs.

Chief Judge Cooke and Judges Jasen, Gabrielli, Wachtler and Fuchsberg concur; Judge Jones taking no part.
Order affirmed. ***97**

432 N.E.2d 765, 447 N.Y.S.2d 893

Footnotes

* While physical custody was not to be shared under the agreement, it required consultation between the parties on all matters pertaining to the health, welfare, education and upbringing of the children.

43 N.Y.2d 242, 372 N.E.2d 4, 401 N.Y.S.2d 168

In the Matter of Susanne Nehra, Appellant,
v.
Rudolf Uhlar, Respondent.

Court of Appeals of New York
Argued November 9, 1977;
decided December 15, 1977

CITE TITLE AS: Matter of Nehra v Uhlar

SUMMARY

Appeal from an order of the Appellate Division of the Supreme Court in the Third Judicial Department, entered April 20, 1977, which reversed, on the law and the facts, an order of the Family Court, Tioga County (George Boldman, J.), awarding sole custody of the parties' two infant children to petitioner mother.

The Family Court held that, notwithstanding that the petitioner had abducted her children in violation of a Michigan decree awarding custody to respondent, both parties were fit parents and a change in custody back to respondent would not be in the best interests of the children.

The Appellate Division reversed in a memorandum decision holding that the Michigan decree should not be disturbed absent extraordinary circumstances and that the *de facto* change in custody should not be considered an extraordinary circumstance.

The Court of Appeals, in an opinion by Chief Judge Breitel, affirmed and held that the Michigan decree is entitled to great weight and that abduction of children should not be encouraged by allowing such a change in custody to constitute extraordinary circumstances, except when the interests of the child require it.

Matter of Susanne U. NN v Rudolf OO, 57 AD2d 653, affirmed.

HEADNOTES

Parent, Child and Family
Custody

([1]) The best interest of the children involved must govern in the adjudication of custody and on no view may their interests be ignored.

Parent, Child and Family
Custody
Jurisdiction

([2]) Since the New York courts had proper jurisdiction of a custody proceeding by the presence of the children in the State when the proceeding was begun, its jurisdiction continues. No useful purpose on behalf of the children would be served by abstaining from exercise of jurisdiction and thereby projecting another round of protracted litigation.

Parent, Child and Family
Custody

([3]) That a change in custody may prove temporarily disruptive to children ***243** is not determinative in a custody proceeding, since all changes in custody are disruptive.

Parent, Child and Family
Out-of-State Custody Determination

([4]) A Michigan judgment in a divorce case awarding custody of infant children to the father based on findings that the mother's conduct with several men in the house during the separation was dangerous to the welfare of the children, like other custody decrees, is not entitled to full faith and credit in the courts of this State, but, absent extraordinary changes in circumstance, is entitled to great weight, not only on grounds of comity, but because of the great interest of the State of the children's residence and domicile, especially since the children had always lived in Michigan until their mother lawlessly abducted them from the jurisdiction.

Parent, Child and Family
Custody
Abduction

([5]) If the best interests of all children are to be served, the abduction of children to avoid the effect of custody decrees must be deterred except that the apparent imperative to discourage abduction must, when necessary, be submerged to the paramount concern in all custody matters: the best interest of the child.

Parent, Child and Family
Custody

([6]) Continual shifting of custody from one parent to another is to be avoided when possible.

Parent, Child and Family
Custody
Abduction

([7]) A mother's unlawful custody of her children for last four and a half years, without more, is not a change in circumstance sufficiently extraordinary to justify upsetting the determination of a Michigan court awarding custody to the father, since a

parent, having lost a custody dispute in another State, might otherwise believe that by abducting the children, secreting them in New York, and waiting for time to pass, the prior custody decree could be effectively nullified, although, were there no tolerable alternatives to awarding custody to the abducting parent, as, for example, if the other parent were not fit to raise the children, or could not provide a suitable home, or just too many years had passed, even the unlawful act might have to be ignored.

Parent, Child and Family
Custody

([8]) In the absence of extraordinary circumstances, priority as to the custody of children should be accorded to the first custody awarded in litigation or by voluntary agreement, not absolutely but as a weighty factor, and a similarly qualified priority should also be accorded to the judgment of the court of greatest concern with the welfare of the children, that is, the court of domicile, residence, and legal dissolution of the sundered marriage. Denigrated in rank should be the consequences of child-snatching, flight from the courts of jurisdiction, and defiance of legal process and judgments. Denigrated in rank, to some degree, should also be the natural or manipulated "satisfaction" of young abducted children with the homes where they presently abide.

Parent, Child and Family
Custody

([9]) Respondent father is entitled to custody of his children because a Michigan court so decreed, because he is a fit parent, because the mother obtained the possession of the children by lawless self-help, because the ***244** transitory harm caused by disruption past and future was caused by the mother, and because there is insufficient showing that the harm to the children if they be returned to the father is any more irreparable than that caused by the mother in creating the situation in the first instance.

TOTAL CLIENT SERVICE LIBRARY REFERENCES

15 NY Jur, Domestic Relations §§ 350, 351

19 Carm-Wait 2d, §§ 118:190-118:194

24 Am Jur 2d, Divorce and Separation §§ 812 et seq.

Am Jur Pl & Pr Forms (Rev ed), Divorce and Separation, Forms 631-638

6 Am Jur Proof of Facts 2d pp 499 et seq., Change in Circumstances Justifying Modification of Child Custody Order

ANNOTATION REFERENCES

Opening or modification of divorce decree as to custody or support of child not provided for in the decree. 71 ALR2d 1370.

POINTS OF COUNSEL

Bruno Colapietro for appellant. Where the Family Court, after a full hearing, has made a determination that in the best interests of the children, and because of extraordinary circumstances, custody of said children should be with the mother, it was an

error for the court below to reverse, especially without remanding for new hearings. *(Halvey v Halvey*, 330 US 610; *May v Anderson*, 345 US 528; *Matter of Berlin v Berlin*, 21 NY2d 371, 393 US 840; *Finlay v Finlay*, 240 NY 429; *Matter of Bennett v Jeffreys*, 40 NY2d 543; *People ex rel. "HH" v "HH"*, 49 AD2d 130; *Matter of Lincoln v Lincoln*, 24 NY2d 270; *Matter of JJ v JJ*, 50 AD2d 959.)

Rudolf Uhlar, pro se, and *William S. Friedlander* for Rudolf Uhlar, respondent. I. The decision of the trial court in this matter is subject to review. *(Finlay v Finlay*, 240 NY 429; *Matter of Bachman v Mejias*, 1 NY2d 575; *People ex rel. Portnoy v Strasser*, 303 NY 539; *Bunim v Bunim*, 298 NY 391.) II. During the time in which respondent had custody of the children there was no change of circumstances on which to base a modification of the existing Michigan custody provisions. *(Lester v Lester*, 178 App Div 205, 222 NY 546; *Matter* ***245** *of Lang v Lang*, 9 AD2d 401, 7 NY2d 1029; *Matter of Hahn v Falce*, 56 Misc 2d 427; *Matter of Wout v Wout*, 32 AD2d 709; *Dintruff v McGreevy*, 42 AD2d 809, 34 NY2d 887.) III. The best interests of the children are served by upholding the judgment of the Michigan trial court which based its decision on the children's best interests, particularly when the court below determined that the subsequent trial in New York showed no change in circumstance to affect that original decision. IV. The trial court erred in refusing to admit into evidence the prior transcripts of the Michigan divorce and custody proceedings. *(Fleury v Edwards*, 14 NY2d 334.) V. The court below was correct in holding that "the transformations which have occurred result almost entirely from the action of the petitioner in disobeying the Michigan order." VI. It was error for the New York court not to recognize the Michigan custody award especially where both parties are found to be fit and petitioner has unclean hands. *(Matter of Feldman v Feldman*, 45 AD2d 320.) VII. The judgment of the Family Court is supported by neither the evidence nor proper findings of fact and the court below did not err in reversing the decision of said court. *(Davin v Isman*, 228 NY 1; *Mason v Lory Dress Co.*, 277 App Div 660, *Sager v Sager*, 21 AD2d 183; *Conklin v State of New York*, 22 AD2d 481; *Matter of Harris v Doley*, 22 AD2d 769; *Matter of Atkins v Atkins*, 28 AD2d 1098; *Matter of Thaler v Thaler*, 29 AD2d 688.)

OPINION OF THE COURT

Chief Judge Breitel.

Petitioner Nehra, the mother, seeks custody of her two children, now aged 11 and 9. Respondent Uhlar, the father, opposes the petition, relying in part on a prior Michigan judgment granting him a divorce and awarding him custody of the children. Family Court granted the petition, but a divided Appellate Division reversed and awarded custody to the father. The mother appeals.

There is litigation over the custody of the hapless children because their mother on a visit in Michigan abducted the children and succeeded in hiding them with her for more than nine months in New York State. She and the children and her new husband now live in New Jersey. The father still resides in Michigan. A separate litigation was brought in New Jersey while the New York proceeding was pending. The New Jersey court has deferred to the courts of this State. ***246**

([1])It is undisputed that the best interest of the children must govern in the adjudication of custody. Certainly on no view may their interests be ignored. The issue that remains is whether those interests require that the children be left with their mother, who has apparently provided them with a good enough home for over four and a half years, despite the Michigan judgment giving custody to the father, and even though the mother obtained possession of the children by abduction and for more than nine months prevented the father from finding or seeing the children.

The order of the Appellate Division should be affirmed.

Although returning the children to their father will provide yet another disruption in the young lives of these unfortunate children, the evidence indicates, and the trial court found, that he can also provide, as he had before, a good enough home for them. And, in the long run, refusal to condone abduction of children will provide better stability for the Uhlar children, who would otherwise remain subject to the exercise of lawless self- help by either of their embattled parents.

The parties, then both residents of Michigan, were married in 1964. They both hold advanced graduate university degrees. They had two children, Sandrae, born in 1966, and Marke, born in 1968, before their separation in 1970. The mother brought

a divorce action in Michigan in January, 1970, and retained custody of the children in the marital home while the divorce action was pending. On March 3, 1972, after trial in the action for divorce, the father was awardedcustody, because of the mother's misconduct and unfitness in the care of the children. The mother was granted visitation rights. The father was given possession of the marital home. Nine months later, on December 26, 1972, the father remarried. The new Mrs. Uhlar, and her young daughter by her former marriage, moved into the Uhlar home. On February 12, 1973, in Connecticut, the mother, too, was remarried, to Gerald Nehra, whose former marriage had also ended in divorce.

In the application for the marriage license the mother gave her occupation as that of attorney and stated that she had never been married. Five days after her remarriage, during a Michigan visitation period, the mother absconded with the children and returned to her new home in New York. Efforts were made to conceal the whereabouts of the children, including listing the Nehra telephone number under an alias. Despite ***247** an extensive search, not until December 5, 1973, more than nine months later, did the father locate his children. Even then, he was denied the opportunity to see them, and, on one occasion, even the chance to talk with them on the telephone at Christmas time.

For a year after the father discovered his children, he was not permitted by the mother to have them visit him in Michigan. And even when the father came to visit the children in New York, which he did eight times in the first year after their discovery, he was only permitted to see them in the presence of their mother or her second husband. The children's paternal grandfather, the father's second wife, and his stepdaughter, were denied access to the children altogether. When the father was finally permitted, in December, 1974, to take the children to Michigan for a visit, he was required under New York court order to post $2,500 bond. Each subsequent visit with the father in Michigan has also required posting of a bond.

The mother brought this proceeding in Family Court to obtain legal custody on December 13, 1973, just eight days after the father discovered the children (Family Ct Act, § 651). On February 26, 1975, after a hearing, the mother was granted custody. On April 14, 1977, the Appellate Division reversed and awarded custody to the father.

The litigation has dragged on for over four years. The New York courts like so many “disinterested” Solomons must disentangle the web wrought by the mother, previously characterized by the Michigan court as selfish. Paradoxically, the mother who had defied the Michigan court brought both the divorce action in Michigan and the custody proceeding in New York.

While these proceedings were pending the Nehras moved to New Jersey, taking the Uhlar children with them. The removal was caused by the transfer in position of Mr. Nehra from New York State to New Jersey. A proceeding to validate the mother's custody of the Uhlar children was started in New Jersey, but, as the briefs advise, the New Jersey court suspended proceedings and stated that it deferred to what the New York courts might hold in the present prior proceeding (compare Domestic Relations Law, § 75-g, eff Sept. 1, 1978). Consequently, there follows the paradox of Michigan children, now in New Jersey, having their care and custody determined in New York State where now neither of their parents nor ***248** they are situated, and where the outstanding custody judgment is that of Michigan where they have not resided for almost five years.

([2])The New York courts having proper jurisdiction by the presence of the children in the State when the custody proceeding was begun, its jurisdiction continues (see Removal of Child From State as Defeating Jurisdiction to Award Custody, Ann., 171 ALR 1405, 1406-1407; Jurisdiction of Court to Award Custody of Child Domiciled in State But Physically Outside It, Ann., 9 ALR2d 434, 446-447; Domestic Relations Law, § 75-d, subd 1, par [a], eff Sept. 1, 1978). No useful purpose on behalf of the children would be served by abstaining from exercise of jurisdiction and thereby projecting another round of protracted and protracting litigation.

It appears from the record that either parent would provide the children with a materially comfortable and loving home. Currently, in the mother's custody, the children seem to be well adapted and are doing well in school. They get along with their stepfather, Mr. Nehra, whose own children by his prior marriage live with their mother in Michigan. Testimony of a psychologist retained by the mother indicated that there was no reason to disrupt the children, and that a change would be “potentially” damaging.

At the same time, testimony of neighbors of the Uhlars in Michigan indicates that the children appeared quite happy before they were abducted. Although the mother contends the children were ill-clothed and poorly cared for while in their father's custody, those allegations are controverted by testimony from the neighbors. In fact, their testimony indicates that the children may not have been properly treated while the mother had custody pending conclusion of the Michigan divorce proceedings. Moreover, the father and his second wife appear to be providing a good home for the new Mrs. Uhlar's daughter, and for two children born since the father's remarriage.

([1], [3])Paramount in child custody cases, of course, is the ultimate best interest of the child (Domestic Relations Law, § 70). That a change in custody may prove temporarily disruptive to the children is not determinative, for all changes in custody are disruptive. Given Mrs. Nehra's hostility to her ex-husband, and her reluctance to allow even visitation with the father, it would be surprising indeed if the children were eager after their enforced separation from him to return to ***249** their father. The desires of young children, capable of distortive manipulation by a bitter, or perhaps even well-meaning, parent, do not always reflect the long- term best interest of the children (see *Dintruff v McGreevy*, 34 NY2d 887, 888; *Matter of Lincoln v Lincoln*, 24 NY2d 270, 273).

As the court noted in the *Dintruff* case, "[t]here are periodic reorientations toward one or another parent, and this is especially true when young parents are involved and one or both remarries" *(supra,* p 888). In the *Lincoln* case, the court observed that "[a] child whose home is or has been torn apart is subjected to emotional stresses that may produce completely distorted images of its parents and its situation. Also its feelings may be transient indeed, and the reasons for its preferences may indicate that no weight should be given to the child's choice" *(supra,* p 273).

([4])The Michigan court awarded custody to the father based on findings that the mother's conduct with several men in the house during the separation was dangerous to the welfare of the children. That judgment, like other custody decrees, is not entitled to full faith and credit in the courts of this State (see *Matter of Berlin v Berlin*, 21 NY2d 371, 376, cert den 393 US 840; *Matter of Bachman v Mejias*, 1 NY2d 575, 580). But, absent extraordinary changes in circumstance, the Michigan determination is entitled to great weight not only on grounds of comity but because of the great interest of the State of the children's residence and domicile (see, e.g., *People ex rel. "XX" v "ZZ"*, 43 AD2d 196, 198). This is especially true since the children had always lived in Michigan until their mother lawlessly spirited them out of the jurisdiction (compare *Matter of Berlin v Berlin*, 21 NY2d 371, 374-377, supra.;, with *Matter of Lang v Lang*, 9 AD2d 401, 406-409, affd 7 NY2d 1029).

([5])This court has recognized that if the best interests of all children are to be served, the abduction of children to avoid the effect of custody decrees must be deterred *(Matter of Bennett v Jeffreys*, 40 NY2d 543, 550). This principle has received statutory recognition with enactment of the new Uniform Child Custody Jurisdiction Act, which will not become effective in New York until September 1, 1978 (L 1977, ch 493; Domestic Relations Law, § 75-i, subd 2). The new statute provides: "Unless required in the interest of the child, the court shall not exercise its jurisdiction to modify a custody decree of another state if the petitioner, without consent of ***250** the person entitled to custody, has improperly removed the child from the physical custody of the person entitled to custody or has improperly retained the child after a visit or other temporary relinquishment of physical custody." Both the statute and the case law, however, recognize properly that the apparent imperative to discourage abduction must, when necessary, be submerged to the paramount concern in all custody matters: the best interest of the child. Otherwise "[t]he dignity of the several courts would be preserved, but the welfare of the children would be destroyed" *(Matter of Lang v Lang*, 9 AD2d 401, 405, affd 7 NY2d 1029, supra.;).

In this case, however, the two concerns can be largely harmonized. The mother, it is true, since she has settled down in her new marriage, appears to have provided her children with a good home for over four and a half years. But the father, too, had provided the children with a good home, despite the hedging psychological testimony, that a change would be "potentially" damaging, given by the mother's expert who never, apparently, interviewed the father. There is, moreover, no significant evidence that the children would suffer permanent damage were they returned to their father.

([6])Of course, continual shifting of custody from one parent to another is to be avoided when possible *(Dintruff v McGreevy*, 34 NY2d 887, 888, supra.; *; Matter of Lang v Lang*, 9 AD2d 401, 409, affd 7 NY2d 1029, supra.;). And, in this case, awarding custody to the father would entail another move for the children. But, in the long run, stability, perhaps even for the Uhlar children, will best be achieved by adhering to prior judicial custody determinations, absent, of course, extraordinary changes of circumstance. Their stability is surely undermined by the example of the mother's direct action in violation of law, contempt of the courts, and humiliation of their father.

([7])The mother's custody of the children for the last four and a half years, without more, is not a change in circumstance sufficiently extraordinary to justify upsetting the determination of the Michigan court. If it were, a parent, having lost a custody dispute in another State, might believe that by abducting the children, secreting them in New York, and waiting for time to pass, the prior custody decree could be effectively nullified. Of course, were there no tolerable alternatives to awarding custody to the abducting parent, as, for example, if the other parent were not fit to raise the children, ***251** or could not provide a suitable home, or just too many years had passed, even the unlawful act might have to be ignored (see *Matter of Bennett v Jeffreys*, 40 NY2d 543, 550, supra.;; cf. *Matter of Benitez v Llano*, 39 NY2d 758, 759). In this case, the alternative, awarding custody to a father who is able and eager to provide a good home for his children, is the least difficult to accept. (For a penetrating analysis with copious collection of authorities considering the almost insuperably difficult problems engendered by child-snatching and conflicting jurisdictions in determining child custody see Bodenheimer, Progress Under the Uniform Child Custody Jurisdiction Act and Remaining Problems: Punitive Decrees, Joint Custody, and Excessive Modifications, 65 Cal L Rev 978, esp pp 983, 1014.)

This case, like most child custody matters, involves a collision of principles as well as of intransigent would-be custodians of the hapless children, innocent subjects of a conflict they can never understand. The primary principle of the child's best interest is never easily applied once the litigants themselves have succeeded in creating the disruption of shifting custody as has happened in this case. The courts can only repair, patch, and cover over, as best they can, the irreparable harm occasioned and reduce the harm to a minimum, if the minimum is discernible.

([8])Priority, not as an absolute but as a weighty factor, should, in the absence of extraordinary circumstances, be accorded to the first custody awarded in litigation or by voluntary agreement. Similarly qualified priority should also be accorded to the judgment of the court of greatest concern with the welfare of the children, that is, the court of domicile, residence, and legal dissolution of the sundered marriage. Denigrated in rank should be the consequences of child-snatching, flight from the courts of jurisdiction, and defiance of legal process and judgments. Denigrated in rank, to some degree, should also be the natural or manipulated “satisfaction” of young abducted children with the homes where they presently abide.

([9])Applying these principles and considering the best interest of the children the father is entitled to custody because the Michigan court so decreed, because he is a fit parent, because the mother obtained the possession of the children by lawless self-help, because the transitory harm caused by disruption past and future was caused by the mother, and because there ***252** is insufficient showing that the harm to the children if they be returned to the father is any more irreparable than that caused by the mother in creating the situation in the first instance. The courts cannot assure the happiness and stability of these children; that only their parents could have done, and, hopefully, can still do.

Accordingly, the order of the Appellate Division should be affirmed, without costs.

Judges Jasen, Gabrielli, Jones, Wachtler, Fuchsberg and Cooke concur.
Order affirmed. ***253**

44 N.Y.2d 584, 378 N.E.2d 1019, 407 N.Y.S.2d 449

Arthur W. Braiman, Appellant,
v.
Sharon Braiman, Respondent.

Court of Appeals of New York
Argued May 1, 1978;
decided June 8, 1978

CITE TITLE AS: Braiman v Braiman

SUMMARY

Appeal from so much of an order of the Appellate Division of the Supreme Court in the Second Judicial Department, entered March 13, 1978, as (1) reversed, on the law and the facts, an order of the Supreme Court at Special Term (Joseph Jiudice, J.), entered in Dutchess County, awarding custody of two children to the petitioner father, and (2) awarded custody of the children to the parties jointly.

Upon the breakdown of the parties' marriage in 1974, custody of the children was, under a separation agreement, given to the respondent mother. That agreement survived a judgment of divorce entered in favor of the father in January, 1975. In April, 1976, when the father, who had remarried, learned that respondent, his former wife, was contemplating leaving the jurisdiction, the present proceeding for change of custody based on respondent's alleged unfitness was begun. The hearing before Special Term, which included the testimony of physicians, psychiatrists, teachers and neighbors, was fraught with contradictions. Concluding that the children had fared poorly with their mother, Special Term awarded custody to the father. The Appellate Division reversed, expressly crediting the testimony in favor of respondent, and awarded joint custody.

The Court of Appeals reversed and ordered a new hearing. In an opinion by Chief Judge Breitel, the court held that joint custody is insupportable when the parents are severely antagonistic and embattled, that, on the two-year- old hearing record, plagued with hopelessly conflicting testimony, it would be improvident to choose between the contradictory findings of the courts below, and that a new hearing was required.

Braiman v Braiman, 61 AD2d 995, reversed.

HEADNOTES

Parent, Child and Family
Joint Custody

([1]) To entrust the custody of young children to their parents jointly, especially where the shared responsibility and control includes alternating physical custody, is insupportable when the parents are severely antagonistic and embattled. When the conflicts and contradictions of the testimony presented at the hearing are so severe as to go to the heart of the matter ***585** making it impossible to resolve them without assessments of credibility, a new hearing is required.

Parent, Child and Family

Joint Custody

([2]) The authority to entrust custody of a child to both parents jointly has been inferred from the provisions of section 240 of the Domestic Relations Law that neither parent has a prima facie right to custody and that the court is to give such direction as, in its discretion, justice requires, having regard to the circumstances and the best interests of the child. Joint custody reposes in both parents a shared responsibility for and control of a child's upbringing and may or may not include an arrangement for alternating physical custody and it is encouraged primarily as a voluntary alternative for relatively stable, amicable parents behaving in a civilized fashion; as a court-ordered arrangement imposed upon already embattled and embittered parents, it can only enhance familial chaos.

TOTAL CLIENT SERVICE LIBRARY REFERENCES

15 NY Jur, Domestic Relations §§ 340-343, 352, 353

19 Carm-Wait 2d, §§ 118:177, 118:183, 118:190

Domestic Relations Law §240

24 Am Jur 2d, Divorce and Separation §§ 783, 799; 59 Am Jur 2d, Parent and Child §§ 25, 28, 31, 32

Am Jur Pl & Pr Forms (Rev), Divorce and Separation, Form 353

1 Am Jur Legal Forms 2d, Alimony and Separation Agreements § 17:91

ANNOTATION REFERENCES

"Split," "divided," or "alternate" custody of children. 92 ALR2d 695.

POINTS OF COUNSEL

Norman Bard, Anthony M. Barraco and *Sandra Krevitsky* for appellant. I. In the 23 months that have elapsed since the custody hearing, the children have resided with their father; the mother has sold the children's former residence and her present whereabouts are currently unknown; and she is presently undergoing psychiatric therapy. These are sufficient changes of circumstances to warrant a new hearing to ascertain the present status of the parties and to determine what is in the best interests of the children under these changed circumstances. *(Matter of Bennett v Jeffreys,* 40 NY2d 543; *People ex rel. Cusano v Leone,* 43 NY2d 665; *Matter of Gomez v Lozado,* 40 NY2d 839; *Matter of Darlene T.,* 28 NY2d 391; ***586** *People ex rel. Wessell v New York Foundling Hosp.,* 34 AD2d 947, 36 AD2d 936; *Sweeney v Sweeney,* 39 AD2d 561; *Pino v Pino,* 57 AD2d 919; *Fleishman v Walters,* 40 AD2d 622; *Matter of Robertson v Robertson,* 54 AD2d 1081.) II. Special Term's determination, made after hearing eight days of hopelessly conflicting testimony, is entitled to great weight and should be reinstated. *(Matter of Ray A. M.,* 37 NY2d 619; *Maule v Kaufman,* 33 NY2d 58; *Schine v Schine,* 31 NY2d 113; *Boyd v Boyd,* 252 NY 422; *Matter of Irene O.,* 38 NY2d 776; *Matter of Ebert v Ebert,* 38 NY2d 700; *Ingalls v Ingalls,* 58 AD2d 1039; *People ex rel. Therese W. v Harold J. D.,* 53 AD2d 620; *Matter of Harrison v Harrison,* 54 AD2d 906.)

Joan Goldberg for respondent. I. The change of custody at Special Term was contrary to the facts and to the law and the court below correctly reversed that decision. *(Dintruff v McGreevy,* 42 AD2d 809, 34 NY2d 887; *Matter of Wout v Wout,* 32 AD2d 709; *Matter of Rodolfo "CC" v Susan "CC",* 37 AD2d 657; *Mantell v Mantell,* 45 AD2d 918; *People ex rel. Hinckley v Hinckley,* 31 AD2d 740; *Nierenberg v Nierenberg,* 43 AD2d 717; *Matter of Metz v Morley,* 29 AD2d 462; *Matter of Lang v Lang,* 9 AD2d 401, 7 NY2d 885; *Matter of Kevin M. JJ v Alice A. JJ,* 50 AD2d 959; *Aberbach v Aberbach,* 33 NY2d 592.) II.

The decision of the court below ordering split custody should be reversed. *(Perotti v Perotti,* 78 Misc 2d 131; *Woicik v Woicik,* 66 Misc 2d 357; *Ross v Ross,* 4 Misc 2d 399.) III. Petitioner-appellant's argument that a new hearing is now required is totally devoid of merit. *(Matter of Darlene T.,* 28 NY2d 391; *People ex rel. Cusano v Leone,* 43 NY2d 665; *People ex rel. Wessell v New York Foundling Hosp.,* 36 AD2d 936; *Matter of Bennett v Jeffreys,* 40 NY2d 543; *Sweeney v Sweeney,* 39 AD2d 561; *Pino v Pino,* 57 AD2d 919.) IV. The decision at Special Term is not entitled to any weight at all. *(Bunim v Bunim,* 298 NY 391; *Matter of Ray A. M.,* 37 NY2d 619.) V. Counsel fees should be awarded for services rendered at Special Term in the court below and in the Court of Appeals. *(Sloan v Sloan,* 286 App Div 1102; *Schulsinger v Schulsinger,* 9 AD2d 909; *Parker v Parker,* 269 App Div 717; *Miraldi v Miraldi,* 37 AD2d 842; *Anonymous v Anonymous,* 47 AD2d 613; *Carlo v Carlo,* 30 AD2d 530; *Martin v Martin,* 28 AD2d 897.)

OPINION OF THE COURT

Chief Judge Breitel.

In a proceeding, described as one to modify a judgment of ***587** divorce obtained by the husband, petitioner father seeks custody of his two sons, now aged six and seven-and-a-half. Until this proceeding, respondent mother had custody under a separation agreement which survived a judgment of divorce. Special Term, Supreme Court, awarded custody to the father, but a unanimous Appellate Division reversed, and awarded custody to the parents jointly. The father appeals.

At issue is whether the custody of children of tender years may be entrusted, jointly, to parents persistently and severely embattled.

([1])The order of the Appellate Division, *insofar as appealed from,* should be reversed, and a new hearing held with utmost expedition. Entrusting the custody of young children to their parents jointly, especially where the shared responsibility and control includes alternating physical custody, is insupportable when parents are severely antagonistic and embattled. On the two-year-old hearing record before this court, plagued as it is with hopelessly conflicting testimony on vital facts and issues, it would be improvident to choose between the contradictory findings of the courts below. Consequently a new hearing is required.

Petitioner father, a successful lawyer, married respondent in 1967. The eldest of their three children, a daughter, was born to the mother before she met petitioner, but was later adopted by him. Although he initially sought custody of his adopted daughter, the father did not appeal from Special Term's award of her custody to the mother. Hence, only custody of the parties' two young sons remains contested.

The preliminary facts are not disputed. Upon the marital breakdown in late 1974, custody of the three children was, under a separation agreement, given to the mother. That agreement survived a judgment of divorce entered in favor of the father in January, 1975. It was not until April, 1976, when the father, who had since remarried, learned that his former wife was contemplating leaving the jurisdiction, that this proceeding for change of custody based on the mother's alleged unfitness was begun. Pending a hearing at Special Term, the sons were temporarily placed with their father.

The picture that developed is a mass of hopelessly conflicting unpleasant cross-accusations. Petitioner views himself as a devoted and responsible father. In the former wife's eyes, however, he is a gambler, an unethical person, and an inattentive ***588** and physically abusive father. The mother, who remarried shortly after this proceeding was brought, describes herself as a homebody. In contrast, the father, buttressed by witnesses, characterizes her as a promiscuous barfly who, while entertaining a series of paramours in the children's home, neglected the children.

An extensive investigation by the County Department of Probation was inconclusive. Noting the number of vital contradictions, the probation officer made no recommendation for custody of the sons. She concluded only that both parents seemed to love and be genuinely concerned with the children, and that, due to the mother's contemplated relocation, the father would probably supply a more stable environment.

The eight-day hearing before Special Term, which included testimony of physicians, psychiatrists, teachers, and neighbors, was similarly fraught with contradictions. The testimony of the medical experts provides but one example among many. The father's experts testified that in April, 1976, when change of custody was first sought, the then four year old was badly bruised and the then five year old was suffering from a nervous skin disorder. One physician even filed a report of child abuse. The boys' pediatrician, on the other hand, stated that he had never seen signs of child abuse and that the five year old's rash could not have been caused by anxiety. The authorities, moreover, ultimately determined that the child abuse report was unfounded.

There is more. The father's alleged physical abuse of the children, his asserted delinquency in support payments, the mother's purported neglect of the home, and her alleged promiscuous consorting with intermittent paramours are but four of numerous areas in which the testimony is flatly contradicted.

Concluding that the sons fared poorly with their mother, Special Term, in an elaborated opinion, awarded their custody to the father. The Appellate Division, in an even more elaborate writing, reversed, expressly crediting the testimony in favor of the mother and citing the rule that modification of a custody agreement reached by the parties requires a change in circumstances, especially with respect to fitness (see *Matter of Ebert v Ebert*, 38 NY2d 700, 703). Custody was awarded to the parents jointly, the sons to spend weekdays with the mother and weekends with the father.

To date, the order of the Appellate Division having been ***589** stayed, the sons remain with the father. Despite court order to the contrary, he has not permitted the mother visitation. For reasons unrevealed by the record, the whereabouts of the mother are now undisclosed.

([2])Under section 240 of the Domestic Relations Law, neither parent has a “prima facie right” to custody. Instead, the court is to “give such direction *** as, in the court's discretion, justice requires, having regard to the circumstances of the case and of the respective parties and to the best interests of the child”. It is from this language that the authority to entrust custody of a child to both parents “jointly” has been inferred (see, e.g., *Dodd v Dodd*, 93 Misc 2d 641, 644- 645; *Perotti v Perotti*, 78 Misc 2d 131, 132).

“Joint”, or, as it is sometimes called “divided”, custody reposes in both parents a shared responsibility for and control of a child's upbringing (see Bodenheimer, Progress Under the Uniform Child Custody Jurisdiction Act and Remaining Problems: Punitive Decrees, Joint Custody, and Excessive Modifications, 65 Cal L Rev 978, 1009-1010; compare 1 Lindey, Separation Agreements and Ante-Nuptial Contracts [rev ed], pp 14-60 to 14-61; see, generally, “Split”, “Divided”, or “Alternate” Custody of Children, Ann., 92 ALR2d 695). It may or may not include an arrangement for alternating physical custody (compare *Schack v Schack*, NYLJ, Aug 21, 1974, p 15, col 8, p 17, col 1, with *Perotti v Perotti*, 78 Misc 2d 131, 134, supra.;).

On the wisdom of joint custody the authorities are divided (see *Dodd v Dodd*, 93 Misc 2d 641, 645-647, supra.;, for a collection of authorities and an analysis of competing concerns; Bodenheimer, pp 1009-1010). Of course, other considerations notwithstanding, children are entitled to the love, companionship, and concern of both parents. So, too, a joint award affords the otherwise noncustodial parent psychological support which can be translated into a healthy environment for the child.

But, that there is no perfect solution to the divided family does not mean that the court should not recognize the division in fact of the family. Children need a home base. Particularly where alternating physical custody is directed, such custody could, and would generally, further the insecurity and resultant pain frequently experienced by the young victims of shattered families (see Foster & Freed, Law and the Family--New York, § 29:6A [1978 Supp]).

It is understandable, therefore, that joint custody is encouraged primarily as a voluntary alternative for relatively stable, ***590** amicable parents behaving in mature civilized fashion (see, e.g., *Dodd v Dodd*, 93 Misc 2d 641, 646-647, supra.;; Bodenheimer, pp 1010-1011). As a court-ordered arrangement imposed upon already embattled and embittered parents, accusing one another of serious vices and wrongs, it can only enhance familial chaos.

More than four years since their separation, the parents are evidently still unable to manage their common problems with their children, let alone trust each other. Instead, they continue to find fault and accuse. They have failed to work out between themselves even a limited visitation with the children. To expect them to exercise the responsibility entailed in sharing their children's physical custody at this time seems beyond rational hope. It would, moreover, take more than reasonable self-restraint to shield the children, as they go from house to house, from the ill feelings, hatred, and disrespect each parent harbors towards the other.

That the mother's whereabouts are undisclosed, and that she is admittedly desirous of moving out of the jurisdiction, suggests still further complications. The physical custody arrangement ordered by the Appellate Division contemplates reasonable geographical proximity. Under the instant circumstances, alternating physical custody is, even as a matter of logistics alone, unrealistic.

([1])That the joint custody may not stand, however, does not resolve the issue. This court, even if it were possible on the hopelessly conflicted record, does not make new findings of fact. Instead, the court reviews the record and chooses only between the findings of the courts below. (See CPLR 5501, subd [b]; 7 Weinstein-Korn-Miller, NY Civ Prac, par 5501.16.) The conflicts and contradictions in this record, however, are so severe and so go to the heart of the matter that it is impossible to resolve them without assessments of credibility. Either or both of the parents with their retinues of contradictory lay and expert witnesses have presented such extremes of proof that further inquiry in depth is required to resolve the issues. While litigation rarely provides issues of fact free from serious contradiction, the state of this particular record makes resolution, at this stage, hopeless.

An added difficulty is that two years have elapsed since the hearing at Special Term. During that period, the boys have lived with their father; they have been prevented from seeing ***591** their mother; and the mother has evidently found it necessary to conceal her whereabouts.

However imperative it otherwise would be for this court to end the proceeding, in light of all that has occurred and the critical inconsistencies in the record, a new but expedited hearing is required. Both Special Term and the Appellate Division in deciding and writing upon this case detailed their reasons. Read together the opinions dramatically reflect the sharp contradictions between the proof presented by the parties. Read separately, each supports the conclusion reached because each emphasizes the testimony of the separate retinues of witnesses. On appellate review, the present record is incapable of sustaining a plausible resolution.

Of course, whatever the ultimate disposition, it must be, as it has always been, in the best interest of the children (see, e.g., Domestic Relations Law, § 240; *Finlay v Finlay*, 240 NY 429, 433-434 [Cardozo, J.]). Yet, at this point on this record, it is impossible to discern where those interests lie. Even the undoubtedly objective probation officer could make no recommendation for the sons. The trial court, therefore, may wish to consider appointing a qualified guardian ad litem for the children, who would be charged with the responsibility of close investigation and exploration of the truth on the issues and perhaps even of recommending by way of report alternative resolutions for the court to consider (see CPLR 1202; cf. *Barry E. v Ingraham*, 43 NY2d 87, 95).

There are no painless solutions. In the rare case, joint custody may approximate the former family relationships more closely than other custodial arrangements. It may not, however, be indiscriminately substituted for an award of sole custody to one parent. Divorce dissolves the family as well as the marriage, a reality that may not be ignored. In this case the gross conflict between the parents is so embittered and so involved with emotion and litigation that between them joint custody is perhaps a Solomonic approach, that is, one to be threatened but never carried out. At least, that is what the present record shows. A new record may offer a better, if still imperfect, solution.

Accordingly, the order of the Appellate Division, insofar as appealed from, should be reversed, without costs, and a new hearing ordered. Pending such hearing the custody of the children should remain as provided by Special Term of Supreme Court in its order of July 6, 1976. ***592**

Judges Jasen, Gabrielli, Jones, Wachtler, Fuchsberg and Cooke concur.
Order, insofar as appealed from, reversed, etc. ***593**

38 A.D.3d 1318, 834 N.Y.S.2d 405, 2007 N.Y. Slip Op. 02318

Catherine C. Wideman, Appellant-Respondent
v
James S. Wideman, Respondent-Appellant.

Supreme Court, Appellate Division, Fourth Department, New York
March 16, 2007

CITE TITLE AS: Wideman v Wideman

HEADNOTE

Parent, Child and Family
Custody
Joint Custody—Decision-Making Authority

Davidson, Fink, Cook, Kelly & Galbraith, LLP, Rochester (S. Gerald Davidson of counsel), for plaintiff-appellant-respondent. James S. Wideman, defendant-respondent-appellant pro se.

Appeal and cross appeal from an order of the Supreme Court, Monroe County (Elma A. Bellini, A.J.), entered January 6, 2006. The order, among other things, granted the parties joint physical custody of their children and distributed the marital assets.

It is hereby ordered that the order so appealed from be and the same hereby is unanimously affirmed without costs.

Memorandum: Supreme Court granted plaintiff a divorce and, by the order on appeal, the court decided the remaining issues ***1319** in the divorce action. Contrary to the contention of plaintiff, the court did not err in refusing to award her primary physical custody of the parties' children. Both parties sought primary physical custody, and the court's determination that joint physical custody is in the children's best interests " 'is supported by a sound and substantial basis in the record' and thus will not be disturbed" (*Matter of Amy L.W. v Brendan K.H.*, 37 AD3d 1060 [2007]; *see Matter of Westfall v Westfall*, 28 AD3d 1229, 1230 [2006], *lv denied* 7 NY3d 706 [2006]; *Sorce v Sorce*, 16 AD3d 1077 [2005]). Also contrary to plaintiff's contention, the record establishes that the court carefully weighed the appropriate factors, and the determination of the court, "which [was] in the best position to evaluate the character and credibility of the witnesses, must be accorded great weight" (*Matter of Paul C. v Tracy C.*, 209 AD2d 955, 956 [1994]; *see Matter of Pinkerton v Pensyl*, 305 AD2d 1113, 1113-1114 [2003]; *see generally Eschbach v Eschbach*, 56 NY2d 167, 171-174 [1982]).

Plaintiff further contends that the court abused its discretion in refusing to award her sole legal custody of the children, i.e., the sole decision-making authority with respect to them, and that the court abused its discretion by instead setting forth the separate areas of sole decision-making authority in the children's lives. In particular, the court granted plaintiff decision-making authority with respect to religion, finances, counseling/therapy, and summer activities, and the court granted defendant decision-making authority with respect to education, medical/dental care, and extracurricular activities. As the court noted, joint legal custody was not a realistic possibility in this case, given the parties' past acrimony and the predictions of the experts and ****2** plaintiff herself that the parties would be unable to agree on major decisions concerning their children (*see Bliss v Ach*, 56 NY2d 995, 998 [1982]; *Matter of Brown v Marr*, 23 AD3d 1029, 1030 [2005]). The court thus did not err in determining that it was appropriate to divide the decision-making authority with respect to the children (*see Matter of Ring v Ring*, 15 AD3d 406 [2005]).

We further reject plaintiff's contention that the court erred in applying the Child Support Standards Act (CSSA) percentage to all of the combined parental income, which was approximately $130,000. The record establishes that the court articulated a

proper basis for applying the CSSA to the combined parental income in excess of $80,000 (*see* Domestic Relations Law § 240 [1-b] [c] [2], [3]; *Terrell v Terrell*, 299 AD2d 810, 812 [2002]; *Corasanti v Corasanti*, 296 AD2d 831 [2002]).

We have considered the contentions raised by defendant on ***1320** his cross appeal and conclude that they are lacking in merit. Present—Hurlbutt, J.P., Gorski, Fahey, Peradotto and Green, JJ.

End of Document

34 A.D.3d 1216, 824 N.Y.S.2d 695, 2006 N.Y. Slip Op. 08380

Robert Fiorelli, Appellant
v
Leah Fiorelli, Respondent.

Supreme Court, Appellate Division, Fourth Department, New York
November 17, 2006

CITE TITLE AS: Fiorelli v Fiorelli

HEADNOTE

Parent, Child and Family
Custody
Joint Custody

Parties were properly granted joint custody of their daughter—parties were capable of placing well-being of their daughter above their own needs; it was in best interests of daughter that joint arrangement continue, despite fact that each party sought sole custody—however, provision that, in event parties were unable to agree on issues concerning their daughter, decision-making authority be given to one parent in even-numbered years and other parent in odd-numbered years, was arbitrary and contrary to concept of joint parental decision-making.

Appeal from a judgment of the Supreme Court, Onondaga County (Deborah H. Karalunas, J.), entered April 11, 2005 in a divorce action. The judgment, inter alia, awarded the parties joint custody of their daughter.

It is hereby ordered that the judgment so appealed from be and the same hereby is unanimously modified on the law by vacating the provision with respect to alternate year decision-making authority and as modified the judgment is affirmed without costs.

Memorandum: Although we recognize that an award of joint custody is reserved for "relatively stable, amicable parents behaving in mature civilized fashion" (*Braiman v Braiman*, 44 NY2d 584, 589-590 [1978]), we nevertheless conclude that Supreme Court properly granted the parties joint custody of their daughter in this contested custody matter. The record establishes that, with professional guidance, the parties established a joint custodial arrangement during the pendency of the matrimonial action. Both parties have shown that they are capable of placing the well-being of their daughter above ***1217** their own needs. "[T]he final consideration for the court ultimately remains the best interests of the child" (*Matter of Ammann v Ammann*, 209 AD2d 1032, 1033 [1994]) and, here, it is in the best interests of the parties' daughter that the joint arrangement continue, despite the fact that each party sought sole custody. However, the provision that, in the event the parties are unable to agree on issues concerning their daughter, decision-making authority be given to one parent in even-numbered years and the other parent in odd-numbered years is both arbitrary and contrary to the concept of joint parental decision-making and must be vacated. We therefore modify the judgment accordingly. Present—Kehoe, J.P., Gorski, Martoche, Smith and Pine, JJ.

Unreported Disposition
38 Misc.3d 1216(A), 967 N.Y.S.2d 870 (Table), 2013 WL 322253 (N.Y.Sup.), 2013 N.Y. Slip Op. 50114(U)

Scott M., Plaintiff,
v.
Ilona M., Defendant.

XXXXX
Supreme Court, Kings County
Decided on January 8, 2013

CITE TITLE AS: Scott M. v Ilona M.

ABSTRACT

Parent, Child and Family
Custody
Award of Joint Custody over Father's Objection

Scott M. v Ilona M., 2013 NY Slip Op 50114(U). Parent, Child and Family—Custody—Award of Joint Custody over Father's Objection. (Sup Ct, Kings County, Jan. 8, 2013, Sunshine, J.)

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OPINION OF THE COURT

Jeffrey S. Sunshine, J.

In New York State, the awarding of joint custody by judicial decision is extremely limited in light of the 1979 New York Court of Appeals decision *Braiman v Braiman*, (44 NY2d 584, 378 N.E.2d 1019, 407 N.Y.S.2d 449 [1978]), wherein the Court held that . . . joint custody is encouraged primarily as a voluntary alternative for relatively stable, amicable parents behaving in mature civilized fashion (*see, e.g., Dodd v Dodd*, 93 Misc 2d 641, 646-647, supra.;; Bodenheimer, pp 1010-1011). As a court-ordered arrangement imposed upon already embattled and embittered parents, accusing one another of serious vices and wrongs, it can

only enhance familial chaos. . . Of course, whatever the ultimate disposition, it must be, as it has always been, in the best interest of the children (*see*, e.g., Domestic Relations Law, § 240; *Finlay v Finlay*, 240 NY 429, 433-434 [Cardozo, J.]). . . ***2**

There are no painless solutions. In the rare case, joint custody may approximate the former family relationships more closely than other custodial arrangements. It may not, however, be indiscriminately substituted for an award of sole custody to one parent. Divorce dissolves the family as well as the marriage, a reality that may not be ignored.

The matter before this Court, based upon the testimony of the parties, affords the Court an opportunity to grant joint custody to these parents.

PROCEDURAL HISTORY

The Court is called upon to determine custody of the parties minor child. This matrimonial action was commenced on October 15, 2010. An order of consolidation of the Family Court petitions was signed by this court on November 10, 2010. Two (2) interim custody orders were issued by this court on consent of both parties. The last interim custody order dated December 16, 2010 provided for joint custody of the parties' child with residence alternating weekly with each parent commencing on Thursday until the following Thursday. The court conducted a bifurcated trial on the issues of custody and visitation on May 14, 16, and 18, 2012. The matter was thereafter adjourned for submission of post trial memoranda, written summations and minutes.

FINDINGS OF FACT

The parties were introduced to one another through a h a dating agency. The father traveled to Russia in 1999 to meet the mother and the cou ple later married in Virginia on June 15, 2000. The parties moved to New York in September of 2001. There is one child of the marriage, a son, who was born on September 28, 2007. There is a prior decision in this matter on *pendente lite relief* (*Scott M. v. Ilona M.*, 31 Misc 3d 353, 915 N.Y.S.2d 834, 2011 NY Slip Op 21026 [NY Sup. Ct. 2011]).

THE ISSUES

The father seeks sole custody of the child. The mother seeks joint custody or in the alternative, sole custody. The father raises the mother's past drug use, the mother's alleged “unilateral parenting style”, and his flexible work schedule as basis for him to be awarded sole custody. On the other hand, the mother references the parties' effective cooperation in raising the child and the child's positive adjustment to the current equal access schedule to support her desire for joint custody. If this court determines that joint custody is not feasible the mother explains that her role as primary decision maker for the child as well as the father's failure to reform his use of marijuana constitute reasons why she, in the alternative, seeks sole custody.

MOTHER'S ECSTACY USE

The father testified that the mother used the drug known as “ecstacy” beginning in the summer of 2008 and lasting until the summer of 2010. He testified that there were numerous weekends during this period wherein the mother abandoned the family to stay out late and attend parties where she used ecstacy. In support of his testimony, the father proffered a print out of the mother's Facebook message, which was written by the mother. In the message, dated August 2010, the mother asks another individual for ecstacy, using a pseudonym, and states that she will head to that individual's party directly after work. Also in the message, the mother writes “I probably just will come after work to your place. Because if I come home and then leave [the ***3** child] will be upset. He does not like [it] when I go out.”

The mother testified that she only began using ecstasy in 2010, not 2008 as the father suggests. She further testified that she did not attend the party which the father referenced via the Facebook message as an example of her poor parenting. More importantly, the mother expressed that she has improved her life. She testified that she confronted her prior drug use following the couple's separation. The mother explains that she completed a 10 month drug treatment program and that both throughout

the program and after its completion, she consistently tested negative for drug and alcohol use. The mother testified that she no longer uses drugs.

PARENTS' WORK SCHEDULES

The father is a vice president of a major financial institution. To support his request for sole custody, he testified that his work schedule is flexible in that it allows him to be home with the child when he has visitation. The father stated that he works from home "five days a week when I have visitation." The father also testified that when he is unable to be home, he employs a babysitter to care for the child.

The mother testified that she has obtained employment as a production coordinator for fashion. Her work schedule is Monday through Friday, from the morning until 7:00 p.m. When the mother is not at home and the child is not in daycare, the maternal grandmother is the child's caretaker. The father testified that he is concerned that the mother keeps the child out of daycare for no apparent reason when the mother has visitation with him. This concern is premised on prior actions of the mother. However, the mother testified that she only kept the child out of daycare on the occasions when she did not have to work. It was her desire to spend more time with the child since she was at home rather than to have the child spend the day in daycare.

DECISION MAKING

The father is concerned that if the mother were awarded custody he would be excluded from participating in major decisions involving the child. The father testified that the mother makes unilateral decisions for the child, particularly in terms of health care needs. On one occasion, the father testified that the mother failed to consult with the father when she chose an out of network dentist for the child which resulted in "a lot of expensive dental work performed that cost [the father] a lot of money out of pocket." This out of net work dentist was chosen based upon a recommendation of the child's regular dentist. On cross-examination, the father testified that the dental work was "needed" and that the mother chose an "excellent dentist." His objection appeared to be premised on the cost.

The father also expressed a concern that the mother will not provide him proper access to his child. The father referenced a time prior to the *pendente lite* joint custody arrangement, during which the mother would not allow the father to call his son in order to wish him a happy birthday. Additionally, the father referenced the family court petition, which was filed after an alleged physical altercation in the marital home where the mother requested that visitation access be denied to the father. The mother explained that her statement in Family Court in 2010 about denying visitation access to the father was a statement made in response to a violent incident which caused her to flee from the martial home and seek protection. During cross-examination, the father denied this alleged incident of domestic violence. The mother stated, "I left the house ***4** after [the father] physically abused me in front of [the child] and strangled me in [the child's] bedroom and told me to get out of the house." The mother explained that the child was "very scared" at that moment and that incident is what lead to her request for denial of visitation to the father in Family Court. The mother contends that since that time, the parents have worked cooperatively and she now finds it necessary for the father to play an important role in the child's life.

Moreover, while the father believes the mother disparages him in front of the child, the mother testified that she does not "say bad things about [the child's] father because [she does not] want [the child] to be hurt by [a] bad impression of his father."

Despite the father's allegations of the mother's unilateral parenting, throughout the trial, neither party could identify a specific decision relating to the child upon which the parents could not ultimately come to an agreement during the past year and a half of the joint custody arrangement. In fact, the father testified that both parents have been able to share vacation and holiday time and that both parents are even able to spend time together with the child. The mother similarly testified that both parties have worked together in a cooperative fashion to ensure that the present joint custody arrangement is effective.

Several examples of the parties cooperative relationship were brought to the court's attention by both parties throughout the trial. The father testified that the parties went to museums and arcades together with the child. Of particular significance is the parents

collaboration on educational matters for the child. Both parents participated in the selection of the child's new pre-K program. Together the parents toured the school and thereafter agreed it would be a suitable choice for their child. Both the mother and the father worked cooperatively again in 2012 when choosing a kindergarten for the child. Together, the parents visited a number of schools, considered their options, and then agreed on sending their child to a particular public school. Furthermore, the parties agreed on the child's participation in enrichment programs and on how to equally divide the child's vacation and holiday time. The parties were also able to agree on a schedule which allowed the child to visit his father's family in another state.

The mother testified that even in light of the the uncontroverted evidence that the couple has worked together cooperatively, the father continues to request sole custody based upon the allegations that the mother is making unilateral decisions of a financial nature. The mother avers that such inaccurate representations by the father shows that his true motive for this custody dispute is to evade payment of full child support.

THE MATERNAL GRANDMOTHER

The father believes that the mother's choice of babysitter, the maternal grandmother, is a poor caretaker for the child. The father testified that the child has begun to have the same obsessive compulsive tendencies as the grandmother regarding germs. The father also testified that he is concerned that the grandmother touches the child inappropriately and simultaneously with this trial he notified the Administration for Children's Service of his concerns.

The mother testified that she does not believe there are any weaknesses in the maternal grandmother's role of caring for the child. The mother explained that the child enjoys spending time with his grandmother and that the father's sexual abuse allegations against the grandmother ***5** are unfounded and an impulsive act on his part.

THE ATTORNEY FOR THE CHILD

The attorney for the child proffers the testimony at trial and the exhibits including the forensic report support a joint custody arrangement. The current *pendente lite* joint custody arrangement is an arrangement that the child is interested in maintaining since he is familiar with the schedule and it gives the child substantial access to each parent.

THE FORENSIC EVALUATOR

The forensic evaluator, Dr. Berrill, was selected, on consent, to conduct the evaluation of the parties and their child. On May 24, 2012, Dr. Berrill was called as a witness. He identified his forensic evaluation report and it was admitted into evidence without objection. On consent the matter was then adjourned, on consent, for the parties to conduct settlement discussions. Dr. Berrill was not recalled as a witness by either party.

The father cites to the report of Dr. Berrill, in order to provide support for his request for full custody. In his report, Dr. Berrill concluded that if both parties continue to quarrel over the custody issue, then custody should be awarded to the father. Dr. Berrill explained that although the mother is no longer using ecstacy, she remains somewhat superficial and even manipulative when it comes to her participation in casual drug use. Dr. Berrill also stated that it is important for the mother to gain a better understanding of her substance abuse problem because if she fails to do so, she could endanger the child.

The mother argues that not only is the father's characterization of Dr. Berrill's report inaccurate, but the report in itself is insufficient as Dr. Berrill lacked important information when reaching his conclusions. In fact, the mother points to Dr. Berrill's report and the father's testimony as to his conversations with Dr. Berrill to support her desire for joint custody. In Dr. Berrill's report, he recommends for the current arrangement to continue. It is only when confronted with a situation in which both parties continue to fight over custody, that Dr. Berrill then recommends for sole custody to be awarded to the child's father. Moreover, the mother raises the father's testimony in which he stated he told Dr. Berrill that the current custody arrangement should continue. The mother notes that Dr. Berrill's conclusion that the father should have sole custody if the parents could not agree was made before the mother completed a drug treatment program, obtained a new job, and jointly made major educational

decisions for the child. The mother contends that if Dr. Berrill had that information, he probably would have reached a different conclusion.[1] The mother also states that Dr. Berrill lacked information about the father's substance abuse when making his report and she contends that the report may have been very different if Dr. Berrill knew about the father's drug use.

Despite the father's concerns regarding the mother's drug use, parenting decisions and choice of babysitter, he testified that the present equal access schedule has worked well and that it should continue. The father also testified that the mother "does take good care of [the child]" ***6** and that she clearly loves the child.

CHILD'S ADJUSTMENT TO EQUAL ACCESS SCHEDULE

In addition to the mother's contention that joint custody should be awarded because of the parent's cooperative relationship, the mother also notes the child's positive development as a reason to continue the current arrangement. The mother expressed that the joint custody arrangement has worked extraordinarily well for the past year and a half and that it is in the child's best interests for it to continue. The mother explained that the child has adjusted positively to the current schedule, as evidenced by his school progress. The mother testified that the child scored in the 99th percentile on New York City's Department of Education Gifted and Talented Programs Test. Additionally, the mother explained that the child has made several new friends since the arrangement has taken effect and that he currently participates in numerous enrichment programs, such as soccer and swimming. Furthermore, the child enjoys his present routine.

MOTHER'S ALTERNATIVE REQUEST FOR SOLE CUSTODY

Although the mother wishes for the court to award joint custody, she alternatively seeks to be awarded sole custody if joint custody cannot be granted. In support of her request for sole custody, the mother reasons that she is the primary decision maker for matters relating to the child. The mother explained that she played a critical role in the selection of schools for the child. The mother stated that she is the one who suggested to remove the child from his former pre-K program because he had outgrown it. Furthermore, the mother testified that her decision to relocate and rent an apartment in it's present location was essential in order to effectuate the parents' mutual choice of public school in the zone in which the child lives. The mother further explained that she has also been the leading decision maker in terms of the child's participation in enrichment programs. The mother testified that she was the parent who enrolled the child in these programs and paid for the programs since the father alleged that he lacked the requisite funds.

Moreover, the mother expressed that she takes a leading role in regards to medical decisions for the child. The mother testified that she chose the child's dentist and that both parents are happy with the dentist's work despite the father's prior contentions that the dentist was too costly since she was out of network. The mother also stated that the father is not attentive to the child's health needs. The mother testified that the father has previously sent the child to school sick and that even after the child had to be picked up from school, the father still waited several days before taking the child to the doctor. The mother further testified that the father has sent the child to school even when he had vomited the previous evening.

The mother is concerned that the father has not been able to reform his prior negative conduct. The mother posits that the father has not taken steps to better his life as she has. The mother notes that the father has testified inconsistently about his prior marijuana usage. On direct examination, the father stated that he never used drugs, however, he later amended his statement to explain that he used marijuana once while the parties were in Amsterdam. During cross-examination, the father again changed his testimony regarding his drug use and explained ***7** that he used marijuana twice in Amsterdam, two or three times in New York, and two or three times in Virginia. That total the father's use of marijuana to six to eight times. The mother has also testified that the father admitted to her that he was smoking marijuana both during and after their marriage. The mother reasons that the father's misrepresentations of his drug use at trial reveals that he may not be the best choice for sole custodian of the child.

The mother is further concerned that the father permits the child to be in the presence of the father's brother who was convicted of aggravated sexually battery of a minor female. The father represents that at a family gathering the father and child were

present with the brother, however at no time was the child ever left unsupervised with father's brother. This Court believes that the husband is acutely aware of his bother's history and has acted appropriately to maintain the safety of the child.

CONCLUSIONS OF LAW

It is well established that the trial court is given great deference to assess the character and credibility of the parties (*see Bassuk v. Bassuk*, 93 AD3d 664, 939 N.Y.S.2d 863 [2 Dept. 2012 [" Determinations as to custody and visitation are ordinarily a matter for the hearing court, and its determination will not be set aside unless lacking a sound and substantial basis in the record' (*Matter of Awan v. Awan*, 63 AD3d at 734, 880 N.Y.S.2d 683)."]; *see also Massirman v. Massirman*, 78 AD3d 1021, 911 N.Y.S.2d 462 [2 Dept., 2010]; citing *Peritore v. Peritore*, 66 AD3d 750, 888 N.Y.S.2d 72 [2 Dept.,2009]; citing *Varga v Varga*, 288 AD2d 210, 211, 732 NYS2d 576 [2 Dept., 2001], citing *Diaco v. Diaco*, 278 AD2d 358, 717 NYS2d 635 [2 Dept., 2000]; *see also Ferraro v. Ferraro*, 257 AD2d 596, 598, 684 NYS2d 274 [2 Dept., 1999]). In determining a child's custody, the court is to act as *parens patriae* and must base its determination on the "child's best interests" (*see Tropea v. Tropea*, 87 NY2d 727, 741 665 N.E.2d 145, 642 NYS2d 575 [1996], *see also Opray v. Fitzharris*, 95 AD3d 1020, 944 N.Y.S.2d 263 [2 Dept., 2012]; *Awan v. Awan*, 63 AD3d 733, 880 N.Y.S.2d 683[2 Dept.,2009]. In doing so, the court must make a decision based upon the totality of the circumstances, (*see Eschbach v. Eschbach*, 56 NY2d 167, 172 436 N.E.2d 1260, 451 NYS2d 658 [1982]), which includes evaluating which parent will best provide for the child's "emotional and intellectual development, the quality of the home environment, and the parental guidance to be provided." (*Matter of Louise E.W. v. W. Stephen S.*, 64 NY2d 946, 947, 477 N.E.2d 1091, 488 NYS2d 637 [1985]; *see Plaza v. Plaza*, 305 AD2d 607, 759 N.Y.S.2d 368 [2 Dept., 2003]; *see also Brown v. Brown*, 97 AD3d 568, 947 N.Y.S.2d 179 [2 Dept., 2012] ["The court must consider various factors, ranging from the quality of each parent's home environment and ability to provide for the child financially, emotionally, and intellectually, to the determination of which parent is more likely to foster future contact with the noncustodial parent"]).

Recently, in *Matter of Blakeney v. Blakeney*, the Appellate Division of the Second Department, held:

The essential consideration in determining custody is the best interests of the child (*see Eschbach v Eschbach*, 56 NY2d 167, 171, 436 N.E.2d 1260, 451 N.Y.S.2d 658; *Matter of Carrasquillo v Cora*, 60 AD3d 852, 876 N.Y.S.2d 436; *Gurewich v Gurewich*, 43 AD3d 458, ***8** 841 N.Y.S.2d 143). The factors to be considered in making a custody determination include "the parental guidance provided by the custodial parent, each parent's ability to provide for the child's emotional and intellectual development, each parent's ability to provide for the child financially, the relative fitness of each parent, and the effect an award of custody to one parent might have on the child's relationship with the other parent" (*Craig v. Williams-Craig*, 61 AD3d 712, 712, 876 N.Y.S.2d 650; *see Matter of McGovern v Lynch*, 62 AD3d 712, 879 N.Y.S.2d 490; *Matter of Carrasquillo Cora*, 60 AD3d at 853). (*Matter of Blakeney v. Blakeney*, 99 AD3d 898, 952 N.Y.S.2d 295 [2 Dept., 2012]; *lv. to appeal denied*, 2012 NY Slip Op. 93929).

The court notes that both parties bring different strengths and weaknesses to the present parenting arrangement. A significant factor in custody determinations is which parent will assure that the child maintains a meaningful relationship with the other parent (*see Matter of Bliss v. Ach*, 56 NY2d 995, 998, 439 N.E.2d 349, 453 N.Y.S.2d 633 [1982]; *see Opray v. Fitzharris*, 95 AD3d 1020, supra). However, that factor does not seem to play a large role in this dispute. Both parents, to their credit, have testified that they believe it is in the child's best interest to have full access to the other parent and are providing a quality home environment for the child and supporting him. Furthermore, the parents' ability to work together to equally share the child's time reveals that neither parent is trying to impede upon the other's access to the child.

In making custody determinations, the court must also consider which parent will provide for the child's emotional and intellectual development (*see Mullins v. Riener*, 100 AD3d 760, 953 N.Y.S.2d 664 [2 Dept.,2012] ["Factors to be considered in determining the child's best interests include . . . the ability of each parent to provide for the child's emotional and intellectual development . . ."]*; see also Matter of Louise v. W. Stephen S.*, 64 NY2d 946, 947, 477 N.E.2d 1091, 488 NYS2d 637 [1985]; *Berrouet v. Greaves*, 35 AD3d 460, 461, 825 NYS2d 719 [2 Dept., 2006]). In this case, it is clear to the court that both parents play active, positive roles in the child's intellectual and emotional development. The parents each testified that together they evaluated and chose educational institutions that would be best for the child. They agreed upon a new pre-K program that would

better cater to the child's maturity level for it divides classrooms by age group, as opposed to the child's former pre-K program in which he was surrounded by a lot of younger children. Moreover, the parents agreed upon a public school that was close to both parents' residences and that would provide the attention the child requires as a gifted and talented student. Also, each of the parties actively participate in overseeing that the child's school work is completed. In terms of emotional development, the parents agree that it is in the child's best interest for him to be raised by both a mother and a father. Additionally, both parents agree that the child should participate in enrichment programs for they help him socialize and stay active.

The court must also consider what custody situation will promote the child's greatest welfare and happiness. While a child's preference, especially at this young age, is not determinative of the court's decision, it is a factor in the totality of circumstances (*see Ebert v. Ebert*, 38 NY2d 700, 346 N.E.2d 240, 382 NYS2d 472 [1976], *see also Chery v. Richardson*, 88 AD3d 788, 930 N.Y.S.2d 663 [2 Dept.,2011] *citing Dintruff v. McGreevy*, 34 NY2d 887, 888, ***9** 316 N.E.2d 716, 359 N.Y.S.2d 281 [1974];). This court notes that the child wishes to spend equal time with both his mother and father. [2]

Another significant factor in determining custody is whether the parents are embroiled in a heated custody dispute, such that an award of joint custody would be ineffective. In the seminal case of *Braiman v Braiman*, (44 NY2d 584, supra) the New York Court of Appeals rejected joint or shared custody where the parties are in bitter conflict and do not agree to such an arrangement. The court stated, "[i]t is understandable, therefore, that joint custody is encouraged primarily as a voluntary alternative for relatively stable, amicable parents behaving in mature civilized fashion. As a court ordered arrangement imposed upon already embattled and embittered parents, accusing one another of serious vices and wrongs, it can only enhance familial chaos." *(Id.* at 589-90. [internal citations omitted]"). In the present case, however, the parents are not engaged in a vicious custody battle.

This court notes that the forensic evaluator was called as a witness and he identified his forensic evaluation report dated August 8, 2011, and it was admitted into evidence without objection. Thereafter, the matter was adjourned at the request of the parties for purposes of settlement discussions. When the discussions failed and the trial continued neither party recalled the forensic evaluator as a witness. The conclusions and recommendations contained in the forensic report are that current schedule in place seems to be working. The evaluator also indicated in his report that "it is clear that these parents have the ability to put aside their differences and behave in a selfless manner, as adults and true parents.". The forensic report also stated that " . . .[i]f the parties insist, however on pushing the issue of sole custody, it is recommended that the Court consider awarding Mr. Miller custody of the subject child or look at assigning each parent a domain of expertise which would allow them to, unilaterally, make decisions concerning things such as health care, education, etc.".

[W]hile "the value of forensic evaluations of the parents and children has long been recognized" (*Matter of Volpe v. Volpe*, 61 AD3d 691, 692, 878 N.Y.S.2d 72, quoting *Ekstra v. Ekstra*, 49 AD3d 594, 595, 854 N.Y.S.2d 439; *see Matter of Womack v. Jackson*, 30 AD3d 433, 815 N.Y.S.2d 486), the court is not required to accept the recommendation of the court-appointed forensic psychologist (*see Bruno v. Bruno*, 47 AD3d 606, 849 N.Y.S.2d 598; *Matter of Kelly v. Hickman*, 44 AD3d 941, 844 N.Y.S.2d 124; *Matter of Griffin v. Scott*, 303 AD2d 504, 756 N.Y.S.2d 437), as such recommendations are merely additional factors to be considered since they are not determinative and do not usurp the judgment of the trial judge'(*Matter of Kozlowski v. Mangialino*, 36 AD3d 916, 917, 830 N.Y.S.2d 557)." (*Bourne v. Bristow*, 66 AD3d 621, 886 N.Y.S.2d 502 [2 Dept.,2009]. The Court herein has not had the benefit of Dr. Berill's testimony notwithstanding that they each had an opportunity to call him back as a witness.

In the case at bar, the parents have a very cooperative relationship and continuously have worked together in order to provide for the child. The parents have been able to divide their time ***10** equally, to make decisions for the child together, and to even spend time together with the child in a friendly manner as a family. Moreover, both parents have testified that they hope that the current arrangement of equal access will continue. In light of these facts, it is clear to the court that an award of joint custody will not be ineffective, instead, such an award will merely continue an arrangement which has worked very well.

In a similar matter, the Second Department permitted the continuation of a separation agreement which provided for joint custody despite the father's motion for sole custody (*see Janecka v. Franklin*, 131 AD2d 436, 516 N.Y.S.2d 85 [2 Dept., 1987).

In *Janecka*, the court stated, "we must reject the father's contention that the parties have such a severely antagonistic relationship that joint legal custody is insupportable. Although the parties are often hostile, the best interests of the children would not be served by awarding sole custody to the father." Thus, in *Janecka*, the court continued the joint custody arrangement even though the parties were sometimes hostile. During the pendency of this action, the parties showed themselves to be remarkably adept at cooperating with one another. The joint custody arrangement, *pendente lite*, is a success. The lack of hostility between the parents in this action and their ability to make major decisions jointly further supports an award of joint custody.

It is clear to this court that as the parties marriage disintegrated they both acted in an inappropriate manner. To both of their credit, they have risen above their disagreements and have conducted themselves in a responsible manner and as two loving parents. Joint custody is feasible in this case, since the parties communicate and work together in parenting the child. They showed an ability to cooperate on matters concerning the child. Accordingly, the parties are awarded joint custody of their son. Each parent shall have access alternating on a weekly basis every Thursday with pick up of the child to occur at the close of school on Thursday. [3] In the event that the child does not have school on a Thursday the child shall be picked up from the parent's home at 3:00 p.m. The parties shall equally share the summer recess and all other school breaks and religious holidays.

The court is concerned that the father is only arguing for full custody in order to evade a final order of child support payments since the father has stated that he wishes for the mother to have full access to the child and that he wishes for the present schedule to continue. His objections to custodial decisions of the mother seem to be concomitant with the economic implications of those decisions while presented in the context of prior drug use. Therefore, the court would like to clarify that even in exactly equal joint custody arrangements, the court must identify a primary custodial parent for purposes of child support *(see Bast v. Rossoff*, 91 NY2d 723, 697 N.E.2d 1009, 675 N.Y.S.2d 19 [1998]). The Appellate Division, Second Department in *Barr v. Cannata* has held that

"[u]nder the circumstances of this case, the Supreme Court properly deemed the father to be the noncustodial parent for the purpose of determining temporary support. Here, the temporary custodial arrangement agreed to by the parties essentially split physical custody of the children on an equal basis. Thus, the parent with the higher income, who bears the greater share of the child support obligation, in this case the father, should be deemed the noncustodial parent for the ***11** purpose of support (*see Bast v. Rossoff*, 91 NY2d 723, 675 N.Y.S.2d 19, 697 N.E.2d 1009; *Powers v. Powers*, 37 AD3d 316, 830 N.Y.S.2d 132; *Carpenter--Siracusa v. Siracusa*, 34 AD3d 611, 824 N.Y.S.2d 662; *Matter of Moore v. Shapiro*, 30 AD3d 1054, 815 N.Y.S.2d 855). (*Barr v. Cannata*, 57 AD3d 813, 870 N.Y.S.2d 120 [2 Dept.,2008])

The court is concerned about the mother's past use of ecstacy and the mothers allegations of domestic violence by the father. However, the mother has taken steps to seek help, has tested negative consistently and recognizes that the use of drugs would have serious consequences. The issue of domestic violence, while clearly inappropriate and will not be sanctioned by this court, appears to be an isolated incident culminating with the end of the parties physical relationship; there is no pattern or repeated event (*see* Domestic Relations Law § 240; *see also Wissink v. Wissink*, 301 AD2d 36, 39, 749 N.Y.S.2d 550 [2 Dept., 2002]).

The father's premise for requesting sole custody is based on the mother's prior use of ecstacy and the expenditures by the mother yet it is the mother who has participated in a drug rehabilitation program and takes the dominant role in making plans and finding extra curricular programs for the child without the father's financial contribution. The father failed to substantiate his claim that he was the primary care giver of the child during the marriage or that he was the parent who initiated in the past or now the planning for the child. The sense that the Court is left with is that he cooperates in parenting if it will not cost him too much money and he supports the decisions and plans and even helps implement the plans which are initiated by the mother. Under a best interest analysis each parent herein provides necessary access, each meets the child' s needs and they communicate to resolve issues. Clearly the father does not like his mother-in-law and he and the wife come from very different cultural experiences; but the Court recognizes that the child bonded with the parents and the grandmother. The maternal grandmother testified credibly regarding her care of the child. There is no basis to claim she acted inappropriately based upon the present testimony. Furthermore, this court notes in response to the court ordered investigation conducted by ACS it was recommended that an Article 10 petition not be filed. [4]

The court cautions the parties that a parent should not attempt to create friction or disagreement in order to seek modification of the joint custody decision. If it can be determined that a party intentionally creates situations to interfere with joint custody continuously, it could negatively impact on any future custody determinations.

The Court does not believe that by designating either of these parents " custodial parent" is in the child's best interest. Hopefully, once the Court or parties are able to resolve or decide the financial responsibilities of each of the parents, then the economic strain that appears to impact the father's decisions will be equitably resolved. Each parent understands and appears to respect the access schedule. This is not to say that there may be additional times when they may have disagreements on parenting issues. They appear to be able to work through the issues, putting aside their differences and act in the child's best interest.

The Court understands the mother's desires to spend time with the child when she is not ***12** working. Notwithstanding same, the child is now of school age and consistency and discipline of working within a schedule is of import. Any continuation of a joint custody order is predicated upon the mother and father being drug free.

The Court does not make this decision in a vacuum. The mother and father being joint custodial parents allows them to exercise parental decision making, taking into account both of their prior history. It also allows the mother to continue her demonstrated abilities and organizational strengths which make her an invaluable asset to planning for and guiding this child during his minority.

CONCLUSION

Settle an interlocutory judgment of custody, on notice together with a copy of this decision with notice of entry within 30 days thereof. A final pretrial conference regarding the financial issues shall be held on January 31, 2013 and trial dates shall be selected. The attorney for the child appearance is not required and is discharged subject to compliance with Rule 36 of the Court.

E N T E R:

JEFFREY S. SUNSHINE

J.S.C

FOOTNOTES

Footnotes

1 Dr. Berill's report is dated August 8, 2011, and this trial was conducted on May 14, 16 and 18, 2012.

2 "The Supreme Court conducted an in-camera interview with the child, the contents of which are confidential and will not receive further comment (*see Matter of Lincoln v. Lincoln*, 24 NY2d 270, 299 N.Y.S.2d 842, 247 N.E.2d 659)" (*In re Eberhardt*, 83 AD3d 116, 920 N.Y.S.2d 216 [2 Dept., 2011].

3 This court intentionally omits a start date for this schedule since this is identical to the *pendente lite* agreement.

4 ACS report dated December 1, 2010.

12 N.Y.3d 309, 907 N.E.2d 696, 879 N.Y.S.2d 818, 2009 N.Y. Slip Op. 03406

Jesus Fuentes, as Parent of a Disabled Child, Appellant
v
Board of Education of the City of New York et al., Respondents.

Court of Appeals of New York
Argued March 24, 2009
Decided April 30, 2009

CITE TITLE AS: Fuentes v Board of Educ. of City of N.Y.

SUMMARY

Proceeding, pursuant to NY Constitution, article VI, § 3 (b) (9) and Rules of the Court of Appeals (22 NYCRR) § 500.27, to review a question certified to the New York State Court of Appeals by the United States Court of Appeals for the Second Circuit. The following question was certified by the United States Court of Appeals and accepted by the New York State Court of Appeals: "Whether, under New York law, the biological and non-custodial parent of a child retains the right to participate in decisions pertaining to the education of the child where (1) the custodial parent is granted exclusive custody of the child and (2) the divorce decree and custody order are silent as to the right to control such decisions." The certified question was reformulated by the New York State Court of Appeals to read: "Whether, under New York law, the non-custodial parent of a child retains decision-making authority pertaining to the education of the child where (1) the custodial parent is granted exclusive custody of the child and (2) the divorce decree and custody order are silent as to the right to control such decisions."

HEADNOTE

Parent, Child and Family
Custody
Noncustodial Parent's Authority to Make Decisions Regarding Education

Plaintiff, the noncustodial parent of a child who received special education services to accommodate his disability, did not have the right to request a hearing under the federal Individuals with Disabilities Education Act to review the adequacy of those services, as plaintiff's former wife had exclusive custody of the child and their divorce decree and custody order were silent on the issue of the right to make decisions regarding the child's education. Generally, a noncustodial parent, even one without any decision-making authority, may "participate" in a child's education by requesting information about, keeping apprised of, or otherwise remaining interested in the child's educational progress. However, unless the custody order expressly permits joint decision-making authority or designates particular authority with respect to the child's education, a noncustodial parent has no right to "control" educational decisions.

***310 RESEARCH REFERENCES**

Am Jur 2d, Divorce and Separation §§ 848, 885; Am Jur 2d, Schools §§ 347, 350.

Carmody-Wait 2d, Proceeding Against a Body or Officer § 145:696.

4 Law and the Family New York (2d ed) § 1:1.60.

NY Jur 2d, Domestic Relations § 525; NY Jur 2d, Schools, Universities, and Colleges §§ 417, 563, 566, 569.

ANNOTATION REFERENCE

Noncustodial parent's rights as respects education of child. 36 ALR3d 1093.

FIND SIMILAR CASES ON WESTLAW

Database: NY-ORCS

Query: non-custodial /2 parent /p education /s deci! & disab!

POINTS OF COUNSEL

Lansner & Kubitschek, New York City (*David J. Lansner* and *Jill M. Zuccardy* of counsel), *Advocates for Children of New York, Inc.* (*Shawn V. Morehead* and *Rebecca C. Shore* of counsel), and *Dewey & LeBoeuf LLP* (*Lawrence W. Pollack* and *Lisa A. Keenan* of counsel) for appellant.
I. The Domestic Relations Law recognizes that a noncustodial parent retains the right to participate in decisions pertaining to his or her child's education. (*Matter of Corey L v Martin L*, 45 NY2d 383; *People ex rel. Kropp v Shepsky*, 305 NY 465; *Meyer v Nebraska*, 262 US 390; *Matter of Roe v Doe*, 29 NY2d 188; *Matter of J. Children*, 57 AD2d 568, 42 NY2d 804; *Matter of Maureen G.*, 103 Misc 2d 109; *Matter of Kenneth V.*, 307 AD2d 767; *Matter of Bock [Breitung]*, 280 NY 349; *People ex rel. Sisson v Sisson*, 271 NY 285; *Weiss v Weiss*, 52 NY2d 170.) II. The Education Law extends rights to parents without regard to custodial status. (*Brown v Board of Education*, 347 US 483; *Matter of Page v Rotterdam-Mohonasen Cent. School Dist.*, 109 Misc 2d 1049; *Matter of Pawling Cent. School Dist. v New York State Educ. Dept.*, 3 AD3d 821.) III. New York law and policy, particularly in the context of special education, are furthered by recognizing the rights of noncustodial parents. (*Schaffer v Weast*, 546 US 49; *School Comm. of Burlington v Department of Ed. of Mass.*, 471 US 359; *People ex rel. Kropp v Shepsky*, 305 NY 465; *Friederwitzer v Friederwitzer*, 55 NY2d 89.)
***311** *Michael A. Cardozo, Corporation Counsel*, New York City (*Scott Shorr* and *Barry P. Schwartz* of counsel), for respondents.
I. Under New York common law, plaintiff lacked authority to make educational decisions for M.F. (*Braiman v Braiman*, 44 NY2d 584; *Matter of Tropea v Tropea*, 87 NY2d 727; *Wideman v Wideman*, 38 AD3d 1318; *Chamberlain v Chamberlain*, 24 AD3d 589; *Bliss v Ach*, 86 AD2d 575, 56 NY2d 995; *Weiss v Weiss*, 52 NY2d 170; *Matter of Fedash v Neilsen*, 211 AD2d 1003; *Matter of De Luca v De Luca*, 202 AD2d 580; *Parrinelli v Parrinelli*, 138 Misc 2d 49; *Mester v Mester*, 58 Misc 2d 790.) II. This Court should reject plaintiff's attempt to establish a presumption that noncustodial parents have implicit authority to participate in educational decision-making. (*Matter of Ring v Ring*, 15 AD3d 406; *Matter of Davis v Davis*, 240 AD2d 928; *Braiman v Braiman*, 44 NY2d 584; *Bliss v Ach*, 56 NY2d 995; *Voelker v Keptner*, 156 AD2d 1014, 76 NY2d 783; *Trapp v Trapp*, 136 AD2d 178; *Ting Yi Chu v Faye*, 293 AD2d 425; *Community Bd. 7 of Borough of Manhattan v Schaffer*, 84 NY2d 148; *Matter of Alonzo M. v New York City Dept. of Probation*, 72 NY2d 662; *Matter of Knight-Ridder Broadcasting v Greenberg*, 70 NY2d 151.) III. Neither New York's Education Law nor New York's regulations implementing the Individuals with Disabilities Education Act create decision-making rights for noncustodial parents. (*People ex rel. Kropp v Shepsky*, 305 NY 465; *Matter of Tropea v Tropea*, 87 NY2d 727; *Matter of Page v Rotterdam-Mohonasen Cent. School Dist.*, 109 Misc 2d 1049; *Taylor v Vermont Dept. of Educ.*, 313 F3d 768.) IV. The presumption that custodial parents have exclusive authority to make educational decisions advances the main purpose of the Individuals with Disabilities Education Act. (*Board of Ed. of Hendrick Hudson Central School Dist., Westchester Cty. v Rowley*, 458 US 176; *Matter of IG Second Generation Partners L.P. v New York State Div. of Hous. & Community Renewal, Off. of Rent Admin.*, 10 NY3d 474; *Taylor v Vermont Dept. of Educ.*, 313 F3d 768; *Navin v Park Ridge School Dist. 64*, 270 F3d 1147.)

OPINION OF THE COURT

Jones, J.

In this certified question case, we are called upon to decide whether a noncustodial parent retains the right to make decisions regarding the child's education where the divorce decree and custody order are silent on this issue. The pertinent facts of this case are ****2** recited below.

***312** Plaintiff Jesus Fuentes and his wife were divorced in 1996. Family Court entered an order granting the wife exclusive custody of the three children, including a son, M.F., who, due to a genetic disorder, was legally blind. M.F. attended public school in New York City and received special education services to accommodate his disability.

In 2000, plaintiff believed that M.F.'s special education services and accommodations were inadequate and requested a reevaluation. When the Committee on Special Education for the Hearing, Handicapped, and Visually Impaired responded that M.F's services were adequate, plaintiff requested a hearing from the Impartial Hearing Office of the New York City Board of Education to review that determination. In 2001, plaintiff's request for a hearing was denied based on his status as the noncustodial parent of M.F. The Office concluded that because plaintiff was not the "person in parental relation" (Education Law § 3212), he did not have the right to make educational decisions pertaining to M.F. and, consequently, did not have a right to request a hearing.

Plaintiff then commenced an action in the United States District Court for the Eastern District of New York alleging, among other things, that he was denied his right under the federal Individuals with Disabilities Education Act (IDEA) to a hearing to review the determinations of the Board of Education. After a dismissal, appeal, and remand on issues not pertinent to the certified question, the District Court dismissed plaintiff's case for lack of standing under the IDEA. On appeal, the United States Court of Appeals for the Second Circuit found that no precedent from this Court directly addressed the dispositive issue and certified the following question:

> "Whether, under New York law, the biological and non-custodial parent of a child retains the right to participate in decisions pertaining to the education of the child where (1) the custodial parent is granted exclusive custody of the child and (2) the divorce decree and custody order are silent as to the right to control such decisions" (*Fuentes v Board of Educ. of City of N.Y.*, 540 F3d 145, 153 [2d Cir 2008]).

The purpose of the IDEA is to provide "all children with disabilities" with a "free appropriate public education" (20 USC § 1400 [d] [1] [A]). Such an education must include "special ***313** education and related services" designed to meet the particular needs of the child (20 USC § 1401 [9]). A qualifying child's educational needs "and the services required to meet those needs must be set forth at least annually in a written individualized education plan ('IEP')" (*M.C. ex rel. Mrs. C. v Voluntown Bd. of Educ.*, 226 F3d 60, 62 [2d Cir 2000]). A "parent" who is dissatisfied with an IEP "may file a complaint with the state or local educational agency," to be resolved through a due process hearing (*id.* at 62-63).

The Second Circuit previously discussed a noncustodial parent's rights under the ****3** IDEA in *Taylor v Vermont Dept. of Educ.* (313 F3d 768 [2d Cir 2002]). In *Taylor*, a noncustodial parent demanded a hearing under the IDEA even though her Vermont divorce decree expressly provided that the custodial parent was "allocate[d] all legal rights and physical rights regarding the choice of schooling for the child" (*id.* at 772). The court concluded that the federal statutory scheme required the courts to turn to state law "to establish which potential parent has authority to make special education decisions for the child" (*id.* at 779). Applying Vermont law, the court held that the noncustodial parent lacked standing to request a hearing under the IDEA because her "parental right to participate in her daughter's education has been revoked by a Vermont family court" (*id.* at 782).

This case presents an issue unanswered by *Taylor*—namely, whether a noncustodial parent has the right to initiate a hearing under the IDEA where the New York divorce decree and custody order grant exclusive custody to the custodial parent but are silent as to who has the authority to make decisions concerning the child's education. In *Weiss v Weiss* (52 NY2d 170 [1981]), a Judge of this Court first alluded to the principle that a custodial parent has the right, absent controlling contrary provisions in a

separation agreement, to determine the child's secular and religious education programs (*id.* at 177 [Meyer, J., concurring]). It is now well settled in the Appellate Division that, absent specific provisions in a separation agreement, custody order, or divorce decree, the custodial parent has sole decision-making authority with respect to practically all aspects of the child's upbringing (*see e.g. Matter of Fedash v Neilsen*, 211 AD2d 1003 [3d Dept 1995]; *Matter of De Luca v De Luca*, 202 AD2d 580 [2d Dept 1994]; *De Beer v De Beer*, 162 AD2d 165 [1st Dept 1990]; *Stevenot v Stevenot*, 133 AD2d 820 [2d Dept 1987]; *Bliss v Ach*, 86 AD2d 575 [1st Dept 1982]).

***314** In appropriate circumstances, courts routinely include specific provisions in custody orders addressing decision-making authority between the parents (*see e.g. Wideman v Wideman*, 38 AD3d 1318 [4th Dept 2007]; *Chamberlain v Chamberlain*, 24 AD3d 589 [2d Dept 2005]; *Matter of Davis v Davis*, 240 AD2d 928 [3d Dept 1997]). Plaintiff asks this Court to recognize an implied right of noncustodial parents to exercise decision-making authority with respect to their child's education notwithstanding the custody order's silence on this subject. We decline to do so and emphasize the importance of parties determining these issues at the time of separation or divorce.

Finally, we note the distinction between a noncustodial parent's right to "participate" in a child's education and the right to "control" educational decisions. Generally, there is nothing which prevents a noncustodial parent (even one without any decision-making authority) from requesting information about, keeping apprised of, or otherwise remaining interested in the child's educational progress. Such parental involvement is to be encouraged. However, unless the custody order expressly permits joint decision-making authority or designates particular authority with respect to the child's education, a noncustodial parent has no ****4** right to "control" such decisions. This authority properly belongs to the custodial parent. In light of our discussion, we see fit to reformulate the certified question to read as follows:

> "Whether, under New York law, the non-custodial parent of a child retains decision-making authority pertaining to the education of the child where (1) the custodial parent is granted exclusive custody of the child and (2) the divorce decree and custody order are silent as to the right to control such decisions."

Accordingly, as reformulated, the certified question should be answered in the negative.

Judges Ciparick, Graffeo, Read, Smith and Pigott concur; Chief Judge Lippman taking no part.

Following certification of a question by the United States Court of Appeals for the Second Circuit and acceptance of the question by this Court pursuant to section 500.27 of the Rules of Practice of the Court of Appeals (22 NYCRR 500.27), and after hearing argument by counsel for the parties and ***315** consideration of the briefs and the record submitted, certified question, as reformulated, answered in the negative.

135 A.D.3d 1045, 24 N.Y.S.3d 226, 2016 N.Y. Slip Op. 00085

**1 Lori Fermon, Respondent-Appellant
v
Ivan Fermon, Appellant-Respondent.

Supreme Court, Appellate Division, Third Department, New York
521100
January 7, 2016

CITE TITLE AS: Fermon v Fermon

HEADNOTES

Parent, Child and Family
Custody
Modification—Change of Circumstances—Apparent Animosity between Parents and Demonstrated Inability to Cooperate for Sake of Child—Award of Sole Legal and Physical Custody to Mother

Parent, Child and Family
Visitation
Limited Parenting Time for Father

Parent, Child and Family
Support
Modification of Child Support Order —Fraudulent Misrepresentation of Annual Income

Husband and Wife and Other Domestic Relationships
Equitable Distribution
Individual Retirement Account

Husband and Wife and Other Domestic Relationships
Counsel Fees

Friedman and Molinsek, PC, Delmar (Stephen L. Molinsek of counsel), for appellant-respondent.
Melody A. Mackenzie, Troy, for respondent-appellant.
Tracey A. Brown, Clifton Park, attorney for the children.

Devine, J. Cross appeal from an order of the Supreme Court (Elliott III, J.), entered December 3, 2014 in Rensselaer County, which, among other things, granted plaintiff's motion to modify the parties' judgment of divorce.

Plaintiff (hereinafter the wife) and defendant (hereinafter the husband) were married in 2000 and have two sons (born in 2002 and 2006). The parties divorced in 2012 and, pursuant to a written stipulation of settlement that was incorporated but not merged with the judgment of divorce, they retained joint custody of the children and waived application of the Child Support Standards Act (*see* Domestic Relations Law § 240 [1-b]) to provide for no payments of basic child support. The stipulation also resolved

issues of equitable distribution by, among other things, directing the husband to transfer a portion of his individual retirement account to the wife.

Extensive motion practice ensued, with the wife seeking a variety of relief that included modification of the custody and child support provisions of the judgment, an assessment as to whether the husband committed fraud in the negotiations that led to the execution of the stipulation and an award of counsel fees to the wife. Supreme Court conducted a hearing on the motions, after which it modified the provisions of the judgment to grant the wife sole legal custody of the children and directed the husband to pay the wife basic child support, arrearages and various add-ons. Supreme Court further directed the husband to pay an additional $11,500 to ****2** the wife due to his alleged fraud in misrepresenting the value of his individual retirement account, and awarded the wife $35,000 in counsel fees. The husband appeals and the wife cross-appeals. ***1046**

We are initially unpersuaded by the husband's contention that Supreme Court erred in granting sole legal custody and primary physical placement of the children to the wife. A custody arrangement may be modified where it is established that "a change in circumstances has occurred since the entry thereof that is sufficient to warrant the court undertaking a best interests analysis" (*Matter of Menhennett v Bixby*, 132 AD3d 1177, 1179 [2015]; *see Matter of Kiernan v Kiernan*, 114 AD3d 1045, 1046 [2014]). The parties have become unable to collaborate in a reasonable manner with regard to the children, an inability that is amply demonstrated by incidents such as the husband summoning the police to take the children from the wife's home while they were eating dinner, his berating the wife in front of one of the children over a seemingly minor dispute, his arguing that the children should spend Christmas with him in contravention of the custody arrangement, and his ongoing refusal to honor the wife's "right of first refusal" to care for the children if he was unable to do so during his custodial time. A psychologist who prepared an evaluation at the behest of Supreme Court opined that it was "exceedingly difficult [for the parties] to directly interact with each other civilly" and, indeed, both parties acknowledged that the breakdown in communication had reached the point where regular collaboration was no longer advisable. The foregoing demonstrates a change in circumstances since the entry of the divorce judgment that rendered joint custody inappropriate and triggered a best interests inquiry (*see Matter of Zahuranec v Zahuranec*, 132 AD3d 1175, 1176 [2015]; *Heather B. v Daniel B.*, 125 AD3d 1157, 1159-1160 [2015]; *Matter of Sherwood v Barrows*, 124 AD3d 940, 941 [2015]).

As for the issue of what custodial arrangement would be appropriate, both parties are loving and capable parents, and there are no concerns as to the ability of either to provide for the well-being of the children. Supreme Court was properly concerned, however, by the "numerous examples of [the husband] not acting with the children's best interest in mind." Inasmuch as the wife has continued to seek to foster a positive relationship between the husband and the children, a sound and substantial basis in the record supports the finding of Supreme Court that the best interests of the children were served by awarding her sole custody and primary physical placement (*see Matter of Zahuranec v Zahuranec*, 132 AD3d at 1177; *Matter of Smith v O'Donnell*, 107 AD3d 1311, 1313 [2013]).

While we perceive no reason to disturb the award of sole ***1047** legal custody and primary physical placement to the wife, we do find the absence of a sound and substantial basis in the record to support the limited parenting time granted to the husband. The stipulation detailed the amount of parenting time available to the parties, but they later reached an informal agreement to split parenting time on alternating weeks. Supreme Court directed a clinical psychologist to evaluate the situation, and she prepared an exhaustive report recommending that the parties continue to exercise equal parenting time, albeit over the course of a week as opposed to alternating weeks. The husband and the attorney for the children expressed their preference for this type of schedule at oral argument and, indeed, the wife testified at the hearing in this matter that she viewed a split week schedule as "the best that could happen for the" children and that she was "[a]bsolutely" willing to adopt it. Despite this seeming agreement, Supreme Court did not make an award of equal parenting time and gave no reason for its failure to do so. As the attorney for the children advises us that a hearing will soon be conducted on a proceeding brought by the husband to modify the custody and visitation terms of the order on appeal, "we are reluctant to attempt to adjust the visitation schedule on this record" (*Matter of Esterle v Dellay*, 281 AD2d 722, 728 [2001]). We accordingly deem it prudent to remit this matter to Supreme ****3** Court so that an appropriate award of parenting time to the husband may be fashioned, perhaps with a referral to Family Court so that it may grapple with that issue at the same time as it addresses the husband's application to modify the custody and visitation

provisions of the order (*see* Family Ct Act § 467 [a]; *Matter of Rumpff v Schorpp*, 133 AD3d 1109, 1113 [2015]; *Matter of Lattuca v Natale-Lattuca*, 293 AD2d 805, 807 [2002]).

Turning to the question of child support, "a party seeking to modify a child support order arising out of an agreement or stipulation must first establish that the stipulation was unfair when entered into or that there has been an unanticipated and unreasonable change in circumstances leading to an accompanying need" (*Matter of Watrous v Watrous*, 295 AD2d 664, 666 [2002]; *accord Matter of Hunt v Bartley*, 85 AD3d 1275, 1276 [2011]). While the husband presents strained arguments to the contrary, the terms of the stipulation regarding basic child support were unfair when they were entered into, as they were premised upon his fraudulent misrepresentation that his annual income was $136,106 when, as the wife belatedly discovered, he had accepted a position that paid $170,000 a year plus bonuses (*see Marlinski v Marlinski*, 111 AD3d 1268, 1270 [2013]; *Chapin v Chapin*, 12 AD3d 550, 551 [2004]). ***1048** Supreme Court therefore acted appropriately in modifying the award of child support. The husband complains of certain terms in the modified award but, in that regard, Supreme Court properly directed that the husband remit 25% of any future bonuses as basic child support (*see Quilty v Quilty*, 169 AD2d 979, 981 [1991]). Supreme Court also acted appropriately in leaving intact the commitments of the husband to pay a portion of various add-on expenses, albeit with a share adjusted to reflect his actual income (*see e.g. Berretta v Berretta*, 201 AD2d 886, 887 [1994]).

We next agree with the husband that Supreme Court erred in modifying the agreed-upon division of assets in his individual retirement account. The husband did not preserve his objection to the wife raising this issue in a motion rather than a plenary action and, in any event, "a court's alteration of a stipulation absent a plenary action is not fatal" (*MacDonald v Guttman*, 72 AD3d 1452, 1455 [2010]; *see* CPLR 2001; *Banker v Banker*, 56 AD3d 1105, 1107 n 2 [2008]). Nonetheless, while a stipulation "will be more closely scrutinized by the courts than ordinary contracts given the fiduciary relationship between husband and wife, such an agreement will not be set aside unless there is evidence of overreaching, fraud, duress or a bargain so inequitable that no reasonable and competent person would have consented to it' " (*Empie v Empie*, 46 AD3d 1008, 1009 [2007], quoting *Curtis v Curtis*, 20 AD3d 653, 654 [2005]). The parties agreed to distribute the husband's individual retirement account based upon its December 2011 value, the point at which the most recent account statement had been issued. The account had grown considerably by the time the stipulation was executed in March 2012, but the husband admittedly made no effort to learn the value of the account at that time and did not know that the appreciation had occurred. It is well settled "that nondisclosure is not the equivalent of fraud" and, given that the wife acknowledged in the stipulation that she did not require further information from the husband in order to knowingly proceed, Supreme Court erred in setting aside that part of the stipulation dealing with equitable distribution of the husband's individual retirement account (*Paul v Paul*, 177 AD2d 901, 901 [1991], *lv denied* 79 NY2d 756 [1992]; *see Empie v Empie*, 46 AD3d at 1009).

Both parties challenge the award of counsel fees, with the husband arguing that no award was appropriate and the wife asserting that the award was too low. The wife requested an award of counsel fees resulting from the various violations of the stipulation committed by the husband, which were allowed ***1049** under the terms of the stipulation as well as Domestic Relations Law §§ 237 and 238, and the parties submitted written applications for counsel fees after the ****4** hearing in this matter had concluded. [*] "An award of counsel fees requires that an evidentiary basis be established as to two elements: the parties' respective financial circumstances and the value of the legal services rendered" (*Curley v Curley*, 125 AD3d 1227, 1231 [2015]; *see Yarinsky v Yarinsky*, 2 AD3d 1108, 1110 [2003]). Counsel for the wife submitted her retainer agreement and billing statements from September 2012 to October 2014, from which Supreme Court calculated that the wife had incurred over $77,000 in counsel fees. Supreme Court found that the amount of work performed by counsel was appropriate given the myriad issues created by the conduct of the husband and noted that, while the wife had significant financial resources of her own, she was nonetheless the less monied spouse. Supreme Court accordingly awarded the wife $35,000 in counsel fees, and we perceive no abuse of discretion in its decision to do so (*see Lowe v Lowe*, 123 AD3d 1207, 1211 [2014]; *Howard v Howard*, 45 AD3d 944, 945-946 [2007]).

The parties' remaining arguments, to the extent that they are properly before us, have been examined and found to be lacking in merit.

Garry, J.P., Rose, Lynch and Clark, JJ., concur. Ordered that the order is modified, on the law, without costs, by reversing so much thereof as set a visitation schedule for defendant and directed defendant to pay $11,500 for a portion of his individual retirement account; matter remitted to the Supreme Court for further proceedings not inconsistent with this Court's decision and, pending said proceedings, the terms of said order with regard to visitation shall remain in effect on a temporary basis; and, as so modified, affirmed.

FOOTNOTES

Footnotes

* The stipulation purports to direct an award of “any and all” counsel fees incurred by a party forced to pursue legal remedies for its breach, but Supreme Court was not bound to make such an award and retained its “inherent authority to determine reasonable attorneys' fees” (*Orix Credit Alliance v Grace Indus.*, 261 AD2d 521, 521-522 [1999], *lv denied* 93 NY2d 818 [1999]; *see Matter of Stortecky v Mazzone*, 85 NY2d 518, 525 [1995]; *Fackelman v Fackelman*, 71 AD3d 724, 726-727 [2010]).

87 N.Y.2d 727, 665 N.E.2d 145, 642 N.Y.S.2d 575, 64 USLW 2619

In the Matter of Tammy L. Tropea, Respondent,
v.
John P. Tropea, Appellant.
In the Matter of Jacqueline Browner, Respondent,
v.
Andrew Kenward, Appellant.

Court of Appeals of New York
Argued February 15, 1996;
Decided March 26, 1996
Argued January 2, 1996;
Decided March 26, 1996

CITE TITLE AS: Matter of Tropea v Tropea

SUMMARY

Appeal, in the first above-entitled proceeding, by permission of the Court of Appeals, from a judgment of the Family Court, Onondaga County (Leonard F. Bersani, J.), fixing a child visitation schedule. The appeal brings up for review a prior, nonfinal order of the Appellate Division of the Supreme Court in the Fourth Judicial Department, entered February 3, 1995, which modified, on the law, and, as modified, affirmed an order of the Family Court, Onondaga County (Donald K. Comstock, J.H.O.), denying the petition for permission to relocate with the two children of the marriage, dismissing the petition for modification of the judgment of divorce, dismissing respondent's cross petition for change in custody, ordering that the custodial and visitation schedules contained in the separation agreement and divorce decree continue in full force and effect, and issuing joint mutual orders of protection to the parties. The modification consisted of granting the petition to permit petitioner to relocate with the children, vacating that portion of the order containing the prior visitation arrangements, and remitting the matter to Onondaga Family Court for further proceedings to fix visitation.

Appeal, in the second above-entitled proceeding, by permission of the Court of Appeals, from an order of the Appellate Division of the Supreme Court in the Second Judicial Department, entered March 6, 1995, which affirmed an order of the Family Court, Westchester County (Bruce E. Tolbert, J.), insofar as it granted that branch of a motion by petitioner seeking permission to relocate to another State with the parties' son.

Matter of Tropea v Tropea, 212 AD2d 1050, affirmed.

Matter of Browner v Kenward, 213 AD2d 400, affirmed.

HEADNOTES

Parent, Child and Family
Custody
Relocation of Custodial Parent--Scope and Nature of Judicial Inquiry

([1]) Where a divorced custodial parent of minor offspring proposes to relocate away from the area in which the noncustodial parent resides and seeks ***728** judicial approval of the relocation plan, which is opposed by the noncustodial parent on the

ground that relocation would significantly reduce that parent's present access to the children, the court should be free to consider and give appropriate weight to all of the factors that may be relevant to the determination including, but not limited to: each parent's reason for seeking or opposing the move, the quality of the relationships between the child and the custodial and noncustodial parents, the impact of the move on the quantity and quality of the child's future contact with the noncustodial parent, the degree to which the custodial parent's and child's life may be enhanced economically, emotionally and educationally by the move, and the feasibility of preserving the relationship between the noncustodial parent and child through suitable visitation arrangements. In the end, it is for the court to determine, based on all of the proof, whether it has been established by a preponderance of the evidence that a proposed relocation would serve the child's best interests. Moreover, a geographical relocation restriction agreed to by the parties and included in their separation agreement might be an additional factor relevant to a court's best interests determination.

Parent, Child and Family
Custody
Relocation of Custodial Parent

([2]) In a proceeding by petitioner, a divorced custodial parent, seeking judicial approval of a plan to relocate with the children some 2 1/2 hours away from respondent noncustodial parent's residence so that the custodial parent could settle into a new home with her fiance and raise the children within a new family unit, the decision below approving the request to move is upheld. In deciding such a relocation request, it is for the court to determine, based on all of the proof, whether it has been established by a preponderance of the evidence that a proposed relocation would serve the child's best interests. The Appellate Division found that the move was in the children's best interest and that the visitation schedule that petitioner proposed would afford respondent frequent and extended visitation. There is no reason derived from the record to upset the Appellate Division's determinations on these points. While the Court considered whether the relocation would deprive respondent of “meaningful access” to his children, the Court did not treat that factor as a threshold test barring further inquiry into the salient “best interests” question. Respondent has offered no persuasive legal reason for disturbing the Appellate Division's finding that the proposed relocation would be in the children's best interest, including his arguments that are directed to petitioner's purported “unclean hands”. Custody and visitation decisions should be made with a view toward what best serves the child's interests, not what would reward or penalize a purportedly “innocent” or “blameworthy” parent.

Parent, Child and Family
Custody
Relocation of Custodial Parent

([3]) In a proceeding by petitioner, a divorced custodial parent, seeking judicial approval of a plan to relocate with the child some 130 miles away from respondent noncustodial parent's residence, the decision below approving the request to move is upheld. In deciding such a relocation request, it is for the court to determine, based on all of the proof, whether it has been established by a preponderance of the evidence that a proposed relocation would serve the child's best interests. Family Court found that the move was in the child's best interests and the Appellate Division did not disturb that finding. While the move will eliminate respondent's midweek visitation opportunity, reduce his ability to participate in his son's religious worship and diminish the quality of the weekend visits he has with his son, these losses cannot be said to have operated to deprive respondent of a meaningful opportunity to maintain a close relationship with his son. ***729**

TOTAL CLIENT SERVICE LIBRARY REFERENCES

Am Jur 2d, Divorce and Separation, §§ 987-989, 1011.

Carmody-Wait 2d, Child Custody and Visitation in Matrimonial Actions §§ 118A:79, 118A:90.

NY Jur 2d, Domestic Relations, §§ 403, 507.

ANNOTATION REFERENCES

See ALR Index under Custody and Support of Children.

POINTS OF COUNSEL

Sigmund V. Mazur, Syracuse, for appellant in the first above-entitled proceeding.
I. Respondent did not meet her burden of proof under any circumstances.
II. The Court below denied appellant due process in reversing the trial court on the record in allowing relocation without any record before it concerning visitation other than a proposition by the Law Guardian. *(Cohen v Hallmark Cards,* 45 NY2d 493; *Walden v Walden,* 41 AD2d 664.)
J. Scott Porter, Syracuse, for respondent in the first above-entitled proceeding.
I. The Court below employed the correct legal standards in determining whether to permit this 130-mile relocation. *(Friederwitzer v Friederwitzer,* 55 NY2d 89; *Weiss v Weiss,* 52 NY2d 170; *Matter of Giovannone v Giovannone,* 206 AD2d 869, 84 NY2d 805; *Matter of Cassidy v Kapur,* 164 AD2d 513; *Zaleski v Zaleski,* 128 AD2d 865, 70 NY2d 603; *Potier v Potier,* 198 AD2d 180; *Matter of Bennett v Bennett,* 208 AD2d 1042; *Matter of Lake v Lake,* 192 AD2d 751; *Rybicki v Rybicki,* 176 AD2d 867; *Murphy v Murphy,* 145 AD2d 857.)
II. The findings of the Court below that relocation preserved regular and meaningful visitation and was in the best interests of the children best conforms to the weight of the evidence. *(Matter of Radford v Propper,* 190 AD2d 93; *Braiman v Braiman,* 44 NY2d 584; *Friederwitzer v Friederwitzer,* 55 NY2d 89; *Weiss v Weiss,* 52 NY2d 170; *Matter of Henehan v Henehan,* 213 AD2d 761; *Zaleski v Zaleski,* 128 AD2d 865; *Frizell v Frizell,* 193 AD2d 861.)
Marsha A. Hunt, Syracuse, Law Guardian in the first above-entitled proceeding.
I. The Court below correctly held that the relocation did not deprive the father of regular and meaningful access to the children. *(Matter of* ***730** *Giovannone v Giovannone,* 206 AD2d 869; *Matter of Lake v Lake,* 192 AD2d 751; *Matter of Niemiec v Hunsberger,* 203 AD2d 731; *Matter of Schouten v Schouten,* 155 AD2d 461; *Matter of Muzzi v Muzzi,* 189 AD2d 1022; *Fisher v Fisher,* 206 AD2d 910; *Matter of Miles v Worthington,* 199 AD2d 1057; *Verity v Verity,* 107 AD2d 1082, 65 NY2d 1002; *Murphy v Murphy,* 145 AD2d 857; *Zaleski v Zaleski,* 128 AD2d 865.)
II. Exceptional circumstances exist which justify the relocation. *(Matter of Pecorello v Snodgrass,* 142 AD2d 920; *Weiss v Weiss,* 52 NY2d 170; *Matter of Niemiec v Hunsberger,* 203 AD2d 731; *Matter of Lake v Lake,* 192 AD2d 751; *Matter of Temperini v Berman,* 199 AD2d 399; *Kuzmicki v Kuzmicki,* 171 AD2d 843; *Reyes v Ball,* 162 AD2d 770, 77 NY2d 872.)
III. Relocation is in the best interests of the children.
Brian D. Graifman, P. C., New York City *(Brian D. Graifman* of counsel), for appellant in the second above-entitled proceeding.
I. The Family Court was correct in holding that the child's move to a sister State 130 miles away deprived the noncustodial father of regular and meaningful access to his child. *(Weiss v Weiss,* 52 NY2d 170; *Rybicki v Rybicki,* 176 AD2d 867; *Matter of Bennett v Bennett,* 208 AD2d 1042; *Roush v Roush,* 204 AD2d 195; *Murphy v Murphy,* 195 AD2d 794.)
II. The mother failed otherwise to show exceptional circumstances justifying the relocation. *(Kozak v Kozak,* 111 AD2d 842; *Weiss v Weiss,* 52 NY2d 170.)
III. The best interests of the child dictate that he not be wrested from his loving father.
IV. The Family Court erred as matter of law in predicating its decision in part on the erroneous assumption that the father was "not seeking custody at this time". *(Natt v Natt,* 101 AD2d 883; *Matter of Atkinson v Atkinson,* 197 AD2d 771.)
Cuddy & Feder & Worby, White Plains *(Kathleen Donelli* and *Joshua E. Kimerling* of counsel), for respondent in the second above-entitled proceeding.

I. The Court below correctly held that the Family Court's revised visitation schedule maintains regular and meaningful contact between appellant and the child because it provides for three weekend visitation periods each month, holidays following a weekend, an uninterrupted four-week summer visitation period, and complete access to the child's educational, religious and therapeutic activities. *(Weiss v Weiss,* 52 NY2d 170; *Lavane v Lavane,* 201 AD2d 623; *Matter of Radford v Propper,* 190 AD2d 93; *Matter of Niemiec v Hunsberger,* 203 AD2d 731; *Matter of Lake v Lake,* 192 AD2d 751; *Matter of Schouten v Schouten,* 155 AD2d 461; *Blundell v Blundell,* 150 AD2d 321; ***731** *Murphy v Murphy,* 145 AD2d 857; *Matter of Cassidy v Kapur,* 164 AD2d 513; *Smith v Finger,* 187 AD2d 711.)

II. The Family Court correctly held that the relocation was necessitated by exceptional circumstances and served the best interest of the child. *(Matter of Temperini v Berman,* 199 AD2d 399; *Kuzmicki v Kuzmicki,* 171 AD2d 843; *Lavane v Lavane,* 201 AD2d 623; *Klein v Klein,* 93 AD2d 807; *Amato v Amato,* 202 AD2d 458; *Cataldi v Shaw,* 101 AD2d 823; *Matter of Clark v Dunn,* 195 AD2d 811; *Matter of Hollington v Cocchiola,* 180 AD2d 635; *Von Ohlen v Von Ohlen,* 178 AD2d 592.)

III. The trial testimony established that the relocation was essential in order for respondent to financially support herself and the child. *(Lavane v Lavane,* 201 AD2d 623; *Matter of Hollington v Cocchiola,* 180 AD2d 635; *Von Ohlen v Von Ohlen,* 178 AD2d 592.)

Cooper & Daniele, P. C., White Plains *(Theresa M. Daniele* and *Marc J. Domicello* of counsel), Law Guardian in the second above-entitled proceeding.

I. The Court below correctly held that the Family Court's modified visitation schedule increased appellant's actual time with the child, afforded appellant an opportunity to be involved with the child's educational, religious and extracurricular activities, and thereby served to maintain appellant's regular and meaningful access to the child. *(Lavane v Lavane,* 201 AD2d 623; *Matter of Radford v Propper,* 190 AD2d 93; *Matter of Niemiec v Hunsberger,* 203 AD2d 731; *Hemphill v Hemphill,* 169 AD2d 29; *Smith v Finger,* 187 AD2d 711; *Matter of A. F. v N. F.,* 156 AD2d 750; *Matter of Schouten v Schouten,* 155 AD2d 461; *Blundell v Blundell,* 150 AD2d 321; *Weiss v Weiss,* 52 NY2d 170; *Matter of Cassidy v Kapur,* 164 AD2d 513.)

II. The Family Court was correct in concluding that the mother established the existence of exceptional financial and other circumstances to warrant the relocation. *(Matter of Temperini v Berman,* 199 AD2d 399; *Kuzmicki v Kuzmicki,* 171 AD2d 843; *Klein v Klein,* 93 AD2d 807; *Von Ohlen v Von Ohlen,* 178 AD2d 592; *Cataldi v Shaw,* 101 AD2d 823; *Amato v Amato,* 202 AD2d 458; *Matter of Hollington v Cocchiola,* 180 AD2d 635.)

III. The Family Court was correct in that the relocation of the mother with the child served the child's best interests. *(Kuzmicki v Kuzmicki,* 171 AD2d 843.)

OPINION OF THE COURT

Titone, J.

In each of these appeals, a divorced spouse who was previously ***732** granted custody of the couple's minor offspring seeks permission to move away from the area in which the noncustodial spouse resides. Both noncustodial spouses oppose the move, contending that it would significantly reduce the access to the children that they now enjoy. Their respective appeals from the Appellate Division order and the Family Court judgment authorizing the requested moves raise significant questions regarding the scope and nature of the inquiry that should be made in cases where a custodial parent proposes to relocate and seeks judicial approval of the relocation plan.

I.

MATTER OF TROPEA V TROPEA

The parties in this case were married in 1981 and have two children, one born in 1985 and the other in 1988. They were divorced in 1992 pursuant to a judgment that incorporated their previously executed separation agreement. Under that agreement, petitioner mother, who had previously been the children's primary caregiver, was to have sole custody of the children and respondent father was granted visitation on holidays and “at least three ... days of each week.” Additionally, the parties were barred from relocating outside of Onondaga County, where both resided, without prior judicial approval.

On June 3, 1993, petitioner brought this proceeding seeking changes in the visitation arrangements and permission to relocate with the children to the Schenectady area. Respondent opposed the requested relief and filed a cross petition for a change of custody. At the ensuing hearing, petitioner testified that she wanted to move because of her plans to marry an architect who had an established firm in Schenectady. According to petitioner, she and her fiance had already purchased a home in the Schenectady area for themselves and the Tropea children and were now expecting a child of their own. Petitioner stated that she was willing to cooperate in a liberal visitation schedule that would afford respondent frequent and extended contact and that she was prepared to drive the children to and from their father's Syracuse home, which is about two and a half hours away from Schenectady. Nonetheless, as all parties recognized, the distance between the two homes made midweek visits during the school term impossible.

Respondent took the position that petitioner's "need" to move was really the product of her own life-style choice and ***733** that, consequently, he should not be the parent who is "punished" with the loss of proximity and weekday contact. Instead, respondent proposed that he be awarded custody of the children if petitioner chose to relocate. To support this proposal, respondent adduced evidence to show that he had maintained frequent and consistent contact with his children at least until June of 1993, when the instant proceeding was commenced. He had coached the children's football and baseball teams, participated in their religion classes and had become involved with his older son's academic education during the 1992-1993 school year. However, there was also evidence that respondent harbored a continuing bitterness toward petitioner which he had verbalized and demonstrated to the children in a number of inappropriate ways. Respondent admitted being bitter enough to have called petitioner "a tramp" and "a low-life" in the children's presence and, in fact, stated that he saw nothing wrong with this conduct, although he acknowledged that it had a negative effect on the children. Respondent's mother confirmed that he had spoken negatively about petitioner in the children's presence and that this behavior had not been helpful to the children.

Following the hearing, the presiding Judicial Hearing Officer (JHO) denied petitioner's request for permission to relocate. Applying what he characterized as "a more restrictive view of relocation," the JHO opined that whenever a proposed move "unduly disrupts or substantially impairs the [noncustodial parent's] access rights to [the] children," the custodial spouse seeking judicial consent must bear the burden of demonstrating "exceptional circumstances" such as a "concrete economic necessity." Applying this principle to the evidence before him, the JHO found that petitioner's desire to obtain a "fresh start" with a new family was insufficient to justify a move that would "significantly impact upon" the close and consistent relationship with his children that respondent had previously enjoyed.

On petitioner's appeal, however, the Appellate Division reversed, holding that petitioner had made the necessary showing that the requested relocation would not deprive respondent of "regular and meaningful access to his children." (212 AD2d 1050.) Further, the Court noted, petitioner's proposed visitation schedule afforded respondent the opportunity for frequent and extended contact with his children. Finally, the Court found that the move would be in the best interests of the children. Accordingly, the Court ruled that petitioner should be ***734** permitted to move to Schenectady and remitted the matter to Family Court for the establishment of an appropriate visitation schedule. The final Family Court judgment from which respondent appeals awards respondent substantial weekend, summer and vacation visitation in accordance with the Law Guardian's recommended schedule. [1] *Matter of Browner v Kenward*

The parties to this proceeding were married in August of 1983 and had a son three years later. After marital discord led the parties to separate, they executed a stipulation of settlement and agreement in January of 1992 which gave petitioner mother physical custody of the couple's child and gave respondent father liberal visitation, including midweek overnight visits and alternating weekends. Under the stipulation, respondent was to remain in the marital residence, which was located in White Plains, New York, and petitioner and the parties' son were to live with petitioner's parents in nearby Purchase. Petitioner was required to seek prior approval of the court if she intended to move more than 35 miles from respondent's residence. The stipulation was incorporated but not merged in the parties' divorce judgment, which was entered in June of 1992.

In October of 1992, petitioner brought the present proceeding for permission to relocate with the couple's child to Pittsfield, Massachusetts, some 130 miles from respondent's Westchester County home. Petitioner requested this relief because her parents

were moving to Pittsfield and she wished to go with them. Respondent opposed the application, contending that he was a committed and involved noncustodial parent and that the proposed move would deprive him of meaningful contact with his son.

A hearing was conducted over a period of several months. The hearing evidence disclosed that petitioner's parents had been considering moving for some time and had made the final decision to do so in September of 1992, coinciding fairly closely with the loss of petitioner's job. Petitioner testified that she had tried to find work in New York but was unable to do so. She further testified that her prospects of finding affordable housing in the Purchase area were bleak. She ultimately located ***735** a marketing job in Pittsfield that would give her enough income to rent a home of her own in that area. Petitioner had also investigated the facilities for children in Pittsfield and had found a suitable school and synagogue for her son.

An additional motivating factor for petitioner was the emotional support and child care that she received from her parents and that she expected to receive from her extended family in Pittsfield. According to the evidence, petitioner was somewhat dependent on her parents for financial and moral support, and petitioner's son had become especially close to his grandparents after his own parents had separated. Further, the boy had a long-standing close relationship with his Pittsfield cousins.

Respondent argued that permission for the move should be denied because it would significantly diminish the quantity and quality of his visits with his child. Respondent noted that the move would eliminate the midweek visits that he had previously enjoyed as well as his opportunity to participate in the child's daily school, sports and religious activities. Accordingly, respondent argued, petitioner's proposed relocation to Pittsfield would deprive him of meaningful access to his child.

The Family Court found petitioner's argument that she was unable to secure employment and new housing within the Westchester area to be less than convincing. The court further found that respondent had been “vigilant” in visiting his son and was “sincerely interested in guiding and nurturing [the] child.” Nonetheless, the court ruled in petitioner's favor and authorized the proposed move, granting respondent liberal visitation rights. In so ruling, the court noted that the move would not deprive respondent of meaningful contact with his son and that, in light of the psychological evidence that had been adduced, the move would be in the child's best interests. With respect to the best-interests question, the court stated that the parents' separation from each other would reduce the bickering that was causing the child difficulty and would enable the child to have the healthy peer relationships that he needed. Additionally, the emotional advantages that petitioner would realize from proximity to her parents would ultimately enhance the child's emotional well being. On respondent's appeal, the Appellate Division affirmed, stating only that “the relocation did not deprive [respondent] of regular and meaningful access to the child” and, thus, petitioner was “not required to show exceptional circumstances to justify relocation.” (213 AD2d 400, 401.) This Court subsequently granted respondent leave to appeal. ***736**

II.

Relocation cases such as the two before us present some of the knottiest and most disturbing problems that our courts are called upon to resolve. In these cases, the interests of a custodial parent who wishes to move away are pitted against those of a noncustodial parent who has a powerful desire to maintain frequent and regular contact with the child. Moreover, the court must weigh the paramount interests of the child, which may or may not be in irreconcilable conflict with those of one or both of the parents.

Because the resolution of relocation disputes is ordinarily a matter entrusted to the fact-finding and discretionary powers of the lower courts, our Court has not had frequent occasion to address the question. We discussed the issue in general terms in *Weiss v Weiss* (52 NY2d 170, 174-175), in which we recognized the importance of continued regular and frequent visitation between the child and the noncustodial parent and stated that “absent exceptional circumstances ... appropriate provision for visitation or other access by the noncustodial parent follows almost as a matter of course” (citing *Strahl v Strahl,* 66 AD2d 571, *affd* 49 NY2d 1036). We revisited the area a year later in *Daghir v Daghir* (56 NY2d 938), but the majority memorandum in that case merely commented on the trial court's failure to separately consider the child's best interests and did not otherwise elucidate the proper standard to be used in assessing requests by custodial parents for permission to relocate (*see also, Priebe v Priebe,* 55 NY2d 997 [upholding Appellate Division's discretionary determination]).

Since our decisions in *Weiss* and *Daghir*, the lower courts have evolved a series of formulae and presumptions to aid them in making their decisions in these difficult relocation cases. The most commonly used formula involves a three-step analysis that looks first to whether the proposed relocation would deprive the noncustodial parent of "regular and meaningful access to the child" (*e.g., Lavane v Lavane,* 201 AD2d 623; *Matter of Lake v Lake,* 192 AD2d 751; *Matter of Radford v Propper,* 190 AD2d 93; *Matter of Schaefer v Brennan,* 170 AD2d 879; *Matter of Cassidy v Kapur,* 164 AD2d 513; *Matter of Schouten v Schouten,* 155 AD2d 461; *Blundell v Blundell,* 150 AD2d 321; *Murphy v Murphy,* 145 AD2d 857; *Zaleski v Zaleski,* 128 AD2d 865; *Klein v Klein,* 93 AD2d 807). Where a disruption of "regular and meaningful access" is not shown, the inquiry is truncated, and the courts generally will not go ***737** on to assess the merits and strength of the custodial parents' motive for moving (*see, e.g., Matter of Bennett v Bennett,* 208 AD2d 1042; *Partridge v Meyerson,* 162 AD2d 507; *Matter of Lake v Lake, supra*). On the other hand, where such a disruption is established, a presumption that the move is not in the child's best interest is invoked and the custodial parent seeking to relocate must demonstrate "exceptional circumstances" to justify the move (*e.g., Matter of Lavelle v Freeman,* 181 AD2d 976; *Rybicki v Rybicki,* 176 AD2d 867; *Hathaway v Hathaway,* 175 AD2d 336). Once that hurdle is overcome, the court will go on to consider the child's best interests.

The premise underlying this formula is that children can derive an abundance of benefits from "the mature guiding hand and love of a second parent" (*Weiss v Weiss, supra,* at 175; *accord, Matter of Radford v Propper, supra,* at 99) and that, consequently, geographic changes that significantly impair the quantity and quality of parent-child contacts are to be "disfavored" (*see, Matter of Farmer v Dervay,* 174 AD2d 857, 858; *Matter of Pasco v Nolen,* 154 AD2d 774, 776; *Matter of Towne v Towne,* 154 AD2d 766, 767). While this premise has much merit as a tenet of human dynamics, the legal formula that it has spawned is problematic and, in many respects, unsatisfactory (*see,* Miller, *Whatever Happened to the "Best Interests" Analysis in New York Relocation Cases?,* 15 Pace L Rev 339).

One problem with the three-tiered analysis is that it is difficult to apply. The lower courts have not settled on a uniform method of defining "meaningful access" (*compare, Bennett v Bennett, supra,* at 1043 [ability to maintain "close and meaningful relationship with ... children], *with Matter of Radford v Propper, supra,* at 99 ["frequent and regular access"]), and even the distance of the move has not been a reliable indicator of whether the " meaningful access " test has been satisfied (*compare, Rybicki v Rybicki, supra* [disapproving 84-mile move], *with Matter of Schouten v Schouten,* 155 AD2d 461, *supra* [approving 258-mile move]; *Murphy v Murphy,* 145 AD2d 857, *supra* [approving 340-mile move]).

On a more fundamental level, the three-tiered test is unsatisfactory because it erects artificial barriers to the courts' consideration of all of the relevant factors. Most moves outside of the noncustodial parent's locale have some disruptive effect on that parent's relationship with the child. Yet, if the disruption does not rise to the level of a deprivation of "meaningful access," the three-tiered analysis would permit it without anyfurther ***738** inquiry into such salient considerations as the custodial parent's motives, the reasons for the proposed move and the positive or negative impact of the change on the child. Similarly, where the noncustodial parent has managed to overcome the threshold "meaningful access" hurdle, the three-tiered approach requires courts to refuse consent if there are no "exceptional circumstances" to justify the change, again without necessarily considering whether the move would serve the child's best interests or whether the benefits to the children would outweigh the diminution in access by the noncustodial parent. The distorting effect of such a mechanical approach may be amplified where the courts require a showing of economic necessity or health-related compulsion to establish the requisite "exceptional circumstances" (*see, e.g., Matter of Lavelle v Freeman, supra; Leslie v Leslie,* 180 AD2d 620; *Goodwin v Goodwin,* 173 AD2d 769; *Coniglio v Coniglio,* 170 AD2d 477) or where the demands of a new marriage are summarily rejected as a sufficient basis for satisfying this test (*e.g., Rybicki v Rybicki, supra; Richardson v Howard,* 135 AD2d 1140).

In reality, cases in which a custodial parent's desire to relocate conflicts with the desire of a noncustodial parent to maximize visitation opportunity are simply too complex to be satisfactorily handled within any mechanical, tiered analysis that prevents or interferes with a simultaneous weighing and comparative analysis of all of the relevant facts and circumstances. Although we have recognized and continue to appreciate both the need of the child and the right of the noncustodial parent to have regular and meaningful contact (*see generally, Weiss v Weiss, supra*), we also believe that no single factor should be treated as dispositive

or given such disproportionate weight as to predetermine the outcome. There are undoubtedly circumstances in which the loss of midweek or every weekend visits necessitated by a distant move may be devastating to the relationship between the noncustodial parent and the child. However, there are undoubtedly also many cases where less frequent but more extended visits over summers and school vacations would be equally conducive, or perhaps even more conducive, to the maintenance of a close parent-child relationship, since such extended visits give the parties the opportunity to interact in a normalized domestic setting. In any event, given the variety of possible permutations, it is counterproductive to rely on presumptions whose only real value is to simplify what are necessarily extremely complicated inquiries.

Accordingly, rather than endorsing the three-step meaningful access exceptional-circumstance analysis that some of the ***739** lower courts have used in the past, we hold that each relocation request must be considered on its own merits with due consideration of all the relevant facts and circumstances and with predominant emphasis being placed on what outcome is most likely to serve the best interests of the child. While the respective rights of the custodial and noncustodial parents are unquestionably significant factors that must be considered (*see, Strahl v Strahl,* 66 AD2d 571, *affd* 49 NY2d 1036, *supra*), it is the rights and needs of the children that must be accorded the greatest weight, since they are innocent victims of their parents' decision to divorce and are the least equipped to handle the stresses of the changing family situation.

Of course, the impact of the move on the relationship between the child and the noncustodial parent will remain a central concern. Indeed, even where the move would leave the noncustodial parent with what may be considered ” meaningful access,“ there is still a need to weigh the effect of the quantitative and qualitative losses that naturally will result against such other relevant factors as the custodial parent's reasons for wanting to relocate and the benefits that the child may enjoy or the harm that may ensue if the move is or is not permitted. Similarly, although economic necessity or a specific health-related concern may present a particularly persuasive ground for permitting the proposed move, other justifications, including the demands of a second marriage and the custodial parent's opportunity to improve his or her economic situation, may also be valid motives that should not be summarily rejected, at least where the over-all impact on the child would be beneficial. While some courts have suggested that the custodial spouse's remarriage or wish for a ”fresh start“ can never suffice to justify a distant move (*see, e.g., Elkus v Elkus,* 182 AD2d 45, 48; *Stec v Levindofske,* 153 AD2d 310), such a rule overlooks the value for the children that strengthening and stabilizing the new, postdivorce family unit can have in a particular case.

In addition to the custodial parent's stated reasons for wanting to move and the noncustodial parent's loss of access, another factor that may well become important in a particular case is the noncustodial parent's interest in securing custody, as well as the feasibility and desirability of a change in custody. Obviously, where a child's ties to the noncustodial parent and to the community are so strong as to make a long-distance move undesirable, the availability of a transfer of custody as realistic alternative to forcing the custodial parent to remain ***740** may have a significant impact on the outcome. By the same token, where the custodial parent's reasons for moving are deemed valid and sound, the court in a proper case might consider the possibility and feasibility of a parallel move by an involved and committed noncustodial parent as an alternative to restricting a custodial parent's mobility.

Other considerations that may have a bearing in particular cases are the good faith of the parents in requesting or opposing the move, the child's respective attachments to the custodial and noncustodial parent, the possibility of devising a visitation schedule that will enable the noncustodial parent to maintain a meaningful parent-child relationship, the quality of the life-style that the child would have if the proposed move were permitted or denied, the negative impact, if any, from continued or exacerbated hostility between the custodial and noncustodial parents, and the effect that the move may have on any extended family relationships. Of course, any other facts or circumstances that have a bearing on the parties' situation should be weighed with a view toward minimizing the parents' discomfort and maximizing the child's prospects of a stable, comfortable and happy life.

Like Humpty Dumpty, a family, once broken by divorce, cannot be put back together in precisely the same way. The relationship between the parents and the children is necessarily different after a divorce and, accordingly, it may be unrealistic in some cases to try to preserve the noncustodial parent's accustomed close involvement in the children's everyday life at the expense

of the custodial parent's efforts to start a new life or to form a new family unit. In some cases, the child's interests might be better served by fashioning visitation plans that maximize the noncustodial parent's opportunity to maintain a positive nurturing relationship while enabling the custodial parent, who has the primary child-rearing responsibility, to go forward with his or her life. In any event, it serves neither the interests of the children nor the ends of justice to view relocation cases through the prisms of presumptions and threshold tests that artificially skew the analysis in favor of one outcome or another.

([1]) Rather, we hold that, in all cases, the courts should be free to consider and give appropriate weight to all of the factors that may be relevant to the determination. These factors include, but are certainly not limited to each parent's reasons for seeking or opposing the move, the quality of the relationships between the child and the custodial and noncustodial ***741** parents, the impact of the move on the quantity and quality of the child's future contact with the noncustodial parent, the degree to which the custodial parent's and child's life may be enhanced economically, emotionally and educationally by the move, and the feasibility of preserving the relationship between the noncustodial parent and child through suitable visitation arrangements. In the end, it is for the court to determine, based on all of the proof, whether it has been established by a preponderance of the evidence that a proposed relocation would serve the child's best interests. [2]

III.

([2]) Turning finally to the cases before us, we conclude that the orders of the courts below, which approved each of the petitioners' requests to move, should be upheld. In *Tropea*, petitioner sought permission to relocate from Onondaga County to the Schenectady area so that she could settle into a new home with her fiance and raise her sons within a new family unit. The Appellate Division found that the move was in the children's best interest and that the visitation schedule that petitioner proposed would afford respondent frequent and extended visitation. [3] We find no reason derived from the record to upset the Appellate Division's determinations on these points (*see, Daghir v Daghir, supra,* at 940). It is true that the Court considered whether the relocation would deprive respondent of ”meaningful access“ to his children. However, it is apparent from the remainder of its writing that the Court did not treat that factor as a threshold test barring further inquiry into the salient ”best interests“ question.

We note that respondent has offered no persuasive legal reason for disturbing the Appellate Division's finding that the proposed relocation would be in the children's best interest. Indeed, in this appeal, respondent's arguments are directed almost entirely to petitioner's purported ”unclean hands“ in ***742** developing a relationship with a person she met before the marriage was dissolved and in choosing to marry that individual after her divorce from respondent. As is evident from our earlier discussion, relocation determinations are not to be made as a means of castigating one party for what the other deems personal misconduct, nor are the courts to be used in this context as arbiters of the parties' respective ”guilt“ or ”innocence.“ Children are not chattel, and custody and visitation decisions should be made with a view toward what best serves their interests, not what would reward or penalize a purportedly ”innocent“ or ”blameworthy“ parent.

([3]) Our analysis in *Browner v Kenward* is somewhat different. The Appellate Division in *Browner* found that the proposed move did not deprive the noncustodial parent of regular and meaningful access to his child and that it was therefore not necessary to weigh the validity and strength of petitioner's reasons for moving against the significant change in the parent-child relationship that the move would entail. The Court's methodology was thus at variance with the open-ended balancing analysis that the law requires. However, respondent's only argument in this Court is that the Appellate Division misapplied the three-tiered *Matter of Radford v Propper* (*supra*) test to the particular facts of his case. Specifically, respondent argues that the 130-mile move from Westchester County to Pittsfield will eliminate his midweek visitation opportunity, reduce his ability to participate in his son's religious worship and diminish the quality of the weekend visits he has with his son. While these losses are undoubtedly real and are certainly far from trivial, it cannot be said that they operated to deprive respondent of a meaningful opportunity to maintain a close relationship with his son. Hence, respondent was not entitled to an order reversing the outcome below and denying petitioner the permission to relocate that she sought. We note that the Family Court found that the proposed relocation in *Browner* was in the child's best interests and the Appellate Division did not disturb that finding.

Accordingly, in *Matter of Tropea v Tropea*, the judgment of the Family Court and the prior nonfinal order of the Appellate Division brought up for review should be affirmed, with costs. In *Matter of Browner v Kenward*, the order of the Appellate Division should be affirmed, with costs.

Chief Judge Kaye and Judges Simons, Bellacosa, Smith, Levine and Ciparick concur. ***743**
In *Matter of Tropea v Tropea:* Judgment of Family Court appealed from and order of the Appellate Division brought up for review affirmed, with costs.

In *Matter of Browner v Kenward:* Order affirmed, with costs. ***744**

Footnotes

1 This Court dismissed respondent's earlier motion for leave to appeal from the prior Appellate Division order on the ground that that order did not finally determine the proceeding within the meaning of the Constitution (85 NY2d 968).

2 ([1]) The separation agreements in both *Tropea* and *Browner* require only that the custodial parent apply for judicial approval before moving out of a specified area without making any mention of criteria or standards. A geographical relocation restriction agreed to by the parties and included in their separation agreement might be an additional factor relevant to a court's best interests determination.

3 Significantly, the Appellate Division's ruling in this regard did not represent a reversal of any contrary first-level factual finding by the nisi prius court. The Family Court J.H.O. did not reach the best interest question, since, in his view, petitioner's failure to show ”exceptional circumstances“ to justify the move obviated the need for further inquiry.

125 A.D.3d 1299, 3 N.Y.S.3d 483, 2015 N.Y. Slip Op. 01006

****1** Ryan M. Forrestel, Respondent
v
Marguerita M. Forrestel, Appellant.

Supreme Court, Appellate Division, Fourth Department, New York
February 6, 2015

CITE TITLE AS: Forrestel v Forrestel

HEADNOTE

Parent, Child and Family
Custody
Relocation of Custodial Parent

Leonard G. Tilney, Jr., Lockport, for defendant-appellant.
John P. Pieri, Buffalo, for plaintiff-respondent.
Kristin L. Arcuri, Attorney for the Children, Buffalo.

Appeal from an order of the Supreme Court, Erie County (Tracey A. Bannister, J.), entered September 19, 2013. The order awarded the parties joint custody of their children and prohibited relocation of the children to the Netherlands.

It is hereby ordered that the order so appealed from is unanimously affirmed without costs.

Memorandum: Defendant mother appeals from an order that, inter alia, awarded the parties joint custody of their children and denied her request to relocate with the children to the Netherlands.

Contrary to the mother's contention, Supreme Court's explanation of its reasons for rejecting her expert's opinion "is supported by the record, and thus it cannot be said that the court arbitrarily rejected [that] opinion" (*Matter of Alexandra H. v Raymond B.H.*, 37 AD3d 1125, 1126 [2007]; *see Matter of Hopkins v Wilkerson*, 255 AD2d 319, 319-320 [1998]). Contrary to the mother's further contention, the court's determination that joint custody with plaintiff father is in the children's best interests "is supported by a sound and substantial basis in the record and thus [should] not be disturbed" (*Wideman v Wideman*, 38 AD3d 1318, 1319 [2007] [internal quotation marks omitted]). Although the custody trial included evidence of acrimony between the parties, the record supports the court's determination that "the parties are not so embattled and embittered as to effectively preclude joint decision making" (*Capodiferro v Capodiferro*, 77 AD3d 1449, 1450 [2010] [internal quotation marks omitted]).

The mother contends that the court erred in denying her request to relocate with the children to the Netherlands. We reject that contention. Inasmuch as this case involves an initial custody determination, "it cannot properly be characterized as a relocation case to which the application of the factors set forth in *Matter of Tropea v Tropea* (87 NY2d 727, 740-741 [1996]) need be strictly applied" (*Matter of Saperston v Holdaway*, 93 AD3d 1271, 1272 [2012], *appeal dismissed* 19 NY3d 887 [2012], 20 NY3d 1052 [2013]; *see Matter of Moore v Kazacos*, 89 AD3d 1546, 1546 [2011], *lv denied* 18 NY3d 806 [2012]). "Although a court may consider the effect of a parent's relocation as part of a best interests analysis, relocation is but one ***1300** factor among many in its custody determination" (*Saperston*, 93 AD3d at 1272; *see Matter of Quistorf v Levesque*, 117 AD3d 1456, 1457 [2014]). Here, the court "properly determined that the children's relationship with [the father] would be adversely affected by the proposed relocation because of the distance between [Erie] County and [the Netherlands]" (*Matter of Jones v Tarnawa*, 26 AD3d 870, 871 [2006], *lv denied* 6 NY3d 714 [2006]; *see Matter of Ramirez v Velazquez*, 91 AD3d 1346, 1347 [2012]).

Finally, we reject the mother's contention that the court erred in refusing to allow the testimony of a therapist who provided treatment to one of the children. The Attorney for the **2 Child "did not consent to the disclosure of confidential communications between the child and [her] therapist" (*Matter of Ascolillo v Ascolillo*, 43 AD3d 1160, 1161 [2007]; *cf. Matter of Billings v Billings*, 309 AD2d 1194, 1194 [2003]). Present—Smith, J.P., Fahey, Carni, Valentino and Whalen, JJ.

97 A.D.2d 398, 467 N.Y.S.2d 223

Evelyn Katz, Respondent,
v.
Sheldon Katz, Appellant

Supreme Court, Appellate Division, Second Department, New York
October 3, 1983

CITE TITLE AS: Katz v Katz

In a matrimonial action, defendant husband appeals from stated portions of a judgment of divorce of the Supreme Court, Suffolk County (Seidell, J.), dated May 18, 1982, which, *inter alia*, after a nonjury trial, (1) denied defendant visitation with the infant child of the marriage; and (2) divided defendant's stock brokerage account equally between the parties.

Judgment modified, on the law and the facts, by (1) deleting the third decretal paragraph thereof, and (2) deleting the ninth decretal paragraph thereof and substituting therefor a provision awarding the stock brokerage account to defendant. As so modified, judgment affirmed, insofar as appealed from, without costs or disbursements, and matter remitted to Special Term for a hearing and new determination with respect to visitation between defendant and his daughter.

The hearing shall be conducted with all convenient speed before a Justice other than the one who presided at the trial. The trial court erred in denying defendant husband visitation with the infant child of the marriage. Denial of visitation rights to a natural parent is a drastic remedy which should only be invoked for compelling reasons, and only when there is a substantial evidence that visitation would be detrimental to the child (see *Parker v Ford*, 89 AD2d 806; *Chirumbolo v Chirumbolo*, 75 AD2d 992; *Farhi v Farhi*, 64 AD2d 840; *Hotze v Hotze*, 57 AD2d 85, 87, mot for lv to app den 42 NY2d 805; *People ex rel. Sanger v Sanger*, 55 AD2d 578, 579; *Herb v Herb*, 8 AD2d 419). “In the absence of a 'pressing concern' and proof that visitation is 'inimical to the welfare of the children', the parent to whom custody is not awarded must be granted reasonable visitation privileges” (*Quinn v Quinn*, 87 AD2d 643; see, also, *Petraglia v Petraglia*, 56 AD2d 923). In the case at bar, the evidence is insufficient to show that visitation would be detrimental to the child. Although defendant abused plaintiff wife in the presence of the child, the only incident directly affecting the child was when defendant threw a television set on the floor when his daughter disobeyed him. Accordingly, the judgment must be modified by striking the provision which denied defendant visitation rights and the matter must be remitted to Special Term for a hearing on the issue of visitation. Since there is evidence in the record which indicates that defendant has emotional and mental problems, he should be directed to undergo a psychiatric examination. Further, any visitation privileges granted to defendant should be limited and take place only under supervised and carefully controlled conditions in a neutral environment where there will be no risk of harm to the child (see *Rubin v Rubin*, 95 AD2d 851; *Schlessel v Schlessel*, 75 AD2d 869; *O'Neill v O'Neill*, 60 AD2d 571, app dsmd 46 NY2d 1057; *Miriam R. v Arthur D. R.*, 85 AD2d 624; *Goldring v Goldring*, 73 AD2d 955, 957). The trial court also erred when it divided defendant's stock brokerage account equally between the parties. The record indicates that the brokerage account was opened by defendant with the proceeds of a certificate of deposit which had already been awarded to him. Accordingly, the judgment should be modified by striking the provision which divided defendant's stock brokerage account equally between the parties and by substituting therefor a provision awarding the stock brokerage account to defendant. We have reviewed defendant's remaining contentions and find them to be without merit.

Titone, J. P., Mangano, Gibbons and Gulotta, JJ., concur.

82 A.D.3d 1296, 918 N.Y.S.2d 619, 2011 N.Y. Slip Op. 01545

In the Matter of Christopher Culver, Respondent
v
Kristi VanPatten Culver, Appellant.

Supreme Court, Appellate Division, Third Department, New York
March 3, 2011

CITE TITLE AS: Matter of Culver v Culver

HEADNOTES

Parent, Child and Family
Visitation
Visitation with Incarcerated Parent at Correctional Facility

Petitioner father, former elementary school teacher who was convicted for sexually molesting boys in his class, was entitled to regular visitation with daughter at place of his incarceration, correctional facility located three hours by car from daughter's residence; although daughter had not seen her father since she was 18 months old, there was clearly established relationship between daughter and father; that daughter was young and would need to travel considerable distance between her residence and father's prison did not preclude visitation; court identified several trustworthy people known to mother and daughter who were willing to accept responsibility of transporting her, thereby making visitation viable and workable, and father would never be alone with daughter.

Parent, Child and Family
Visitation
Expenses Related to Visitation with Incarcerated Parent at Correctional Facility

In visitation proceeding, respondent mother was not required to pay for telephone calls and counseling for child and her escorts before and after visits with petitioner father at correctional facility where he was incarcerated; respondent reported that she was single mother with modest income as church pastor, received no child support, relied on her mother for financial assistance and had no health insurance to cover counseling expenses for child; requiring mother to pay for petitioner's visitation-related expenses would deplete resources available to child; it was petitioner's responsibility to pay all expenses associated with visitation, including counseling and telephone calls, all of which were necessitated by his incarceration.

Friedman & Molinsek, P.C., Delmar (Michael P. Friedman of counsel), for appellant.
Justin C. Brusgul, Voorheesville, for respondent.
G. Scott Walling, Queensbury, attorney for the child.

Spain, J. Appeal from an order of the Family Court of Saratoga County (Hall, J.), entered September 10, 2009, which granted petitioner's application, in a proceeding pursuant to Family Ct Act article 6, for visitation with the parties' child.

Petitioner (hereinafter the father) and respondent (hereinafter the mother) are the parents of a daughter born in 2005. In February 2007, the father, an elementary school teacher, was arrested and charged in a 49-count indictment with sexually molesting a

number of boys in his class. In March 2007, the father signed a separation agreement which made no provision for custody or visitation of the child, who continued to reside with the mother. Thereafter, while the mother initially permitted the father to visit with the child, in July 2007—when the child was 18 months old—she refused the father any further visitation. The father pleaded guilty to the entire indictment and was sentenced in January 2008 to an agreed-upon aggregate prison sentence of 12 years. On his appeal, this Court affirmed the conviction (*People v Culver*, 69 AD3d 976 [2010]).

The parties were divorced in August 2008 in a judgment ***1297** which incorporated their separation agreement. In November 2008, the father filed a petition in Family Court seeking regular visitation with the child at the place of his incarceration, a correctional facility in Clinton County, located about three hours by car from the child's residence. Included in the father's petition were affidavits from his parents and his sister offering to provide transportation to and ****2** supervision during the requested visits.

After four days of trial at which numerous witnesses testified, Family Court awarded the mother full custody and granted the father four visits per year with the child at the correctional facility where he is confined or such other facility provided it is within 150 miles of the mother's residence. The court further ordered, among other things, that the child be accompanied by a responsible adult—other than the mother—with whom the child is familiar and who will cooperate with the mother and father in effectuating each visit, that the child and her escorts engage in counseling in preparation for and subsequent to each visit, and that the father have monitored telephone contact and written communication with the child. The mother was directed to bear the cost of said counseling and telephone calls. [1] The mother now appeals.

"[T]he best interests of children generally lie with a meaningful relationship with both parents" (*Tait v Tait*, 44 AD3d 1142, 1143 [2007]) and "[v]isitation with a noncustodial parent is presumed to be in a child's best interests even when the parent is incarcerated" (*Matter of Chambers v Renaud*, 72 AD3d 1433, 1434 [2010]; *see Matter of Garraway v Laforet*, 68 AD3d 1192, 1193 [2009]). "A court should not base a denial of visitation on the strong opposition of the custodial parent" (*Matter of Buffin v Mosley*, 263 AD2d 962, 962 [1999]); "[s]ubstantial proof that such visitation would be harmful to the child will, however, justify the denial of an application for visitation" (*Matter of Davis v Davis*, 232 AD2d 773, 773 [1996]). The totality of the circumstances must be considered in determining such an application (*see Matter of Garraway v Laforet*, 68 AD3d at 1194), including the distance the child would have to travel in order to effectuate visitation (*see id.*). "The propriety of visitation is left to the sound discretion of Family Court and its findings, guided by the best interests of the child, will not be disturbed unless they lack a sound basis in the record" (*Matter of Moore v Schill*, 44 AD3d 1123, 1123 [2007] [citations omitted]).

Here, the mother opposes visitation asserting, among other ***1298** reasons, that the child does not know her father, does not enjoy long car rides and that such visitation will likely frighten the child. The mother testified, however, that, prior to the father's arrest, he enjoyed "[a] decent father-daughter relationship"—a fact corroborated by the testimony of others who have known the father and child—and that, since the father's incarceration, the child has begun to inquire about his whereabouts. To the mother's credit, the child has received mail from the father on a regular basis, and both the child's paternal aunt and paternal grandparents—who have been permitted ongoing relationships with the child by the mother—are willing to transport the child to the correctional facility and cooperate with the mother's related wishes—e.g., to not discuss the specific circumstances surrounding the father's incarceration and to attend counseling in order to facilitate the visits. The father testified that, prior to his arrest, he was very involved in the child's life and that, if granted visitation, he would abide by any limitations the mother imposes with respect to the content of the conversations between himself and the child—e.g., excluding any discussion of his conviction and guilt or innocence. The record further reflects that a number of accommodations are made at the prison to make children who visit their parents more comfortable during visits. ****3**

The key objective evidence presented came in the form of conflicting opinions of experts, each of whom met with the mother and the child. Family Court found "persuasive and reasoned" the report and testimony of Jerold Grodin, a licensed psychologist with significant experience in the field of child psychology, who testified for the father. Grodin opined that visitation with the father, even at his correctional facility, would be "healthful and safe" and in the child's best interests because the child seems to be comfortable in new situations and is quite inquisitive, and also because of the inherent need for any child to maintain

contact with both parents. His interaction with the child also revealed a bond between the child and father and a desire on the part of the child to contact the father. Grodin discussed how children who are separated from their parents, without a clear understanding, tend to develop feelings of abandonment. Grodin further concluded that visitation would not be traumatic for the child and that it could be facilitated by therapeutic counseling. Steven Wood, a licensed mental health counselor and clinical specialist with significant experience in child and adolescent therapy testified for the mother and disagreed. Specifically, Wood asserted that because the child is beginning to reach the age at which she will begin forming substantive memories, visiting her father in prison may damage ***1299** her future relationship with him. In Wood's opinion, the child does not have sufficient life experience to be able to go through the process of visiting a maximum security prison. Wood also concluded that, while the individual processes the child would have to go through to visit the father would not—in themselves—be traumatic, the cumulative effect of such an experience would be. Yet, Wood also concluded that the child was stable, did not demonstrate an increased vulnerability to social trauma and did not express a fear of her father and that, although the child did not feel abandoned by her father, any child who had a parent disappear could develop a feeling of abandonment.

While the child has not seen her father since she was 18 months old, [2] there is clearly an established relationship between the child and the father as evidenced by the child's own behavior. Indeed, it cannot be said that the father is "essentially a stranger to the child" (*Matter of Cole v Comfort*, 63 AD3d 1234, 1236 [2009], *lv denied* 13 NY3d 706 [2009]). That the child is young and will likely need to travel a considerable distance between her residence and the father's prison does not necessarily preclude visitation (*see Matter of Moore v Schill*, 44 AD3d at 1123). Importantly, Family Court identified several trustworthy people known to the mother and the child, as opposed to "virtual strangers," who are willing to accept this responsibility (*Matter of Goldsmith v Goldsmith*, 68 AD3d 1209, 1210 [2009]; *see Matter of Conklin v Hernandez*, 41 AD3d 908, 911 [2007]), thereby making visitation "viable and workable" (*Matter of Albanese v Albanese*, 44 AD3d 1117, 1120 [2007]), and the father will never be alone with the child. While the father's prison term is long and the offenses for which he is incarcerated are undeniably disturbing—and visitation will likely not be easy—we cannot say that Family Court's discretionary conclusion is unsound.

We do, however, agree with the mother's contention that she should not be required to pay for the telephone calls and the counseling for the child and her escorts before and after the visits. While the record on appeal is barren of any evidence of the parties' financial circumstances or of the mother's financial ability to pay for these potentially costly and long-term ****4** expenses, at the time that the mother applied for the stay of Family Court's order, she reported—in an affidavit to this Court—that she was a single mother with a very modest income as a church pastor, received no child support, relied on her mother for ***1300** financial assistance and had no health insurance to cover counseling expenses for the child (and any insurance she might obtain would not cover the father's family members). Under these circumstances, requiring the mother to pay for the father's visitation-related expenses would deplete the resources available to the child. It is the father who should bear the responsibility (or pursue third-party or family assistance) to pay all expenses associated with visitation, including counseling [3] and telephone calls, all of which are necessitated by his incarceration (*see e.g. Matter of Franklin v Richey*, 57 AD3d 663, 664-665 [2008]; *Matter of Albanese v Albanese*, 44 AD3d at 1120; *Matter of Moore v Schill*, 44 AD3d at 1123).

Malone Jr. and Stein, JJ., concur.

Peters, J.P. (dissenting). We respectfully dissent. The parties' daughter was born in 2005. Before she was even conceived, petitioner (hereinafter the father) began molesting students in his elementary school. A teacher, he chose his own students to victimize.

When his daughter was 14 months of age, the father was arrested and charged in a 49-count indictment with sexually molesting eight boys under the age of 11. Shortly thereafter, he signed a separation agreement which made no provision for custody or visitation. After pleading guilty to the entire indictment, he was sentenced, in January 2008, to an aggregate sentence of 12 years in prison. After sentencing, but before this Court affirmed his conviction (*People v Culver*, 69 AD3d 976 [2010]), he filed a petition in Family Court seeking visitation at the facility where he was incarcerated. At the time his petition was filed, he had not seen the child for over one year.

Despite the fact that this father's reprehensible conduct toward children—who had been placed in his trust—had torn her family asunder, respondent (hereinafter the mother) fostered a positive relationship between her daughter and the child's paternal relatives. She also permitted correspondence between the father and the child.

Prior to the fact-finding hearing concerning visitation, the child and her mother were evaluated by experts who rendered conflicting opinions at trial. Significantly, neither expert evaluated the father. While a visit to the institution of his incarceration for such purpose may have been challenging, it strikes us ***1301** as disingenuous for an expert to opine that visitation with a convicted sex offender in a maximum security prison setting serves the best interests of an infant without conducting even a perfunctory assessment of that offender. ****5**

The majority opines that "[w]hile the child has not seen her father since she was 18 months old, there is clearly an established relationship between the child and the father." During the time this "relationship" was forming, the father was sexually abusing young boys in his classroom. A "relationship" may have existed, but one cannot conclude that it was a healthy parent-child relationship. Moreover, at the time of the fact-finding hearing, the father had not engaged in sex offender treatment. Strikingly, in testifying at the hearing, he refused to acknowledge his criminal conduct and declined any need for sex offender treatment, instead asserting that he had been "railroaded."

It is against this backdrop that relevant law should be applied. To be sure, visitation with a noncustodial parent is presumed to be in a child's best interests (*see Matter of Chambers v Renaud*, 72 AD3d 1433, 1434 [2010]). And, while "the incarceration of a noncustodial parent shall not, by itself, preclude visitation with his or her child, a denial of an application for visitation is proper where evidence demonstrates that visitation would not be in the child's best interest[s]" (*Matter of Conklin v Hernandez*, 41 AD3d 908, 910 [2007] [internal quotation marks and citations omitted]; *see Matter of Morelli v Tucker*, 48 AD3d 919, 920 [2008], *lv denied* 10 NY3d 709 [2008]). Moreover, if Family Court has exercised its sound discretion in assessing best interests, its findings will not be disturbed unless lacking a sound and substantial basis in the record (*see Matter of Cole v Comfort*, 63 AD3d 1234, 1235 [2009], *lv denied* 13 NY3d 706 [2009]). Yet, we are unable to glean sound discretion from Family Court's decision or substantial support for its findings as to the propriety of visitation. In fact, consideration of the relevant factors leads us to the inescapable conclusion that visitation under these circumstances would not serve the child's best interests.

The father's crimes are serious, were committed against young children who had been placed in his trust, and have resulted in a lengthy sentence. The record is bereft of any evidence that he attempted to receive treatment for his urges and conduct prior to his arrest or incarceration, or thereafter. Thus, as stated by the mother's counsel at the fact-finding hearing, the father is a "convicted, unrepentant, untreated pederast." He committed these serious acts prior to and during his "rela ***1302** tionship" with his child and has not seen her since she was 18 months old. While the child has been described as well adjusted, the full credit for this result must be granted to the mother, for we cannot conclude that a father who leaves the home he shares with his infant daughter in the morning to molest his students during the school day could properly have a healthy emotional relationship with this child.

Given this father's lengthy prison sentence, the horrific nature of the underlying sex offenses, his refusal to acknowledge his conduct or his need for sex abuse counseling, the distance the child would have to travel to exercise visitation in a maximum security prison setting, and the fact that more than three years have now elapsed since he has seen the child, we find lacking any sound and substantial basis in this record for Family Court's conclusion that future visitation would serve the child's best interests (*see Matter of Gutkaiss v Leahy*, 285 AD2d 752, 753 [2001]; *Matter of Rogowski v Rogowski*, 251 AD2d 827, 827-828 [1998]; *Matter of Hadsell v Hadsell*, 249 AD2d 853, 854 [1998], *lv denied* 92 NY2d 809 [1998]; *see also Matter of Jasmin E.R.*, 303 AD2d 1034, 1035 [2003]). That Family Court could further reward the father by requiring that the mother pay the cost of counseling to prepare her daughter for prison visits truly adds insult to injury. For these reasons, we would reverse Family Court's order and permit weekly monitored letters to the child and monthly monitored telephone calls with all costs to be borne by the father. ****6**

Egan Jr., J., concurs. Ordered that the order is modified, on the facts, without costs, by reversing so much thereof as holds respondent financially responsible for all expenses associated with visitation including, but not limited to, counseling and telephone expenses, unless she has since obtained or in the future acquires health insurance covering such counseling expenses, in which case the mother shall utilize that coverage, and, as so modified, affirmed.

FOOTNOTES

Footnotes

1 A stay of Family Court's order pending this appeal was issued by this Court and has been in effect since October 2, 2009.

2 Almost a year and a half of this period of time is attributable to this Court's stay of Family Court's order.

3 If the mother has since obtained—or in the future acquires—health insurance covering counseling expenses for the child, the mother must utilize that coverage to its fullest extent, with the father remaining responsible for any non-covered expenses.

71 A.D.3d 556, 896 N.Y.S.2d 677 (Mem), 2010 N.Y. Slip Op. 02420

In the Matter of James W., Sr., Appellant
v
Theresa D., Respondent.

Supreme Court, Appellate Division, First Department, New York
March 23, 2010

CITE TITLE AS: Matter of James W. v Theresa D.

HEADNOTE

Parent, Child and Family
Visitation

Law Office of Kenneth M. Tuccillo, Hastings-on-Hudson (Kenneth M. Tuccillo of counsel), for appellant.
Yisrael Schulman, New York Legal Assistance Group, New York (Anya Emerson of counsel), for respondent.
Karen P. Simmons, The Children's Law Center, Brooklyn (Naomi Buchman of counsel), Law Guardian.
Order, Supreme Court, Bronx County (Diane Kiesel, J.), entered on or about August 14, 2007, which dismissed the petition for visitation, unanimously affirmed, without costs.

Given petitioner's repeated abductions of the parties' children, violations of court orders of visitation and protection, and long history of domestic violence against the children's mother, the court properly determined that visitation would not be in ***557** the children's best interests (*see Weiss v Weiss*, 52 NY2d 170, 175 [1981]; *Matter of B.G. v A.M.O.*, 57 AD3d 246 [2008], *lv denied* 12 NY3d 705 [2009]; *Matter of Maxamillian*, 6 AD3d 349, 351-352 [2004]; *Matter of Dyandria D.*, 304 AD2d 419 [2003]). Petitioner's record demonstrates his contempt for the authority of the court, his disregard for the safety and well-being of his children, and his failure to appreciate the psychological impact of his repeated abductions on the children (*see Matter of Dyandria D.*, 304 AD2d 419 [2003]; *Gregory C. v Nyree S.*, 16 AD3d 142 [2005], *lv denied* 5 NY3d 702 [2005]).

We have considered petitioner's remaining arguments and find them unavailing. Concur—Mazzarelli, J.P., Friedman, DeGrasse, Abdus-Salaam and Manzanet-Daniels, JJ.

67 A.D.3d 1373, 890 N.Y.S.2d 226, 2009 N.Y. Slip Op. 08300

In the Matter of Michael Jacobs, Appellant
v
Kathleen Chadwick, Respondent.

Supreme Court, Appellate Division, Fourth Department, New York
November 13, 2009

CITE TITLE AS: Matter of Jacobs v Chadwick

HEADNOTE

Parent, Child and Family
Visitation

Child's forced visitation with incarcerated father would be harmful to child's emotional and psychological well-being and thus would not be in best interests of child; father had been convicted of assault in first degree, arising from his having attacked and beaten child's older sister; father had engaged in pattern of domestic violence in presence of child, child suffered from posttraumatic stress disorder and she did not wish to visit father.

Elizabeth A. Sammons, Williamson, for petitioner-appellant.
Tyson Blue, Macedon, for respondent-respondent.
Nancy M. Lord, Law Guardian, Lyons, for Michaela J.
Appeal from an order of the Family Court, Wayne County (John B. Nesbitt, J.), entered January 16, 2008 in a proceeding pursuant to Family Court Act article 6. The order denied the petition.

It is hereby ordered that the order so appealed from is unanimously affirmed without costs.

Memorandum: Petitioner father appeals from an order denying his petition seeking visitation with the parties' daughter. Contrary to the contention of the father, Family Court properly based its determination on the mental health evaluation of the child, concluding that forced visitation with the father, who is incarcerated, would be harmful to the child's emotional and psychological well-being and thus would not be in the best interests of the child (*see Matter of Christina F.F. v Stephen T.C.*, 48 AD3d 1112 [2008], *lv denied* 10 NY3d 710 [2008]). During the course of this proceeding, the father was incarcerated based upon his conviction of assault in the first degree, arising from his having attacked and beaten the child's older sister. The record establishes that the father had engaged in a pattern of domestic violence in the presence of the child who is the subject of this appeal, that she suffered from post-traumatic stress disorder, and that she did not wish to visit the father (*see Matter of Piwowar v Glosek*, 53 AD3d 1121 [2008]). Present—Centra, J.P., Fahey, Peradotto, Carni and Gorski, JJ.

21 N.Y.3d 86, 990 N.E.2d 110, 967 N.Y.S.2d 872, 2013 N.Y. Slip Op. 03021

In the Matter of Shawn G. Granger, Respondent
v
Danielle D. Misercola, Appellant.

Court of Appeals of New York
Argued March 20, 2013
Decided April 30, 2013

CITE TITLE AS: Matter of Granger v Misercola

SUMMARY

Appeal, by permission of the Court of Appeals, from an order of the Appellate Division of the Supreme Court in the Fourth Judicial Department, entered June 29, 2012. The Appellate Division affirmed an order of the Family Court, Jefferson County (Peter A. Schwerzmann, J.), which had granted the petition for visitation.

Matter of Granger v Misercola, 96 AD3d 1694, affirmed.

HEADNOTES

Parent, Child and Family
Visitation
Rebuttable Presumption in Favor of Visitation

([1]) A rebuttable presumption that a noncustodial parent will be granted visitation is an appropriate starting point in any initial determination regarding custody and/or visitation, and may be rebutted through demonstration by a preponderance of the evidence that such visitation would be harmful to the child or proof that the right to visitation has been forfeited. The presumption is not contrary to the holding in *Tropea v Tropea* (87 NY2d 727 [1996]). In *Tropea*, the Court did not reject an initial presumption in favor of visitation, but rather a "mechanical, tiered analysis that prevents or interferes with a simultaneous weighing and comparative analysis of all of the relevant facts and circumstances" involved in deciding a relocation case (*id.* at 738).

Parent, Child and Family
Visitation
Visitation with Incarcerated Parent

([2]) The rebuttable presumption that a noncustodial parent will be granted visitation applies when the parent seeking visitation is incarcerated. A parent who is in prison does not forfeit his or her visitation rights by being incarcerated. In deciding whether the presumption is rebutted, the possibility that a visit to an incarcerated parent would be harmful to the child must be considered, together with other relevant facts. Visitation should be denied where it is demonstrated that under all the circumstances visitation would be harmful to the child's welfare, or that the right to visitation has been forfeited.

Parent, Child and Family
Visitation
Visitation with Incarcerated Parent

([3]) In a proceeding brought by petitioner inmate seeking visitation with the parties' child after respondent mother refused to bring the child to the prison, the lower courts appropriately applied the presumption in favor of visitation and considered whether respondent rebutted the presumption through showing, by a preponderance of the evidence, that visitation would be harmful to the child.

Parent, Child and Family
Visitation
Visitation with Incarcerated Parent

([4]) In a proceeding brought by petitioner inmate seeking visitation with the parties' then three-year-old child after respondent mother refused to bring the ***87** child to the prison, there was record support for the finding that the travel would not be harmful to the welfare of the child, and that petitioner made efforts to establish a meaningful relationship with the child.

Appeal
Raising Issue for First Time on Appeal

([5]) In determining respondent mother's appeal from the Family Court's order granting petitioner inmate visitation with the parties' child, the Appellate Division did not err in failing to consider the impact of petitioner's move from one prison to another while the appeal was pending. The Appellate Division correctly ruled that the question of petitioner's move from one prison to another should have been brought to the attention of Family Court, by means of a modification petition. That issue should not have been raised in the first instance for determination by an appellate court.

RESEARCH REFERENCES

Am Jur 2d, Divorce and Separation §§ 891, 892; Am Jur 2d, Parent and Child §§ 36, 37.

Carmody-Wait 2d, Child Custody and Visitation in Matrimonial Actions §§ 118A:104–118A:106, 118A:118–118A:121, 118A:124, 118A:127.

5 Law and the Family New York (2d ed) §§ 2:11, 2:14, 2:16–2:19.

NY Jur 2d, Domestic Relations §§ 385, 389, 390.

ANNOTATION REFERENCE

Right of jailed or imprisoned parent to visit from minor child. 6 ALR6th 483.

FIND SIMILAR CASES ON WESTLAW

Database: NY-ORCS

Query: presum! /5 visitation /s non-custodial /2 parent & incarcerated

POINTS OF COUNSEL

Davison Law Office PLLC, Canandaigua (*Mary P. Davison* of counsel), for appellant.
I. The lower courts employed an incorrect standard in reviewing the merits of the petition. (*Finlay v Finlay*, 240 NY 429; *Matter of Alison D. v Virginia M.*, 77 NY2d 651; *Martin v Martin*, 45 NY2d 739; *Braiman v Braiman*, 44 NY2d 584; *Obey v Degling*, 37 NY2d 768; *Matter of Bachman v Mejias*, 1 NY2d 575; *Eschbach v Eschbach*, 56 NY2d 167; *Friederwitzer v Friederwitzer*, 55 NY2d 89; *Daghir v Daghir*, 56 NY2d 938; *Weiss v Weiss*, 52 NY2d 170.) II. The record lacks a sound and substantial basis to support the Family Court's determination that prison visitation would be in the child's best ***88** interests. (*Sitts v Sitts*, 74 AD3d 1722, 18 NY3d 801; *Fox v Fox*, 177 AD2d 209; *Matter of Vincent L.*, 46 AD3d 395; *Matter of Cole v Comfort*, 63 AD3d 1234; *Matter of Donald C. v Michelle T.*, 254 AD2d 124; *Matter of Smith v Smith*, 92 AD3d 791; *Matter of Goldsmith v Goldsmith*, 68 AD3d 1209; *Matter of Lonobile v Betkowski*, 295 AD2d 994; *Matter of Ruple v Harkenreader*, 99 AD3d 1085; *Matter of Butler v Ewers*, 78 AD3d 1667.) III. The intermediate appellate court erred in failing to consider the impact of petitioner's change in location on the child's best interests. (*Matter of Louise E.S. v W. Stephen S.*, 64 NY2d 946; *Matter of Moore v Schill*, 44 AD3d 1123; *Matter of Michael B.*, 80 NY2d 299; *Affronti v Crosson*, 95 NY2d 713; *Matter of Shaida W.*, 85 NY2d 453; *Williams v Brown*, 53 App Div 486; *Dorr v Esders*, 112 App Div 896; *Matter of Ruple v Harkenreader*, 99 AD3d 1085; *Matter of Fewell v Ratzel*, 99 AD3d 1237; *Matter of Steven M. v Meghan M.*, 43 AD3d 1349.)
Charles J. Greenberg, Amherst, for respondent.
I. The Jefferson County Family Court and the Appellate Division employed the correct standard in reviewing the merits of the petition. (*Weiss v Weiss*, 52 NY2d 170; *Matter of Thomas v Thomas*, 277 AD2d 935; *Matter of Davis v Davis*, 232 AD2d 773.) II. There is a sound or substantial basis in the record to support the Family Court's determination that prison visitation would be in the child's best interest. (*Matter of Moore v Schill*, 44 AD3d 1123; *Matter of McCullough v Brown*, 21 AD3d 1349; *Matter of Rogowski v Rogowski*, 251 AD2d 827; *Matter of Hadsell v Hadsell*, 249 AD2d 853.) III. The Appellate Division did not err by failing to consider the impact of the petitioner's change in location on the child's best interests. (*Matter of Michael B.*, 80 NY2d 299; *Matter of Moore v Schill*, 44 AD3d 1123.)
Koffs Law Firm, Chaumont (*Melissa L. Koffs* of counsel), Attorney for the Child.
I. The lower courts erred in determining it was in the child's best interest to visit the father at prison and used the wrong test in making that determination. (*Friederwitzer v Friederwitzer*, 55 NY2d 89; *Eschbach v Eschbach*, 56 NY2d 167; *Daghir v Daghir*, 82 AD2d 191; *Matter of Gloria S. v Richard B.*, 80 AD2d 72.) II. The trial court did not have a sound and substantial basis to determine that it was in the child's best interests to visit petitioner father while he was incarcerated. (*Matter of Morales v Bruno*, 29 AD3d 1001; *Matter of Wispe v Leandry*, 63 AD3d 853; *Sitts v Sitts*, 74 AD3d 1722; *Fox v Fox*, 177 AD2d 209; *Eschbach v Eschbach*, 56 NY2d 167; *Matter of Cardona v Vantassel*, 96 AD3d 1052; *Matter of* ***89** *Flood v Flood*, 63 AD3d 1197; *Matter of Tanner v Tanner*, 35 AD3d 1102; *Matter of Garraway v Laforet*, 68 AD3d 1192; *Matter of Eck v Eck*, 33 AD3d 1082.) III. The intermediate appellate court should have reviewed the lower courts' lack of setting an appropriate distance for the child to travel to see his father. (*Matter of Michael B.*, 80 NY2d 299.)

OPINION OF THE COURT

Pigott, J.

Petitioner, an inmate in New York's correctional system, who had acknowledged paternity of a child prior to his imprisonment, commenced this Family Court Act proceeding seeking visitation with the child after respondent mother refused to bring the child to the prison. Following a fact-finding hearing, Family Court granted the petition, awarding petitioner periodic ****2** four-hour visits at the prison with the child, who was then three years old.

Family Court noted that “the law in New York presumes visitation with a non-custodial parent to be in the child's best interest and the fact that such parent is incarcerated is not an automatic reason for blocking visitation.” The court found that petitioner had “demonstrated that he was involved in a meaningful way in the child's life prior to his incarceration and seeks to maintain

a relationship." It further found that the child was old enough to travel to and from the prison by car without harm, and would "benefit from the visitation with his father." The court considered the length of petitioner's sentence and reasoned that "[l]osing contact for such a long period is felt to be detrimental to an established relationship." The court concluded that visitation with petitioner would be in the child's best interests.

The Appellate Division affirmed Family Court's order, finding "a sound and substantial basis in the record to support the court's determination to grant the father visitation with the child in accordance with the schedule set forth in the order" (96 AD3d 1694, 1695 [4th Dept 2012]). The Appellate Division deferred to Family Court's ability to assess directly the parties' character and credibility, noting that petitioner had "attempted to maintain a relationship with the child over the telephone and by sending letters, cards, and gifts. . . . [T]he father made, and continues to make, efforts to establish a relationship with the child, and it cannot be said that he is 'a stranger to the child' " (*id.*, quoting *Matter of Culver v Culver*, 82 AD3d 1296, 1299 [3d Dept 2011]).

***90** While his appeal was pending, petitioner had been moved to a different correctional facility, further from respondent's home. The Appellate Division made no finding of fact in this regard, ruling that any such change in circumstance was more appropriately the subject of a modification petition (*id.*).

Respondent's primary contention is that the lower courts employed an incorrect legal standard in reviewing the petition for visitation. We granted respondent leave to appeal, and now affirm.

In *Weiss v Weiss* (52 NY2d 170 [1981]), we held that "in initially prescribing or approving custodial arrangements, absent exceptional circumstances, such as those in which it would be inimical to the welfare of the child or where a parent in some manner has forfeited his or her right to such access, appropriate provision for visitation or other access by the noncustodial parent follows almost as a matter of course" (*id.* at 175 [citation omitted]). Subsequent Appellate Division decisions have frequently referred to a rebuttable presumption that, in initial custodial arrangements, a noncustodial parent will be granted visitation. "[I]t is presumed that parental visitation is in the best interest of the child in the absence of proof that it will be harmful" (*Matter of Nathaniel T.*, 97 AD2d 973, 974 [4th Dept 1983]) or proof that the noncustodial parent has forfeited the right to visitation. In the present case, Family Court similarly noted that New York law "presumes visitation with a non-custodial parent to be in the ****3** child's best interest."

([1]) Respondent contends that this presumption is contrary to this Court's holding in *Matter of Tropea v Tropea* (87 NY2d 727 [1996]), in which we wrote that, where a custodial parent seeks judicial approval of a relocation plan that would hinder visitation by the noncustodial parent, "presumptions and threshold tests that artificially skew the analysis in favor of one outcome or another" must be rejected (*id.* at 740). However, in *Tropea*, we did not reject an initial presumption in favor of visitation, but rather a "mechanical, tiered analysis that prevents or interferes with a simultaneous weighing and comparative analysis of all of the relevant facts and circumstances" involved in deciding a relocation case (*id.* at 738). Our holding was not that presumptions can never be relied upon, but that "each relocation request must be considered on its own merits . . . and with predominant emphasis being placed on what outcome is most likely to serve the best interests of the child" (*id.* at 739). A rebuttable presumption that a noncustodial parent will be granted ***91** visitation is an appropriate starting point in any initial determination regarding custody and/or visitation.

([2]) Moreover, the rebuttable presumption in favor of visitation applies when the parent seeking visitation is incarcerated. A parent who is in prison does not forfeit his or her visitation rights by being incarcerated. "[P]etitioner's incarceration, standing alone, does not make a visitation order inappropriate," but a demonstration "that such visitation would be harmful to the child will justify denying such a request" (*Matter of Mohammed v Cortland County Dept. of Social Servs.*, 186 AD2d 908, 908 [3d Dept 1992], *lv denied* 81 NY2d 706 [1993]; *see also e.g. Matter of Morales v Bruno*, 29 AD3d 1001 [2d Dept 2006]; *Matter of Thomas v Thomas*, 277 AD2d 935 [4th Dept 2000]; *Matter of Davis v Davis*, 232 AD2d 773 [3d Dept 1996]). Such a presumption is consistent with *Tropea* because it does not give the noncustodial parent's rights "such disproportionate weight as to predetermine the outcome" (*id.* at 738) or "bar[ ] further inquiry into the salient 'best interests' question" (*id.* at 741). In deciding whether the presumption is rebutted, the possibility that a visit to an incarcerated parent would be harmful to the child

must be considered, together with other relevant facts. Visitation should be denied where it is demonstrated that under all the circumstances visitation would be harmful to the child's welfare, or that the right to visitation has been forfeited.

([1]) In speaking of the manner in which the presumption of visitation may be rebutted, the Appellate Division has frequently used the terms “substantial proof” and “substantial evidence.” “[T]he sweeping denial of the right of the father to visit or see the child is a drastic decision that should be based upon substantial evidence” (*Herb v Herb*, 8 AD2d 419, 422 [4th Dept 1959]). This language is intended to convey to lower courts and practitioners that visitation will be denied only upon a demonstration —that visitation would be harmful to the child—that proceeds by means of sworn testimony or documentary evidence. Thus, the arguments of the party contesting visitation did not amount to “substantial proof” when that party did not attempt ****4** to contradict expert testimony favoring visitation (*see Matter of Hughes v Wiegman*, 150 AD2d 449, 450 [2d Dept 1989]), when sworn testimony and documentary evidence were entirely missing from the proceeding (*see e.g. Matter of Folsom v Folsom*, 262 AD2d 875, 876 [3d Dept 1999]; *Matter of Thomas v Thomas*, 277 AD2d 935 [4th Dept 2000]), or when the trial court's decision was based on a secret report, without benefit of the parties' ***92** responses (*see Herb v Herb*). The “substantial proof” language should not be interpreted in such a way as to heighten the burden, of the party who opposes visitation, to rebut the presumption of visitation. The presumption in favor of visitation may be rebutted through demonstration by a *preponderance of the evidence* (*see generally Tropea*, 87 NY2d at 741).

([3]) Here, the lower courts used the appropriate legal standard, applying the presumption in favor of visitation and considering whether respondent rebutted the presumption through showing, by a preponderance of the evidence, that visitation would be harmful to the child.

([4]) Respondent's second challenge is that there is no “sound and substantial basis in the testimony” (*Bunim v Bunim*, 298 NY 391, 393 [1949]) for finding that visitation was in the child's best interests. However, the factual findings underpinning the lower courts' best interests determinations in this case—that travel to and from the prison would not harm the child and that petitioner sought to maintain a relationship with the child—constitute affirmed findings of fact that we lack the “power to review . . . if . . . supported by evidence in the record” (*Humphrey v State of New York*, 60 NY2d 742, 743 [1983]; *see e.g. Matter of Shondel J. v Mark D.*, 7 NY3d 320, 326 [2006]). Here, there is support in the record for the finding that the travel would not be harmful to the welfare of the child, and that petitioner made efforts to establish a meaningful relationship with the child.

([5]) Finally, respondent contends that the Appellate Division erred in failing to consider the impact of petitioner's move from one prison to another. The Appellate Division correctly ruled that the question of petitioner's move from one prison to another should have been brought to the attention of Family Court, by means of a modification petition. That issue should not have been raised in the first instance for determination by an appellate court (*see Matter of Moore v Schill*, 44 AD3d 1123 [2007]; *see generally Matter of Michael B.*, 80 NY2d 299, 318 [1992]).

Accordingly, the order of the Appellate Division should be affirmed, without costs.

Chief Judge Lippman and Judges Graffeo, Read, Smith and Rivera concur.

Order affirmed, without costs.

131 A.D.3d 964, 15 N.Y.S.3d 834, 2015 N.Y. Slip Op. 06723

**1 In the Matter of Robert Coull, Appellant
v
Pamela Rottman, Respondent.

Supreme Court, Appellate Division, Second Department, New York
2014-01516, O-3023-12, V-10168-10, V-12180-10, V-4968-06, V-6353-10
September 2, 2015

CITE TITLE AS: Matter of Coull v Rottman

HEADNOTES

Parent, Child and Family
Visitation
Modification

Parent, Child and Family
Support
Suspension of Child Support Payments—Interference with Visitation Rights

Robert Coull, New York, N.Y., appellant pro se.
Robin D. Carton, White Plains, N.Y., attorney for the child.
Appeal from an order of the Family Court, Westchester County (Hal B. Greenwald, J.), entered January 10, 2014. The order, insofar as appealed from, after a hearing, inter alia, denied the father's petition to enforce his visitation rights or, in the alternative, to suspend his child support obligation, and granted the mother's cross petition to modify a prior order of custody and visitation of that court dated November 6, 2009, so as to suspend the father's visitation with the subject child.

Ordered that the order entered January 10, 2014, is modified, on the law, on the facts, and in the exercise of discretion, by deleting the provision thereof denying that branch of the father's petition which was to suspend his child support obligation, and substituting therefor a provision granting that branch of the petition; as so modified, the order entered January 10, 2014, is affirmed insofar as appealed from, without costs or disbursements.

A party seeking to modify an existing visitation order must show that there has been a sufficient change in circumstances since the entry of the order such that modification is warranted to further the child's best interests (*see Matter of Rambali v Rambali*, 102 AD3d 797, 799 [2013]; *Matter of Peralta v Irrizary*, 91 AD3d 877, 879 [2012]). The determination of visitation is within the sound discretion of the hearing court, based on the best interests of the child, and its determination will not be set aside unless it lacks a sound and substantial basis in the record (*see Matter of Nicholas v Nicholas*, 107 AD3d 899, 899-900 [2013]; *Matter of Rambali v Rambali*, 102 AD3d at 799; *Matter of Giannoulakis v Kounalis*, 97 AD3d 748, 749 [2012]). Furthermore, while the express wishes of the child are not controlling, they are entitled to great weight, particularly where the child's age and maturity would make his or her input particularly meaningful (*see Matter of Samuel S. v Dayawathie R.*, 63 AD3d 746, 747 [2009]; *Matter of Manfredo v Manfredo*, 53 AD3d 498, 500 [2008]; *Matter of O'Connor v Dyer*, 18 AD3d 757, 757 [2005]). ***965**

In determining custody and visitation rights, the most important factor to be considered is the best interest of the child (*see Eschbach v Eschbach*, 56 NY2d 167, 174 [1982]; *Matter of Rosenblatt v Rosenblatt*, 129 AD3d 1091 [2015]). The determination of visitation issues is entrusted to the sound discretion of the trial court, and should not be disturbed on appeal unless it lacks

an ****2** evidentiary basis in the record (*see Matter of Rosenblatt v Rosenblatt*, 129 AD3d 1091 [2015]; *Matter of Mera v Rodriguez*, 73 AD3d 1069 [2010]). Here, the evidence adduced at the hearing demonstrated that despite the fact that the child had participated in therapy for several months in an effort to foster a relationship with his father, the child remained vehemently opposed to any form of visitation with the father. The Family Court was entitled to place great weight on the child's wishes, since he was mature enough to express them (*see Matter of Rosenblatt v Rosenblatt*, 129 AD3d 1091 [2015]; *Matter of Luo v Yang*, 103 AD3d 636 [2013]). The court's finding that further attempts to compel the child, who was then 13 years old, to engage in visitation would be detrimental to the child's emotional well being has a sound and substantial basis in the record and, thus, should not be disturbed (*see Matter of Rosenblatt v Rosenblatt*, 129 AD3d 1091 [2015]; *Matter of Lyons v Knox*, 126 AD3d 798, 799 [2015]; *Matter of Luo v Yang*, 103 AD3d at 637; *Matter of Krasner v Krasner*, 94 AD3d 763, 764 [2012]).

However, contrary to the conclusion of the Family Court, the evidence adduced at the hearing justified a suspension of the father's obligation to make future child support payments (*see Rodman v Friedman*, 112 AD3d 537 [2013]; *Ledgin v Ledgin*, 36 AD3d 669, 670 [2007]). The forensic evaluator testified that there was a "pattern of alienation" resulting from the mother's interference with a regular schedule of visitation. The evaluator was unable to complete her evaluation because the mother refused to consent to the evaluator's request to speak with mental health providers or school officials, and the child did not appear for his interview. Moreover, after the father's last visit with the child, which occurred on February 7, 2010, the father continued to go to the exchange location on visitation days for several months. On one occasion, the mother and child appeared, but the mother said the child would not come out of the car. On the other occasions, neither the mother nor the child appeared, nor did the mother communicate with the father. The father was never told about the child's medical needs or that the child had been hospitalized until after the fact, nor was he advised of any information about the child's school or school events. Further, the record reflects that the ***966** mother, who represented herself before the Family Court, assumed an inappropriately hostile stance toward the father and witnesses who testified in his favor. The Family Court noted in its decision that the mother stated "many times, that she will never allow [the father] to see the subject child and that she would do whatever it takes to keep the subject child away" from him.

Under these circumstances, it is appropriate to suspend the father's current child support obligations (*see Matter of Thompson v Thompson*, 78 AD3d 845 [2010]).

The father's remaining contentions are without merit. Leventhal, J.P., Miller, Hinds-Radix and Maltese, JJ., concur.

142 A.D.3d 530, 36 N.Y.S.3d 222, 2016 N.Y. Slip Op. 05743

**1 Donald J. Cook, Respondent-Appellant,
v
Lynn A. Cook, Appellant-Respondent.

Supreme Court, Appellate Division, Second Department, New York
2015-08112, 2015-10749, 21796/10
August 10, 2016

CITE TITLE AS: Cook v Cook

HEADNOTES

Parent, Child and Family
Custody
Modification—Change in Circumstances

Contempt
Civil Contempt

Jaspan Schlesinger LLP, Garden City, NY (Steven R. Schlesinger, Jeffrey D. Lebowitz, Katharine E. O'Dette, and Marissa J. Pullano of counsel), for appellant-respondent.
Campagna Johnson, P.C., Hauppauge, NY (Thomas K. Campagna and Nicholas E. Arazoza of counsel), for respondent-appellant.
Catherine Miller, Hauppauge, NY, attorney for the children.

Appeal by the mother from an order of the Supreme Court, Suffolk County (Carol MacKenzie, J.), dated July 23, 2015, and appeal by the mother and cross appeal by the father from an order of that court dated August 18, 2015. The order dated July 23, 2015, insofar as appealed from, denied that branch of the mother's motion which was to appoint a forensic evaluator to conduct an evaluation of the parties and their children. The order dated August 18, 2015, insofar as appealed and cross-appealed from, after a hearing, granted that branch of the father's petition which was to modify a settlement agreement dated May 3, 2012, which was incorporated but not merged into the parties' judgment of divorce dated September 25, 2012, so as to award him residential custody of the parties' child Jonathan, denied that branch of the father's petition which *531 was to modify the custody terms of the settlement agreement so as to award him residential custody of the parties' child Madison, and granted that branch of the father's motion which was to hold the mother in civil contempt for violating certain provisions of the settlement agreement and of a so-ordered stipulation of settlement dated August 8, 2013, regarding the father's telephone communication with the parties' children.

Ordered that the order dated July 23, 2015, is affirmed insofar as appealed from, without costs or disbursements; and it is further,

Ordered that the order dated August 18, 2015, is modified, on the law, (1) by deleting the provision thereof granting that branch of the father's motion which was to hold the mother in civil contempt for violating certain provisions of the settlement agreement dated May 3, 2012, which was incorporated but not merged into the parties' judgment of divorce dated September 25, 2012, and of the so-ordered stipulation of settlement, dated August 8, 2013, regarding the father's telephone communication with the parties' children, and substituting therefor a provision denying **2 that branch of the motion, and (2) by deleting the provision thereof denying that branch of the father's petition which was to modify

the settlement agreement so as to award him residential custody of the parties' child Madison, and substituting therefor a provision granting that branch of the petition; as so modified, the order dated August 18, 2015, is affirmed insofar as appealed from, without costs or disbursements, and the matter is remitted to the Supreme Court, Suffolk County, for further proceedings to establish an appropriate visitation schedule for the mother with the parties' child Madison; and it is further,

Ordered that pending the new determination, the mother shall have the same visitation schedule with the parties' child Madison as she currently has with the parties' child Jonathan.

The parties have two children, a son, Jonathan, born in May 2002, and a daughter, Madison, born in July 2005. In a settlement agreement dated May 3, 2012, which was incorporated but not merged into the parties' judgment of divorce dated September 25, 2012, the parties agreed that they would share joint legal custody of the children, that the mother would have primary residential custody of the children, and that the father would have visitation. The settlement agreement provided, inter alia, that "[e]ach party shall have the right to communicate with the children by telephone at all reasonable times and for reasonable periods of time when the children [are] with the other party and neither party shall interfere with or restrict ***532** or impair such right of communication." The parties thereafter entered into a stipulation of settlement, dated August 8, 2013, which was so-ordered by the Supreme Court, which provided, inter alia, that "the parties agree to promote and encourage communication, via telephone or otherwise, between the children and the other parent."

On or about April 23, 2015, the father filed a petition in the Family Court, Suffolk County, inter alia, to modify the custody provisions of the settlement agreement so as to award him sole custody of the children, with visitation to the mother. On or about June 4, 2015, the mother moved in the Supreme Court, Suffolk County, inter alia, to modify the custody provisions of the settlement agreement so as to award her sole custody of the children, with supervised visitation to the father, to consolidate the Family Court proceeding with the Supreme Court action, and for the appointment of a forensic evaluator to conduct evaluations of the parties and the children. Thereafter, the father moved in the Supreme Court, inter alia, to hold the mother in civil contempt for violating the provisions of the settlement agreement and the so-ordered stipulation of settlement directing that the parties had the right to communicate with the children by telephone at all reasonable times, that neither party shall interfere with, restrict, or impair such right of communication, and that the parties should promote and encourage communication between the children and the other parent.

In an order dated July 23, 2015, the Supreme Court, inter alia, granted the branch of the mother's motion which was to consolidate the Family Court proceeding with the Supreme Court action, denied the branch of the mother's motion which was to appoint a forensic evaluator to conduct evaluations of the parties and the children, and referred for a hearing the custody and visitation issues, and the branch of the father's motion which was to hold the mother in civil contempt. The mother appeals from the order dated July 23, 2015.

Following the hearing, in an order dated August 18, 2015, the Supreme Court, inter alia, awarded the father residential custody of the parties' son Jonathan, with visitation to the mother. The court determined that the mother should retain residential custody of the parties' daughter Madison. The court also granted the branch of the father's motion which was to hold the mother in civil contempt because it determined that she had interfered with the father's telephone communication with the children. The mother appeals and the father cross-appeals from the order dated August 18, 2015. ***533**

The Supreme Court providently exercised its discretion in denying that branch of the mother's motion which was to appoint a forensic evaluator to conduct evaluations of the parties and the children, as the court possessed sufficient information to render an informed decision regarding ****3** custody consistent with the subject children's best interests (*see Matter of Keyes v Watson*, 133 AD3d 757 [2015]; *Matter of Stones v Vandenberge*, 127 AD3d 1213, 1215 [2015]; *McDonald v McDonald*, 122 AD3d 911 [2014]; *Matter of Solovay v Solovay*, 94 AD3d 898 [2012]).

"A party seeking the modification of an existing court-ordered child custody arrangement has the burden of demonstrating that circumstances have changed since the initial custody determination" such that modification is necessary to ensure the children's best interests (*Musachio v Musachio*, 137 AD3d 881, 882-883 [2016]; *see Matter of Klotz v O'Connor*, 124 AD3d 662, 662-663 [2015]). "In determining whether a custody agreement that was incorporated into a judgment of divorce should be modified, the paramount issue before the court is whether, under the totality of the circumstances, a modification of custody is in the best interests of the child[ren]" (*Matter of Honeywell v Honeywell*, 39 AD3d 857, 858 [2007]; *see Anonymous 2011-1 v Anonymous 2011-2*, 102 AD3d 640, 641 [2013]). To determine whether modification of a custody arrangement is in the best interests of the children, the court must weigh several factors of varying degrees of importance, including, inter alia, (1) the original placement of the children, (2) the length of that placement, (3) the children's desires, (4) the relative fitness of the parents, (5) the quality of the home environment, (6) the parental guidance given to the children, (7) the parents' relative financial status, (8) the parents' relative ability to provide for the children's emotional and intellectual development, and (9) the willingness of each parent to assure meaningful contact between the children and the other parent (*see Anonymous 2011-1 v Anonymous 2011-2*, 136 AD3d 946, 948 [2016]; *Cuccurullo v Cuccurullo*, 21 AD3d 983, 984 [2005]).

Here, the father demonstrated a sufficient change in circumstances to warrant modification of the custody provisions of the settlement agreement so as to award him residential custody of Jonathan. The record supports the Supreme Court's determination that Jonathan's relationship with the mother has deteriorated since the prior custody arrangement was agreed to (*see Matter of Burke v Cogan*, 122 AD3d 625, 626 [2014]; *Matter of Filippelli v Chant*, 40 AD3d 1221, 1222 [2007]; *Matter of Maute v Maute*, 228 AD2d 444 [1996]), and that the father exhibits a greater sensitivity to his emotional and ***534** psychological needs, particularly with respect to the environment in Jonathan's new school (*see Matter of Dorsa v Dorsa*, 90 AD3d 1046, 1047 [2011]). We discern no reason to disturb the court's determination that the father's testimony was more credible than the mother's testimony. Additionally, the attorney for the children advocated for residential custody to be awarded to the father, since Jonathan, who was 12 years old when the father's petition was filed, communicated a preference to reside with him. While the express wishes of a child are not controlling (*see Matter of Ross v Ross*, 86 AD3d 615 [2011]; *Matter of Bond v MacLeod*, 83 AD3d 1304 [2011]), the child's wishes should be considered and are entitled to great weight, where, as here, the child's age and maturity would make his input particularly meaningful (*see Matter of Coull v Rottman*, 131 AD3d 964 [2015]; *Matter of Rosenblatt v Rosenblatt*, 129 AD3d 1091 [2015]; *Koppenhoefer v Koppenhoefer*, 159 AD2d 113 [1990]). Accordingly, the court's determination to modify the custody provisions of the settlement agreement so as to award the father residential custody of Jonathan has a sound and substantial basis in the record.

However, the Supreme Court's determination that the evidence did not demonstrate a sufficient change in circumstances warranting modification of the custody provisions of the settlement agreement so as to award the father residential custody of the parties' child Madison is not supported by a sound and substantial basis in the record. It "has long [been] recognized that it is often in the child's best interests to continue to live with his [or her] siblings" (*Eschbach v Eschbach*, 56 NY2d 167, 173 [1982]), and "the courts will not disrupt sibling relationships unless there is an overwhelming need to do so" (*Matter of Lao v Gonzales*, 130 AD3d 624, 625 [2015]; *see Matter of Shannon J. v Aaron P.*, 111 AD3d 829, 831 [2013]). It is undisputed that Jonathan and Madison have a close relationship, and, based upon the recommendations of the children's therapist that they should not be separated, the position of the attorney for the children that they should remain with the same custodial parent, and evidence that the father demonstrated more of an ability and willingness to assure meaningful contact between the children and the mother, and to foster a healthier relationship between the children and the mother, than the mother would have fostered between the children and the father, the court should have awarded residential custody of Madison to the father (*see Eschbach v Eschbach*, 56 NY2d at 173-174; *Matter of Shannon J. v Aaron P.*, 111 AD3d at 831; ****4** *Matter of Pappas v Kells*, 77 AD3d 952 [2010]; *Matter of Tori v Tori*, 67 AD3d 1021 [2009]). ***535**

The Supreme Court also erred in granting that branch of the father's motion which was to hold the mother in civil contempt. In order to hold a party in civil contempt, the moving party must establish the following elements by clear and convincing evidence: " 'First, it must be determined that a lawful order of the court, clearly expressing an unequivocal mandate, was in effect. Second, it must appear, with reasonable certainty, that the order has been disobeyed. Third, the party to be held in contempt must have had knowledge of the court's order . . . Fourth, prejudice to the right of a party to the litigation must be demonstrated' " (*Thimm v Thimm*, 137 AD3d 775, 776 [2016], quoting *El-Dehdan v El-Dehdan*, 26 NY3d 19, 29 [2015]; *see Mollah v Mollah*, 136 AD3d 992, 993 [2016]; *Wood v Wood*, 134 AD3d 1028, 1029 [2015]). Here, the father failed to sustain his burden because the evidence did not establish that the mother's actions with respect to the father's telephone communication with the children violated an unequivocal mandate contained in the settlement agreement or the so-ordered stipulation of settlement (*see Matter of Hughes v Kameneva*, 96 AD3d 845 [2012]; *Matter of Nelson v Nelson*, 194 AD2d 828 [1993]; *Matter of Frandsen v Frandsen*, 190 AD2d 975 [1993]).

We note that the joint record on appeal contains certain material that is dehors the record. We have not considered this material (*see Stanton v Carrara*, 28 AD3d 642 [2006]; *Czernicki v Lawniczak*, 25 AD3d 581 [2006]). Chambers, J.P., Dickerson, Duffy and LaSalle, JJ., concur.

301 A.D.2d 36, 749 N.Y.S.2d 550, 2002 N.Y. Slip Op. 07948

In the Matter of David Wissink, Respondent,
v.
Jane Wissink, Appellant.

Supreme Court, Appellate Division, Second Department, New York
November 4, 2002

CITE TITLE AS: Matter of Wissink v Wissink

SUMMARY

Appeal in a child custody proceeding pursuant to Family Court Act article 6 from so much of an order of the Family Court, Orange County (Andrew P. Bivona, J.), entered July 11, 2000, as granted the father's petition for custody.

HEADNOTE

Parent, Child and Family
Custody
Consideration of Domestic Violence

In a custody dispute involving a teenaged girl who has expressed a clear preference to live with petitioner father, who has a history of domestic violence directed at respondent mother but has never directly mistreated his daughter, Family Court erred in awarding custody to petitioner without first ordering comprehensive psychological evaluations to ensure that the award of custody was truly in the child's best interest. Domestic violence is a factor which the court must consider among others in awarding custody or visitation (Domestic Relations Law § 240 [1]). Under the circumstances, Family Court's "consideration" of the effect of domestic violence upon the best interest of the child was inadequate, especially in view of overwhelming authority that a child living in a home where there has been abuse between the adults becomes a secondary victim and is likely to suffer psychological injury. The court should have ordered a comprehensive psychological evaluation that would likely have included a clinical evaluation, psychological testing, and review of records and information from collateral sources. Furthermore, the court also erred in limiting respondent's inquiry regarding petitioner's failure to comply with child support obligations and in finding financial consideration "not relevant at all" to the custody proceeding. Family Court was required to consider the parties' support obligations and their compliance with court orders and to evaluate each party's ability to support the child.

TOTAL CLIENT SERVICE LIBRARY REFERENCES

Am Jur 2d, Divorce and Separation §§ 931, 932, 936, 963, 964.

Carmody-Wait 2d, Child Custody and Visitation in Matrimonial Actions §§ 118A:42, 118A:45, 118A:56, 118A:71, 118A:72.

McKinney's, Domestic Relations Law § 240 (1).

NY Jur 2d, Domestic Relations §§ 370, 379.5, 480.

ANNOTATION REFERENCES

Wishes of child as factor in awarding custody. 4 ALR3d 1396. ***37**

Construction and effect of statutes mandating consideration of, or creating presumptions regarding, domestic violence in awarding custody of children. 51 ALR5th 241.

APPEARANCES OF COUNSEL

Laurie T. McDermott, Sugar Loaf, for appellant.
Mark Diamond, New York City, *Law Guardian* for infant.

OPINION OF THE COURT

S. Miller, J.

This appeal presents a vexing custody dispute over a teenaged girl who has expressed a clear preference to live with her father. While both parents are seemingly fit custodians, the father has a history of domestic violence directed at the mother; yet he has never posed a direct threat to the child. Because of this circumstance, we hold that the Family Court erred in awarding custody to the father without first ordering comprehensive psychological evaluations to ensure that this award of custody was truly in the child's best interest.

The child in controversy, Andrea, born June 21, 1986, is the biological child of the mother and father; the mother also has a daughter, Karin, by a prior marriage. The parties have had a tumultuous relationship marked by numerous episodes of heated arguments, physical violence, police intervention and Family Court orders of protection. It is apparent that when it comes to his dealings with the mother, the father is a batterer whose temper gets the better of him. When it comes to Andrea, however, the father is the favored parent; he has never directly mistreated Andrea.

The parties have lived apart at various times during their marriage, and separated most recently in 1999 following yet another physical altercation. The mother commenced a family offense proceeding and a proceeding for custody of Andrea. The father cross-petitioned for custody. The Family Court assigned a law guardian and ordered a mental health study which was clearly deficient. A hearing was held at which the parties, Karin, and other witnesses testified, and the court examined Andrea in camera; she downplayed the father's culpability and expressed her clear preference for living with him.

The order appealed from awarded custody to the father. In separate orders, the Family Court dismissed the mother's custody petition and sustained the mother's family offense petitions, directing, inter alia, that the father enter and complete a ***38** domestic violence program. We now reverse the order awarding custody to the father and remit for a new custody hearing following an in-depth forensic examination of the parties and child.

Andrea's preference for her father and her closely bonded relationship to him were confirmed by her law guardian and the “mental health professional” social worker who interviewed her. Indeed, putting aside the established fact of his abusive conduct toward her mother, Andrea's father appears a truly model parent. He is significantly involved in her school work and her extracurricular activities. They enjoy many pleasurable activities, including movies, shopping, building a barn, and horseback riding. He provides her with material benefits-- a television set, clothing, a horse, a trip to Europe. He is loving and affectionate. She is his “princess,” his “best girl.” In contrast, Andrea's mother has not been significantly involved in her school work or her extracurricular activities, and Andrea does not enjoy her company or their relationship.

Were it not for the documented history of domestic violence confirmed by the court after a hearing, we would have unanimously affirmed the Family Court's award of custody to the father in accordance with Andrea's expressed preference and the evidence documenting their positive relationship. However, the fact of domestic violence should have been considered more than superficially, particularly in this case where Andrea expressed her unequivocal preference for the abuser, while denying the very existence of the domestic violence that the court found she witnessed.

The record is replete with incidents of domestic violence reported by the mother, and by evidence supporting her testimony. The earliest incident that the mother reported was perpetrated when Andrea was merely an infant in 1986. In a fit of anger the father hit and kicked the mother and pulled out chunks of her hair. In the course of the attack she heard him say, “Oh well, she's going to die.” On Super Bowl Sunday in 1995, he attacked her, throwing her on the floor, kicking, hitting, and choking her. She sustained marks on her neck and a sore throat causing pain while speaking and inhibiting her ability to swallow.

In March 1995, she obtained an order of protection from the Village Court of Montgomery. In the fall of that year the father allegedly held a knife, approximately 8 to 10 inches long, to the mother's throat while Andrea, then nine, sat on her lap. In February 1996, the mother again obtained an order of protection from the Village Court of Montgomery. ***39**

In 1997, the father attacked the mother, hit and kicked her, resulting in her obtaining a permanent order of protection from the Orange County Family Court. The severity of her injuries are documented by a photograph, entered in evidence, showing a large black and blue bruise on her left hip.

In June 1999, the mother left the marital home with Andrea and moved into a shelter where they remained for five days. Upon their return home the father blocked her car in the driveway, yelled at the mother and punched her.

On June 24, 1999, a few days after her return from the shelter, during a dispute over tax returns, the father tried to wrest papers the mother held in her teeth by squeezing her face in his hands, leaving marks and even enlisting the assistance of Andrea; he allegedly directed the child to “hold [the mother's] nose so she can't breathe.”

On December 20, 1999, while Andrea was at home, the father attacked the mother, choking her. She had marks on her neck for days.

The latter two incidents were the subjects of the mother's most recent family offense petition, which the court sustained. In doing so, the Family Court also noted that a final order of protection had been entered in 1997, stating “based upon the proceeding [of 1997] as well as the succeeding [incidents] ... Mr. Wissink is guilty of incidents of domestic violence occurring on June 24, [1999] and December 20, [1999].”

Domestic Relations Law § 240 (1) provides that in any action concerning custody or visitation where domestic violence is alleged, “the court must consider” the effect of such domestic violence upon the best interest of the child, together with other factors and circumstances as the court deems relevant in making an award of custody. In this case the Family Court did not entirely ignore that legislative mandate, and specifically noted that it had considered the effect of domestic violence in rendering its custody determination. However, the “consideration” afforded the effect of domestic violence in this case was, in our view, sorely inadequate.

The court-ordered mental health evaluation consisted of the social worker's interview of Andrea on two occasions (about 45 minutes each) and each parent once (about one hour each). These interviews resulted in the social worker's clearly foreseeable conclusion that Andrea was far more comfortable and involved with her father than her mother, that she did not relate well to her mother, and that she preferred living with her father. ***40**

In a case such as this, where the record reveals years of domestic violence, which is denied by the child who witnessed it, and the child has expressed her preference to live with the abuser, the court should have ordered a comprehensive psychological evaluation. Such an evaluation would likely include a clinical evaluation, psychological testing, and review of records and information from collateral sources. The forensic evaluator would be concerned with such issues as the nature of the psychopathology of the abuser and of the victim; whether the child might be in danger of becoming a future victim, or a witness to the abuse of some other victim; the child's developmental needs given the fact that she has lived in the polluted environment of domestic violence all of her life and the remedial efforts that should be undertaken in regard to all parties concerned.

The devastating consequences of domestic violence have been recognized by our courts, by law enforcement, and by society as a whole. The effect of such violence on children exposed to it has also been established. There is overwhelming authority that a child living in a home where there has been abuse between the adults becomes a secondary victim and is likely to suffer psychological injury.

Moreover, that child learns a dangerous and morally depraved lesson that abusive behavior is not only acceptable, but may even be rewarded (*see People v Malone*, 180 Misc 2d 744, 747, citing Frazee, Noel and Brenneke, Violence Against Women, Law and Litigation § 1:40, at 1-43--1-44 [Clark Boardman Callaghan 1997]).

In many states a rebuttable presumption that perpetrators of domestic violence should not be eligible for legal or physical custody has been accepted and the courts of those states are required to specify why custody should be granted to an offender and how such an order is in the best interest of the child (*see* Philip M. Stahl, Complex Issues in Child Custody Evaluations, at 36 [Sage 1999]). We in New York have not gone that far, but the Legislature, in enacting Domestic Relations Law § 240, has recognized that domestic violence is a factor which the court must consider among others in awarding custody or visitation.

Moreover, the court also erred in limiting the mother's inquiry regarding the father's failure to comply with child support obligations and in finding financial consideration “not relevant at all” to the custody proceeding. The Family Court was required to consider the parties' support obligations and their ***41** compliance with court orders (Domestic Relations Law § 240 [1] [a] [4]) and to evaluate each party's ability to support the child (*see Eschbach v Eschbach*, 56 NY2d 167, 172). If, as the mother alleged, the father violated the child support order, and if he terminated the telephone and electrical services in the marital residence after he had been ordered to stay away pursuant to an order of protection, these facts would clearly be relevant to the court's custody determination.

Only after considering the complex nature of the issues and the relative merits and deficiencies of the alternatives can the court attempt to determine the difficult issue of the best interest of the child in a case such as this.

For the above reasons we thus reverse the custody order and direct a new custody hearing to be conducted after completion of a comprehensive psychological evaluation of the parties and the child. However, we stay Andrea's return to her mother, permitting her continued residence with her father, pending a final custody determination.

We note that the foregoing is without prejudice to the mother renewing her petition for custody, which was dismissed by an order from which no appeal was taken.

Florio, J.P., McGinity and Adams, JJ., concur.
Ordered that the order is reversed insofar as appealed from, on the law and as a matter of discretion in the interest of justice, without costs or disbursements, the petition is denied, and the matter is remitted to the Family Court, Orange County, for further proceedings in accordance herewith; and it is further,

Ordered that pending the final custody determination, the father shall have temporary custody of the child, Andrea, with visitation to the mother pursuant to the terms of the order appealed from. ***42**

301 A.D.2d 884, 754 N.Y.S.2d 406, 2003 N.Y. Slip Op. 10341

Scott Scialdo, Respondent,
v.
Mary Kernan, Appellant.

Supreme Court, Appellate Division, Third Department, New York
(January 23, 2003)

CITE TITLE AS: Scialdo v Kernan

Cardona, P.J.

Appeal from an order of the Family Court of Otsego County (Burns, J.), entered November 28, 2001, which partially granted petitioner's application, in a proceeding pursuant to Family Ct Act article 6, for custody of the parties' child.

The parties, who never married, have a child, Stephen, born in November 1995. After paternity was established in February 1996, petitioner began biweekly daytime visitation which ***885** expanded to overnight stays when Stephen was about 15 months old. In April 2000, the parties, through mediation, entered into a custody agreement which was submitted to Family Court and, subsequently, incorporated into an order entered in May 2000, which awarded respondent sole custody. The order further stated that either party could petition for joint custody without a change in circumstances. Several months later, petitioner filed for joint custody, however, he withdrew that petition and filed for sole custody in January 2001. After a hearing involving numerous witnesses, Family Court awarded the parties joint legal custody and placed Stephen in the primary physical custody of petitioner subject to respondent's visitation. Respondent appeals.

Initially, we note that an "existing custody order which was the product of an agreement between the parties and not a plenary trial is but one factor to be considered in determining whether modification of that custody arrangement is warranted" (*Matter of Lattuca v Natale-Lattuca*, 293 AD2d 805, 806). In determining custody, the primary focus is on the best interest of the child (*see Eschbach v Eschbach*, 56 NY2d 167; *Friederwitzer v Friederwitzer*, 55 NY2d 89; *Matter of Hudson v Hudson*, 279 AD2d 659, 660-661). Where changed circumstances demonstrate a real need for change, modification will be ordered to insure the continued best interest of the child (*see Matter of Hudson v Hudson, supra* at 660-661; *Matter of Morgan v Becker*, 245 AD2d 889, 890). Moreover, we generally accord great deference to Family Court's factual findings which will be disturbed only "'if they lack a sound and substantial basis in the record since [Family Court] is in the best position to assess the credibility of witnesses'" (*Matter of Breitung v Trask*, 279 AD2d 677, 678, quoting *Matter of Russo v Russo*, 257 AD2d 926, 927).

Turning to the merits, the testimony of various witnesses demonstrates that respondent's repeated lapses in judgment and lifestyle choices have exposed Stephen to drug and alcohol abuse as well as domestic violence resulting in numerous visits by the police, Department of Social Services (hereinafter DSS) caseworkers and child protective workers. For example, respondent was indicated in a report filed by DSS investigators in 1999 following her failure to adequately supervise Stephen who was then three years old. On that occasion, this young child wandered off from his home which was located on a lake. He walked about 400 feet to a neighbor's house where he was subsequently discovered by searchers asleep in the family room next to a propane heating stove in full operation. The neighbors ***886** were not home. Respondent stated that she watched Stephen walk to the neighbor's house, which he did often to play with their dog. However, she never called to make sure anyone was home. After Kayla, Stephen's half sister, looked for him without success, respondent went to the neighbor's house. She banged on the door, however, there was no answer, so she left and summoned help. It was also revealed that respondent, on occasion, would permit Stephen to walk to the neighbor's house without even watching him knowing that he could not swim, but trusting that he would not go near the lake because "he was afraid of the water."

The record further established that respondent has a history of abusive relationships, having been abused by all three of her former husbands. In another example of poor decision-making, after having her most recent former husband removed from the home for domestic violence that was witnessed by Stephen and required police intervention, she allowed him back into the home two days later only to have him arrested for a second incident of domestic violence, again witnessed by her son. The record also indicates that this same individual, who was often inebriated, threw a television remote at Stephen, which struck him on the forehead causing an injury. On other occasions, respondent allowed various men, who she knew for a very short time, to move into her home. One of these men, Keith Riordan, testified that during their six-month relationship, respondent consumed alcohol almost every night and was intoxicated about four times per week. He also stated that she smoked marihuana.

Testimony by Stephen's parochial school kindergarten teacher established that many times he came to school hungry, extremely tired, not always clean and with inadequate lunches. The teacher indicated that Stephen was behind in basic skills and was a serious behavior problem. Overall, the record establishes that respondent has repeatedly demonstrated a lack of judgment that has and could continue to impact on Stephen's emotional and intellectual development. Moreover, according to Stephen's treating psychologist, the lack of stability in his life and the resulting stress this child experiences contributes to his adjustment disorder.

On the other hand, the record supports Family Court's finding that petitioner "can provide Stephen with a stable, nurturing environment where his needs come first." Petitioner lives in a two-family house which he shares with his father, who enjoys a close relationship with Stephen. The house is located in close proximity to Stephen's school. Further, Stephen's kindergarten ***887** teacher testified that on the days he comes to school from petitioner's house, he is "meticulously clean," not hungry, tired or excited. She stated that petitioner prepares adequate lunches and shows greater involvement in the child's educational program and extracurricular activities. Significantly, as Family Court found, petitioner can provide a home free from alcohol abuse and domestic violence and can provide Stephen with the stability that he needs. Notably, the evidence strongly suggests that petitioner will place Stephen's emotional well-being ahead of his own lifestyle desires (*see Matter of Hudson v Hudson*, 279 AD2d 659, 660, *supra*). Moreover, petitioner acknowledges the importance of fostering the relationship between Stephen and respondent (*see Matter of Esterle v Dellay*, 281 AD2d 722, 726) and is committed to doing the same between Stephen and his half sister (*see Matter of Lawrence v Lawrence*, 275 AD2d 985). We also note that the Law Guardian advocated a change in Stephen's custody to petitioner. Under all the circumstances, we find Family Court's determination supported by a sound and substantial basis in the record, and, therefore, we will not disturb it.

Additionally, although we agree with respondent's contention that Family Court improperly admitted certain testimony of Barbara Brennan, a DSS investigator, who testified to unsworn oral statements attributed to one of respondent's former husbands, we find the error harmless "given the quantum of other proof" supporting Family Court's determination (*Matter of Nicole VV.*, 296 AD2d 608, 613, *lv denied* 98 NY2d 616).

We have considered respondent's remaining contentions and find that they lack merit.

Mercure, Spain, Carpinello and Kane, JJ., concur.
Ordered that the order is affirmed, without costs.

McKinney's Consolidated Laws of New York Annotated
Domestic Relations Law (Refs & Annos)
Chapter 14. Of the Consolidated Laws (Refs & Annos)
Article 5. The Custody and Wages of Children (Refs & Annos)

McKinney's DRL § 72

§ 72. Special proceeding or habeas corpus to obtain visitation rights or custody in respect to certain infant grandchildren

Effective: January 5, 2004
Currentness

1. Where either or both of the parents of a minor child, residing within this state, is or are deceased, or where circumstances show that conditions exist which equity would see fit to intervene, a grandparent or the grandparents of such child may apply to the supreme court by commencing a special proceeding or for a writ of habeas corpus to have such child brought before such court, or may apply to the family court pursuant to subdivision (b) of section six hundred fifty-one of the family court act; and on the return thereof, the court, by order, after due notice to the parent or any other person or party having the care, custody, and control of such child, to be given in such manner as the court shall prescribe, may make such directions as the best interest of the child may require, for visitation rights for such grandparent or grandparents in respect to such child.

2. (a) Where a grandparent or the grandparents of a minor child, residing within this state, can demonstrate to the satisfaction of the court the existence of extraordinary circumstances, such grandparent or grandparents of such child may apply to the supreme court by commencing a special proceeding or for a writ of habeas corpus to have such child brought before such court, or may apply to family court pursuant to subdivision (b) of section six hundred fifty-one of the family court act; and on the return thereof, the court, by order, after due notice to the parent or any other person or party having the care, custody, and control of such child, to be given in such manner as the court shall prescribe, may make such directions as the best interests of the child may require, for custody rights for such grandparent or grandparents in respect to such child. An extended disruption of custody, as such term is defined in this section, shall constitute an extraordinary circumstance.

(b) For the purposes of this section "extended disruption of custody" shall include, but not be limited to, a prolonged separation of the respondent parent and the child for at least twenty-four continuous months during which the parent voluntarily relinquished care and control of the child and the child resided in the household of the petitioner grandparent or grandparents, provided, however, that the court may find that extraordinary circumstances exist should the prolonged separation have lasted for less than twenty-four months.

(c) Nothing in this section shall limit the ability of parties to enter into consensual custody agreements absent the existence of extraordinary circumstances.

Credits
(Added L.1966, c. 631, § 1. Amended L.1975, c. 431, § 1; L.1986, c. 252, § 1; L.1988, c. 457, § 8; L.2003, c. 657, § 2, eff. Jan. 5, 2004.)

McKinney's D. R. L. § 72, NY DOM REL § 72

40 N.Y.2d 543, 356 N.E.2d 277, 387 N.Y.S.2d 821

In the Matter of Joanne Bennett, Respondent,
v.
Marie Jeffreys, Also Known as Marie Green, Also Known as Marie Morrow, Appellant.

Court of Appeals of New York
Argued June 8, 1976;
decided September 21, 1976

CITE TITLE AS: Matter of Bennett v Jeffreys

HEADNOTES

Parent, Child and Family
custody
parental right to custody--best interest of child.

([1]) In a proceeding by the natural mother of a child who is now eight years old, to obtain custody of her from her present custodian, a former classmate of the child's grandmother, to whom the mother's parents had voluntarily, but not formally, entrusted the child just after her birth, with the acquiescence of the mother, then 15 years old and unwed, the Family Court ruled that, although the mother had not surrendered or abandoned the child and was not unfit, the child should remain with her present custodian, but the Appellate Division reversed and awarded custody to the mother. Its order is reversed and the proceeding is remitted to the Family Court for a new hearing. The State may not deprive a natural parent of the custody of a child absent surrender, abandonment, persisting neglect, unfitness or other like extraordinary circumstances, and extraordinary circumstances alone do not justify depriving a natural parent of custody, but, once such circumstances are found, the disposition of custody is controlled by what is in the best interest of the child. In this case, extraordinary circumstances were present, namely, the prolonged separation of mother from child, combined with the mother's lack of an established household of her own, her unwed state, and the attachment of the child to the custodian, and, therefore, inquiry by the court into the best interest of the child was required. However, neither court below examined sufficiently into the qualifications and backgrounds of the mother and custodian to determine the best interest of the child.

Matter of Bennett v Jeffreys, 51 AD2d 544, reversed.

SUMMARY

Appeal from an order of the Appellate Division of the Supreme Court in the Second Judicial Department, entered January 19, 1976, which (1) reversed, on the law and the facts, an order of the Family Court, Westchester County (Matthew F. Coppola, J.), dismissing the petition in a custody proceeding, directing that custody of the child remain with respondent, and granting visitation rights to petitioner, (2) granted the petition, and (3) directed respondent to return custody of the child to petitioner, the natural mother.

POINTS OF COUNSEL

Jerome J. Goldstein, Mount Vernon, for appellant.

356 N.E.2d 277, 387 N.Y.S.2d 821

John T. Hand and *Lawrence S. Kahn,* Mount Vernon, for respondent.
Herbert J. Malach, Law Guardian, New Rochelle, *Marcia Robinson Lowry* and *William J. Toppeta,* New York City, for infant.

OPINION OF THE COURT

Chief Judge Breitel.

Petitioner is the natural mother of Gina Marie Bennett, now an eight-year- old girl. The mother in ***544** this proceeding seeks custody of her daughter from respondent, to whom the child had been entrusted since just after birth. Family Court ruled that, although the mother had not surrendered or abandoned the child and was not unfit, the child should remain with the present custodian, a former schoolmate of the child's grandmother. The Appellate Division reversed, one Justice dissenting, and awarded custody to the mother. Respondent custodian appeals. [1]

The issue is whether the natural mother, who has not surrendered, abandoned, or persistently neglected her child, may, nevertheless, be deprived of the custody of her child because of a prolonged separation from the child for most of its life.

There should be a reversal and a new hearing before the Family Court. The State may not deprive a parent of the custody of a child absent surrender, abandonment, persisting neglect, unfitness or other like extraordinary circumstances. If any of such extraordinary circumstances are present, the disposition of custody is influenced or controlled by what is in the best interest of the child. In the instant case, extraordinary circumstances, namely, the prolonged separation of mother and child for most of the child's life, require inquiry into the best interest of the child. Neither court below examined sufficiently into the qualifications and backgrounds of the mother and the custodian to determine the best interest of the child. Consequently a new hearing should be held.

Some eight years ago, the mother, then 15 years old, unwed, and living with her parents, gave birth to the child. Under pressure from her mother, she reluctantly acquiesced in the transfer of the newborn infant to an older woman, Mrs. Jeffreys, a former classmate of the child's grandmother. The quality and quantity of the mother's later contacts with the child were disputed. The Family Court found, however, that there was no statutory surrender or abandonment. Pointedly, the Family Court found that the mother was not unfit. The Appellate Division agreed with this finding.

There was evidence that Mrs. Jeffreys intended to adopt the child at an early date. She testified, however, that she could not afford to do so and admitted that she never took formal steps to adopt. ***545**

The natural mother is now 23 and will soon graduate from college. She still lives with her family, in a private home with quarters available for herself and the child. The attitude of the mother's parents, however, is changed and they are now anxious that their daughter keep her child.

Mrs. Jeffreys, on the other hand, is now separated from her husband, is employed as a domestic and, on occasion, has kept the child in a motel. It is significant that Mrs. Jeffreys once said that she was willing to surrender the child to the parent upon demand when the child reached the age of 12 or 13 years.

At the outset, it is emphasized that not involved is an attempted revocation of a voluntary surrender to an agency or private individual for adoption (see Social Services Law, § 383, subd 5; *People ex rel. Scarpetta v Spence-Chapin Adoption Serv.*, 28 NY2d 185, cert den 404 US 805; Domestic Relations Law, § 115-b, subd 3, par [d], cl [v]). Nor is abandonment involved (see, e.g., *Matter of Malik M.,* 40 NY2d 840). Nor does the proceeding involve an attempted permanent termination of custody (Family Ct Act, § 614, subd 1; § 631; *Matter of Anonymous [St. Christopher's Home],* 40 NY2d 96; *Matter of Orlando F.,* 40 NY2d 103; *Matter of Ray A. M.,* 37 NY2d 619). Nor is there involved the temporary placement into foster care by an authorized agency which is obliged to conduct an investigation and to determine the qualification of foster parents before placement of a child in need of such care (see Social Services Law, § 383, subds 1-3; *Matter of Jewish Child Care Assn. of N. Y. [Sanders],* 5 NY2d 222, 224-225; *State of New York ex rel. Wallace v Lhotan* 51 AD2d 252, app dsmd 39 NY2d 743).

Instead, this proceeding was brought by an unwed mother to obtain custody of her daughter from a custodian to whom the child had been voluntarily, although not formally, entrusted by the mother's parents when the mother was only 15 years old. Thus, as an unsupervised private placement, no statute is directly applicable, and the analysis must proceed from common-law principles.

Absent extraordinary circumstances, narrowly categorized, it is not within the power of a court, or, by delegation of the Legislature or court, a social agency, to make significant decisions concerning the custody of children, merely because it could make a better decision or disposition. The State is ***546** *parens patriae* and always has been, but it has not displaced the parent in right or responsibility. Indeed, the courts and the law would, under existing constitutional principles, be powerless to supplant parents except for grievous cause or necessity (see *Stanley v Illinois*, 405 US 645, 651). Examples of cause or necessity permitting displacement of or intrusion on parental control would be fault or omission by the parent seriously affecting the welfare of a child, the preservation of the child's freedom from serious physical harm, illness or death, or the child's right to an education, and the like (cf., e.g., *Wisconsin v Yoder*, 406 US 205, 213-215; *Pierce v Society of Sisters*, 268 US 510, 535).

The parent has a “right” to rear its child, and the child has a “right” to be reared by its parent. However, there are exceptions created by extraordinary circumstances, illustratively, surrender, abandonment, persisting neglect, unfitness, and unfortunate or involuntary disruption of custody over an extended period of time. It is these exceptions which have engendered confusion, sometimes in thought but most often only in language.

The day is long past in this State, if it had ever been, when the right of a parent to the custody of his or her child, where the extraordinary circumstances are present, would be enforced inexorably, contrary to the best interest of the child, on the theory solely of an absolute legal right. Instead, in the extraordinary circumstance, when there is a conflict, the best interest of the child has always been regarded as superior to the right of parental custody. Indeed, analysis of the cases reveals a shifting of emphasis rather than a remaking of substance. This shifting reflects more the modern principle that a child is a person, and not a subperson over whom the parent has an absolute possessory interest. A child has rights too, some of which are of a constitutional magnitude (cf. *Goss v Lopez*, 419 US 565, 574; *Matter of Winship*, 397 US 358, 365; *Tinker v Des Moines School Dist.*, 393 US 503, 506; *Matter of Gault*, 387 US 1, 47).

Earlier cases, such as *People ex rel. Kropp v Shepsky* (305 NY 465, 468-469) and *People ex rel. Portnoy v Strasser* (303 NY 539, 542), emphasized the right of the parent, superior to all others, to the care and custody of the child. This right could be dissolved only by abandonment, surrender, or unfitness. Of course, even in these earlier cases, it was recognized that parental custody is lost or denied not as a moral sanction ***547** for parental failure, but because “the child's welfare compels awarding its custody to the nonparent” *(People ex rel. Kropp v Shepsky*, 305 NY 465, 469, supra.;).

Although always recognizing the parent's custodial rights, the concern in the later cases, given the extraordinary circumstances, was consciously with the best interest of the child. Thus, in *People ex rel. Anonymous v Anonymous* (10 NY2d 332, 335), in acknowledging the “ 'primacy of parental rights' ”, the court pointed out that “it has never been held or suggested that the child's welfare may ever be forgotten or disregarded” (10 NY2d, at p 335). And in *People ex rel. Scarpetta v Spence- Chapin Adoption Serv.* (28 NY2d 185, supra.;), the ultimate consideration, again given extraordinary circumstances, was the best interest of the child (28 NY2d, at pp 192, 193, n 10). Thus, the court held “that the record before us supports the finding by the courts below that the surrender was improvident and that the child's best interests-- moral and temporal--will be best served by its return to the natural mother” (p 194).

Finally, in *Matter of Spence-Chapin Adoption Serv. v Polk* (29 NY2d 196, 204), the court rejected any notion of absolute parental rights. The court restated the abiding principle that the child's rights and interests are “paramount” and are not subordinated to the right of parental custody, as important as that right is (p 204). Indeed, and this is key, the rights of the parent and the child are ordinarily compatible, for “the generally accepted view [is] that a child's best interest is that it be raised by its parent unless the parent is disqualified by gross misconduct” (p 204).

Recently enacted statute law, applicable to related areas of child custody such as adoption and permanent neglect proceedings, has explicitly required the courts to base custody decisions solely upon the best interest of the child (Social Services Law, § 383, subd 5; Domestic Relations Law, § 115-b, subd 3, par [d], cl [v]; Family Ct Act, § 614, subd 1, par [e]; § 631; see *Matter of Anonymous [St. Christopher's Home]*, 40 NY2d 96, supra.;; *Matter of Orlando F.*, 40 NY2d 103, supra.;; *Matter of Ray A. M.*, 37 NY2d 619, 621, supra.;; cf. *Lo Presti v Lo Presti*, 40 NY2d 522). Under these statutes, there is no presumption that the best interest of the child will be promoted by any particular custodial disposition. Only to this limited extent is there a departure from the pre-existing ***548** decisional rule, which never gave more than rebuttable presumptive status, however strongly, to the parent's "right".

Such legislative changes conform, of course, to constitutional limitations. Their purpose, because they involve presumptions, or their negation, is only to implement judicial disposition of evidentiary matters in reconciling the "rights of parents" with the "rights of children" in custody dispositions.

But neither decisional rule nor statute can displace a fit parent because someone else could do a "better job" of raising the child in the view of the court (or the Legislature), so long as the parent or parents have not forfeited their "rights" by surrender, abandonment, unfitness, persisting neglect or other extraordinary circumstance. These "rights" are not so much "rights", but responsibilities which reflect the view, noted earlier, that, except when disqualified or displaced by extraordinary circumstances, parents are generally best qualified to care for their own children and therefore entitled to do so *(Matter of Spence-Chapin Adoption Serv. v Polk*, 29 NY2d 196, 204, supra.;).

Indeed, as said earlier, the courts and the law would, under existing constitutional principles, be powerless to supplant parents except for grievous cause or necessity (see *Stanley v Illinois*, 405 US 645, 651, supra.;, in which the principle is plainly stated and stressed as more significant than other essential constitutional rights).

But where there is warrant to consider displacement of the parent, a determination that extraordinary circumstances exist is only the beginning, not the end, of judicial inquiry. Extraordinary circumstances alone do not justify depriving a natural parent of the custody of a child. Instead, once extraordinary circumstances are found, the court must then make the disposition that is in the best interest of the child.

Although the extraordinary circumstances trigger the "best interests of the child" test, this must not mean that parental rights or responsibilities may be relegated to a parity with all the other surrounding circumstances in the analysis of what is best for the child. So, for one example only, while it is true that disruption of custody over an extended period of time is the touchstone in many custody cases, where it is voluntary the test is met more easily but where it is involuntary the test is met only with great difficulty, for evident reasons of humanity and policy. ***549**

The child's "best interest" is not controlled by whether the natural parent or the nonparent would make a "better" parent, or by whether the parent or the nonparent would afford the child a "better" background or superior creature comforts. Nor is the child's best interest controlled alone by comparing the depth of love and affection between the child and those who vie for its custody. Instead, in ascertaining the child's best interest, the court is guided by principles which reflect a "considered social judgment in this society respecting the family and parenthood" *(Matter of Spence-Chapin Adoption Serv. v Polk*, 29 NY2d 196, 204, supra.;). These principles do not, however, dictate that the child's custody be routinely awarded to the natural parent (see *Matter of Benitez v Llano*, 39 NY2d 758, 759).

Matter of Benitez v Llano is a particularly good example. In *Benitez*, there was no termination of the parental right to custody and no finding of parental unfitness or abandonment; nevertheless, the court, acting in the best interest of the child, ruled that the child should remain in the custody of a second cousin. This was because of the extended period of the nonparental custody, the attachment of the child to the custodian, and the child's imminent attainment of majority.

To recapitulate: intervention by the State in the right and responsibility of a natural parent to custody of her or his child is warranted if there is first a judicial finding of surrender, abandonment, unfitness, persistent neglect, unfortunate or involuntary extended disruption of custody, or other equivalent but rare extraordinary circumstance which would drastically affect the welfare of the child. It is only on such a premise that the courts may then proceed to inquire into the best interest of the child and to order a custodial disposition on that ground.

In custody matters parties and courts may be very dependent on the auxiliary services of psychiatrists, psychologists, and trained social workers. This is good. But it may be an evil when the dependence is too obsequious or routine or the experts too casual. Particularly important is this caution where one or both parties may not have the means to retain their own experts and where publicly compensated experts or experts compensated by only one side have uncurbed leave to express opinions which may be subjective or are not narrowly controlled by the underlying facts.

The court's determination may be influenced by whether ***550** the child is in the present custody of the parent or the nonparent (see *People ex rel. Grament v Free Synagogue Child Adoption Committee*, 194 Misc 332, 337 [Botein, J.]). Changes in conditions which affect the relative desirability of custodians, even when the contest is between two natural parents, are not to be accorded significance unless the advantages of changing custody outweigh the essential principle of continued and stable custody of children (cf. *Matter of Ebert v Ebert*, 38 NY2d 700, 703-704; *Obey v Degling*, 37 NY2d 768, 770; *Dintruff v McGreevy*, 34 NY2d 887, 888).

Moreover, the child may be so long in the custody of the nonparent that, even though there has been no abandonment or persisting neglect by the parent, the psychological trauma of removal is grave enough to threaten destruction of the child. Of course, such a situation would offer no opportunity for the court, under the guise of determining the best interest of the child, to weigh the material advantages offered by the adverse parties. As noted earlier, such considerations do not determine the best interest of the child (see *Matter of Gomez v Lozado*, 40 NY2d 839, decided herewith, involving a motherless child in the custody of its grandmother for many years and separated from its father for still more years).

Before applying these principles to this case, a factor should be mentioned which, although not here present, often complicates custody dispositions. The resolution of cases must not provide incentives for those likely to take the law into their own hands. Thus, those who obtain custody of children unlawfully, particularly by kidnapping, violence, or flight from the jurisdiction of the courts, must be deterred. Society may not reward, except at its peril, the lawless because the passage of time has made correction inexpedient. Yet, even then, circumstances may require that, in the best interest of the child, the unlawful acts be blinked (see *Matter of Lang v Lang*, 9 AD2d 401, 408-410, affd 7 NY2d 1029).

In this case, there were extraordinary circumstances present, namely, the protracted separation of mother from child, combined with the mother's lack of an established household of her own, her unwed state, and the attachment of the child to the custodian. Thus, application of the principles discussed required an examination by the court into the best interest of the child.

In reaching its conclusion that the child should remain with the nonparent custodian, the Family Court relied primarily ***551** upon the seven-year period of custody by the nonparent and evidently on the related testimony of a psychologist. The court did not, however, adequately examine into the nonparent custodian's qualifications and background. Also, the court apparently failed to consider the fact that, absent a finding of abandonment or neglect by the mother, or her consent, the nonparent cannot adopt the child (see *Matter of Anonymous [St. Christopher's Home]*, 40 NY2d 96, 101-102, supra.;). Family Court's disposition, if sustained, would therefore have left the child in legal limbo, her status indefinite until the attainment of her majority. For a single example, a question could arise as to whose consent, the parent's or the nonparent custodian's, would be necessary for the child to marry while underage (see Domestic Relations Law, § 15, subd 2 [consent of “parent” or “guardian” required]). A similar question could arise with respect to many situations affecting employment and entry into occupations, an adoption, and any other matters requiring the consent of a parent or legal guardian (e.g., General Obligations Law, § 3-105, subd 2, par c; Education Law, § 3230, subd 3, par b; Domestic Relations Law, § 111, subds 2-3).

On the other hand, the Appellate Division, in awarding custody to the mother, too automatically applied the primary principle that a parent is entitled to the custody of the child. This was not enough if there were extraordinary circumstances, as indeed there were. Other than to agree with Family Court that she was not “unfit”, the court did not pursue a further analysis. Most important, no psychological or other background examination of the mother had ever been obtained. There was, therefore, no consideration of whether the mother is an adequate parent, in capacity, motivation, and efficacious planning. Nevertheless, the Appellate Division determination may well be right.

Thus, a new hearing is required because the Family Court did not examine enough into the qualifications and background of the long-time custodian, and the Appellate Division did not require further examination into the qualifications and background of the mother. Each court was excessive in applying abstract principles, a failing, however important those principles are.

At the cost of some repetition, perhaps unnecessary, it should be said, given the extraordinary circumstances present in this case, in determining the best interest of the child, the age of the child, and the fact and length of custody by the ***552** nonparent custodian are significant. Standing alone, these factors may not be sufficient to outweigh the mother's “right” to custody. However, taken together with the testimony of the psychologist that return to her mother would be “very traumatic for the child”, the relatively lengthy period of nonparent custody casts the matter in sufficient doubt with respect to the best interest of the child to require a new hearing. At this hearing, the mother's adequacy may be explored and positively established, and if so, in connection with the parent's past visiting it might well weight the balance in her favor. Then too, the circumstances and environment of the custodian, the stability of her household, her inability to adopt, her age, and any other circumstances bearing upon the fitness or adequacy of a child's custodian over the whole period of childhood, are all relevant.

In all of this troublesome and troubled area there is a fundamental principle. Neither law, nor policy, nor the tenets of our society would allow a child to be separated by officials of the State from its parent unless the circumstances are compelling. Neither the lawyers nor Judges in the judicial system nor the experts in psychology or social welfare may displace the primary responsibility of child-raising that naturally and legally falls to those who conceive and bear children. Again, this is not so much because it is their “right”, but because it is their responsibility. The nature of human relationships suggests overall the natural workings of the child-rearing process as the most desirable alternative. But absolute generalizations do not fulfill themselves and multifold exceptions give rise to cases where the natural workings of the process fail, not so much because a legal right has been lost, but because the best interest of the child dictates a finding of failure. [2]

Accordingly, the order of the Appellate Division should be ***553** reversed, without costs, and the proceeding remitted to Family Court for a new hearing.

Fuchsberg, J.

(Concurring).

I welcome the express recognition the court today gives to the concept that, under evolving child custody law in New York, circumstances other than the statutory and traditional ones of abandonment, surrender, permanent neglect and unfitness may form the basis for termination of a biological parent-child relationship, and I agree with the result it reaches. However, in concurring, the strength of my conviction that even greater movement in this area of the law is long overdue requires me to indicate the nature of some of my reservations.

Security, continuity and “long-term stability” *(Matter of Ebert v Ebert,* 38 NY2d 700, 704) in an on-going custodial relationship, whether maintained with a natural parent or a third party, are vital to the successful personality development of a child (see Foster, Adoption and Child Custody: Best Interests of the Child?, 22 Buffalo L Rev 1, 12-13, and authorities cited therein). Indeed, that is one of the soundest justifications for the priority which our society accords natural parents when the continuance of their status as parents is under legal attack.

The same considerations, however, it seems to me, dictate that, where a natural parent has affirmatively brought about or acquiesced in the creation of a secure, stable and continuing parent-child relationship with a third party who has become the psychological parent, [1] there comes a point where the "rebuttable presumption" which, absent such a change, is employed to favor the natural parent, disappears, as evidentiary presumptions usually do in the face of facts. Accordingly, when that point is reached, the determination of whether the original parental relationship has terminated should proceed without such bolstering of the natural parent's position vis-à-vis that of the child, the custodial parent or any other proper parties in interest. Generally speaking, when displaced by a state of facts contraindicating their further utility in a fact-finding setting, presumptions can only get in the way of substance, and, as a practical matter, when that happens, the ***554** less they are relied upon the better. I would, therefore, that we had spelled out an evidentiary balance consistent with these principles for application in custody litigation, always bearing in mind that each custody case, dealing as it does with emotion-laden and highly sensitive human relationships, is unique. [2]

Further, I do not agree that inquiry into the best interests of a child must await a determination that, because of surrender, abandonment, neglect or "extraordinary" circumstances, a natural parent's "rights" to a child are at an end. Willynilly, concern for the best interests of the child must play a central and unavoidable role in the resolution of such questions (cf. *Matter of Gomez v Lozado*, 40 NY2d 839 [decided herewith]).

Moreover, even under prior law, when only a finding of abandonment, surrender or neglect could defeat the presumption in favor of natural parents, the best interests of the child were involved from the very outset. Unfitness, for instance, cannot be determined abstractly or in isolation, but only relative to the psychological needs of a particular child, given its age, its mental health, its physical well-being and the like. And the very same conduct which constitutes clear neglect towards one child might not be so at all with regard to another child whose level of independence and emotional requirements are different. It follows that evidence offered to show that the State must intervene in a natural parent-child relationship is, by its very nature, evidence as to the best interests of the child. In short, termination or intervention, on the one hand, and best interests, on the other, are not discrete matters. Pragmatically, they are closely interrelated. Proof of one overlaps the other and I do not believe they should be considered separately. ***555**

I would add too that I am not completely convinced that there was not a sufficient basis for the decision of the Trial Judge, despite the unfortunate limitation on resources available to the Family Court and, often, the parties who appear before it (see Gordon, Terminal Placements of Children and Permanent Termination of Parental Rights: The New York Permanent Neglect Statute, 46 St John's L Rev 215, 256, n 204, and citations therein). Among other things, the trial court here fully heard out both Mrs. Jeffreys and Ms. Bennett, conducted an *in camera* interview with the child following which he concluded that she was a "happy, well-adjusted young girl" who "was most adamant about the fact that she wished to continue residing with Mrs. Jeffreys", and, in aid of his determination, sought and had the benefit of a formal psychological study. Nevertheless, since painstaking fact finding is so far superior to presumptions and assumptions, and, therefore, should be encouraged, I join in the decision to remit this case for further information-gathering, noting, in doing so, that it is clear that it should not be controlling that Ms. Bennett, the natural mother, because she is now pursuing collegiate studies may at some time in the future be more likely to afford greater creature comforts for the child than is Mrs. Jeffreys, whose modest position on the vocational social scale did not prevent her from undertaking to act as surrogate mother and thus to form psychological bonds between the child and herself. And, needless to say, any profession by Mrs. Jeffreys that she would have been willing to return the child to her biological mother when she was older *if* it were in the best interests of the child for her to do so would be an evidence of altruistic maternal concern that would win the approval of every sound practitioner of child psychiatry from King Solomon on.

Judges Jasen, Gabrielli, Jones, Wachtler and Cooke concur with Chief Judge Breitel; Judge Fuchsberg concurs in result in a separate opinion.
Order reversed, etc. ***556**

Footnotes

1 The child is currently with her mother and will remain there pending final determination of this litigation, a stay of the Appellate Division order having been denied by that court.

2 Insofar as the concurring opinion is concerned only the following comments are perhaps necessary. The court has considered the reservations and rejects them. Particularly rejected is the notion, if that it be, that third-party custodians may acquire some sort of squatter's rights in another's child. Third-party custodians acquire “rights”--really the opportunity to be heard-- only derivatively by virtue of the child's best interests being considered, a consideration which arises only after, as the cases have always held, the parent's rights and responsibilities have been displaced. Lastly, the problem is substantive. It is not a matter of evidentiary rules or procedural burdens of proof or going forward. It would not be good for new confusions to be introduced in the analysis of custody cases, each of which, like all cases, may be unique, but still require resolution by the application of universals.

1 (Goldstein, Freud and Solnit, Beyond the Best Interests of the Child [1973]; Erikson, Growth and Crisis of the “Healthy Personality” in Personality, in Nature, Society and Culture [1955], 185-225; Bowley, Child Care and Growth of Love [1953]; Freud, Some Remarks on Infant Observation, 8 Psychoanalytic Study of the Child.)

2 Commentators point out that presumptions and the burden to rebut them should be allocated “on the basis of pragmatic considerations of fairness, convenience, and policy” (James, Burdens of Proof, 47 Va L Rev 51, 60). Thus, where the burden of proof is allocated on policy grounds, it is most often done in order to “handicap” a party whose cause is disfavored (at p 61). That was the historical basis for casting the entire burden of rebutting the presumption in favor of natural parents on third parties in custody proceedings, the resulting substantive effect varying with the extent to which the “handicap”, combined with other evidentiary strictures, rendered the nonparent's case difficult to maintain. In those jurisdictions where that policy was fully developed, it produced essentially the same results as were obtained under the old theory that children were the chattels of their parents (see Note, Alternatives to “Parental Right” in Child Custody Disputes Involving Third Parties, 73 Yale LJ 151, 154, n 18, and accompanying text).

20 A.D.3d 47, 794 N.Y.S.2d 516, 2005 N.Y. Slip Op. 03352

In the Matter of Michael A. Guinta et al., Appellants
v
Bridget S. Doxtator et al., Respondents

Supreme Court, Appellate Division, Fourth Department, New York
April 29, 2005

CITE TITLE AS: Matter of Guinta v Doxtator

SUMMARY

Appeal from an order of the Family Court, Onondaga County (David G. Klim, J.), entered January 22, 2004 in a proceeding pursuant to Family Court Act article 6. The order denied and dismissed the petition to modify a prior joint custody order by granting petitioners sole custody and to end overnight visitation with respondents, and granted respondents' cross petition for sole custody.

HEADNOTE

Parent, Child and Family
Custody
Modification—Extraordinary Circumstances Test in Dispute between Parents and Nonparents

Family Court, having awarded custody of the subject child jointly to petitioners, the child's paternal aunt and uncle, and respondents, the birth parents, based on the finding that extraordinary circumstances existed due to respondents' history of drug and alcohol abuse and severe criminal problems, erred in applying the extraordinary circumstances test a second time in a modification proceeding that resulted in the award of sole custody to respondents without a determination of whether there had been a change of circumstances or whether the change in custody was in the child's best interests. In a custody dispute between parents and nonparents, once the preferred status of the birth parents has been lost by a judicial determination of extraordinary circumstances, the appropriate standard in addressing the possible modification of a prior custody order is whether there has been a change of circumstances requiring a modification of custody to ensure the best interests of the child. Where there has been a prior judicial determination of extraordinary circumstances that warranted an award of custody to a nonparent, in subsequent proceedings seeking modification of a prior custody order it is appropriate that the best interests of the child come first.

TOTAL CLIENT-SERVICE LIBRARY REFERENCES

Am Jur 2d, Parent and Child §§ 26, 27, 32, 33, 36, 37.

Carmody-Wait 2d, Child Custody and Visitation in Matrimonial Actions §§ 118A:87, 118A:88, 118A:91.

4 Law and the Family New York (2d ed) § 1:19; 4A Law and the Family New York (2d ed) §§ 1:139/N1:144.

NY Jur 2d, Domestic Relations §§ 349, 355, 382–384, 395, 506, 510.

ANNOTATION REFERENCE

See ALR Index under Custody and Support of Children. ***48**

FIND SIMILAR CASES ON WESTLAW

Database: NY-ORCS

Query: custody /6 modify /p extraordinary /2 circumstance

APPEARANCES OF COUNSEL

J. Scott Porter, Syracuse, for appellants.
Frank H. Hiscock Legal Aid Society, Syracuse (*Robert P. Rickert* of counsel), for respondents.
Daniel F. Mathews, III, Law Guardian, Syracuse, for infant.

OPINION OF THE COURT

Pine, J.

This appeal requires us to determine whether, in a custody dispute between parents and nonparents, a court that has previously found extraordinary circumstances and awarded joint custody to the parties may, upon petitions from both parties seeking sole custody based on a change of circumstances and the best interests of the child, revisit the issue of extraordinary circumstances, find that they no longer exist, and award custody of the child to the parents as a matter of right without consideration of the child's best interests. No reported New York case has addressed that issue. For the reasons that follow, we hold that, under such circumstances, the court may not revisit the issue of extraordinary circumstances.

I

Petitioners, the paternal aunt and uncle of now six-year-old Dayona D., appeal from an order that "denied and dismissed" their petition seeking to modify a prior order of custody and granted respondents' cross petition seeking to modify that prior order. Family Court had previously awarded custody of Dayona jointly to petitioners and respondents, the birth parents, with primary physical residence to petitioners and liberal visitation to respondents. The court issued that prior order based on a finding that extraordinary circumstances existed and that such arrangement was in the best interests of Dayona (*see generally Matter of Bennett v Jeffreys*, 40 NY2d 543 [1976]). Thereafter petitioners and respondents both sought to modify that order and obtain ****2** sole custody**,** alleging only that there had been a change of circumstances. The court, sua sponte, determined that extraordinary circumstances no longer existed and awarded sole custody to respondents. That part of the order directingtransfer ***49** of sole custody to respondents on September 1, 2004 was stayed by order of this Court.[*]

On this appeal, petitioners contend that the court erred in applying the extraordinary circumstances test in a modification proceeding and that it is in Dayona's best interests for petitioners to have sole custody. Respondents contend that the court had discretion to apply the extraordinary circumstances test and that we should not undertake a best interests analysis. For the reasons that follow, we conclude that the court erred in applying the extraordinary circumstances test a second time in a modification proceeding and that the proper standard is whether either petitioners or respondents established "a change [of] circumstances which reflects a real need for change to ensure the best interest[s] of the child" (*Matter of Irwin v Neyland*, 213 AD2d 773, 773 [1995]).

II

Dayona was born on January 16, 1999 and, shortly thereafter, respondents asked Dayona's paternal grandmother to care for the child while respondent Bridget S. Doxtator served a jail sentence. Indeed, both respondents have a lengthy history of substance abuse and criminal behavior. By stipulated order, the grandmother and respondents were awarded joint custody of Dayona. Subsequently, the grandmother was awarded sole custody by a default order, but petitioners took over the care of the

child. In December 2000, respondents petitioned and petitioners cross-petitioned for custody of Dayona. Family Court found that extraordinary circumstances existed, noting that respondents had, at one point, gone one year without any contact with Dayona, thereby abdicating all parental responsibilities to petitioners. The court further found that the "pattern of neglect and abandonment" of respondents was "obviously attributable to their persistent criminal behavior and their underlying problems with drugs and alcohol." Despite respondents' then 10-month period of sobriety and lawful behavior, the court concluded that such a praiseworthy achievement had to be balanced with respondents' "almost 20 year history of drug and alcohol abuse and severe criminal problems." The court granted respondents liberal visitation, including alternate weekends. That order was affirmed by this Court on December 30, 2002 (*Matter of Doxtator v Darling*, 300 AD2d 1075 [2002]). ***50**

In April 2003, petitioners filed a petition seeking sole custody of Dayona and suspension of future visitation between respondents and the child based on an alleged change of circumstances. Petitioners alleged an inability to communicate with respondents; a lack of cooperation from respondents; a failure by respondents to focus on Dayona's needs; a failure by respondents to become actively involved in Dayona's development; and a failure by respondents to provide a suitable and stable home environment. Specifically, petitioners expressed concern over conditions in respondents' home that included the violent behavior of another child living in the home.

Respondents cross-petitioned for sole custody, alleging that there had been a significant change of circumstances in that petitioners failed to acknowledge respondents' rights, thwarted respondents' efforts and had attempted to change Dayona's name. Respondents further alleged ****3** that they were able to provide a stable home and that it would be in the best interests of Dayona to be with her parents and siblings.

Following six days of testimony, the court determined that, because extraordinary circumstances no longer existed, Dayona must be returned to respondents, her birth parents. The court did not determine whether there had been a change of circumstances nor did it consider the child's best interests, the standard both petitioners and respondents had attempted to satisfy.

III

On appeal, petitioners contend that the court is precluded from revisiting the issue of extraordinary circumstances where, as here, there has been a prior judicial determination that such circumstances existed. Petitioners rely on language in *Matter of Gary G. v Roslyn P.* (248 AD2d 980 [1998]). In that case we wrote that a parent has a superior right to custody and thus a nonparent seeking custody has a burden of proving that extraordinary circumstances exist. We noted that "[t]he foregoing rule applies even if there is an existing order of custody concerning that child unless there is a prior determination that extraordinary circumstances exist" (*id.* at 981; *see Matter of Michael G.B. v Angela L.B.*, 219 AD2d 289, 292 [1996]). That case, however, did not involve a reassessment of extraordinary circumstances. Rather, we held that, in the absence of a prior determination of extraordinary circumstances, "the record [was] adequate to enable us to apply the 'extraordinary circumstances' test, and we reach[ed] that issue in the interest of judicialeconomy" ***51** (*Gary G.*, 248 AD2d at 981). In *Matter of Ash v Jones* (281 AD2d 930, 930 [2001]), we noted that the court had previously determined that extraordinary circumstances exist and held that "a change in custody is warranted only if it is in the best interests of the child." While that case may imply that reassessment of extraordinary circumstances is not required, it does not address whether a court is precluded from engaging in such a reassessment.

Here, as previously noted, we are called upon to determine whether a court in a proceeding to modify a prior custody order may revisit the issue of extraordinary circumstances where there has been a prior judicial determination that extraordinary circumstances exist, thereby possibly restoring the birth parents to their preferred status, or whether, after a court has made a judicial determination that extraordinary circumstances warranted an award of custody to a nonparent, the test is whether there has been a change of circumstances requiring a change of custody to ensure the best interests of the child. We conclude that, once the preferred status of the birth parent under *Bennett* (40 NY2d 543 [1976]) has been lost by a judicial determination of extraordinary circumstances, the appropriate standard in addressing the possible modification of the prior order is whether there has been a change of circumstances requiring a modification of custody to ensure the best interests of the child.

IV

Like most states, New York recognizes " 'that a parent has a right to rear his [or her] child superior to that of a nonparent' " (*Matter of Cote v Brown*, 299 AD2d 876, 877 [2002], quoting *People ex rel. Anderson v Mott*, 199 AD2d 961, 961 [1993]; *see Bennett*, 40 NY2d at 546-548; *Gary G.*, 248 AD2d at 981). That "parental preference" is one of two "foundational policies in child custody law" (*C.R.B. v C.C.*, 959 P2d 375, 379 [Alaska 1998]; *see* Taylor, *C.R.B. v. C.C. and B.C.: Protecting Children's Need for Stability in Custody Modification Disputes Between Biological Parents and Third Parties*, 32 Akron L Rev 371, 372 [1999]), and it is applied to avoid "totalitarian social engineering" that could occur if nonparents could seek an initial award of custody merely by showing that they could better care for a child (*C.R.B.*, 959 P2d at 380). The other foundational policy is the child's need for stability (*see id.* at 379; Taylor, 32 Akron L Rev at 372). ****4**

Policies differ among the states with respect to criteria for modifying custody orders. Numerous states adhere to theprinciple ***52** that the parental preference no longer applies where there has been a prior judicial determination applying the parental preference and nevertheless awarding custody to a nonparent (*see Ex parte McLendon*, 455 So 2d 863, 865 [Ala 1984]; *C.R.B.*, 959 P2d at 380-381; *Jones v Strauser*, 266 Ark 441, 443, 585 SW2d 931, 932 [1979]; *Willis v Duck*, 733 So 2d 707, 713 [La 1999]; *Barnett v Oathout*, 883 So 2d 563, 567-568 [Miss 2004]; *Searcy v Seedorff*, 8 SW3d 113, 117 [Mo 1999]; *Bivens v Cottle*, 120 NC App 467, 469, 462 SE2d 829, 831 [1995], *appeal dismissed* 346 NC 270, 485 SE2d 296 [1997]; *In re Whiting*, 70 Ohio App 3d 183, 186-187, 590 NE2d 859, 861-862 [1990]; *Johnson v Johnson*, 681 P2d 78, 80-81 [Okla 1984]; *Lear v Lear*, 124 Or App 524, 527, 863 P2d 482, 484 [1993]; *Blair v Badenhope*, 77 SW3d 137, 148 [Tenn 2002]; *In Interest of Ferguson*, 927 SW2d 766, 768-769 [Tex 1996]; *Dyer v Howell*, 212 Va 453, 455-456, 184 SE2d 789, 791-792 [1971]).

Other states apply the parental preference in all custody proceedings, whether they are initial proceedings or proceedings to modify prior orders (*see e.g. Perez v Perez*, 212 Conn 63, 77-79, 561 A2d 907, 915 [1989]; *Ward v Ward*, 874 So 2d 634, 636-638 [Fla 2004]; *In re Custody of Walters*, 174 Ill App 3d 949, 952, 529 NE2d 308, 310-311 [1988]; *Hunt v Whalen*, 565 NE2d 1109, 1110-1111 [Ind 1991]; *Matter of Guardianship of Williams*, 254 Kan 814, 828, 869 P2d 661, 670 [1994]; *Heltzel v Heltzel*, 248 Mich App 1, 23-24, 638 NW2d 123, 136 [2001], *lv denied* 465 Mich 942, 639 NW2d 256 [2001]).

Finally, a small minority of states applies a best interests test in all circumstances, including custody cases between parents and nonparents and regardless of whether an initial determination or a modification of custody is sought (*see e.g. Matter of Custody of C.C.R.S.*, 892 P2d 246, 256-258 [Colo 1995], *cert denied* 516 US 837 [1995]; *Ross v Hoffman*, 280 Md 172, 178-179, 372 A2d 582, 587 [1977]).

In states that use the parental preference for initial determinations, but use a change of circumstances/best interests test for modification of a prior order, there are two lines of cases concerning the effect a prior voluntary surrender or consent order has on the parental preference. One line of cases holds that the parental preference will not apply even if custody was obtained by a nonparent by a consent order or voluntary placement (*see e.g. S.B.L. v E.S.*, 865 So 2d 1214, 1219 [Ala 2003]; *Jones*, 266 Ark at 443, 585 SW2d at 932; *Barnett*, 883 So 2d at 567-568; ***53** *Price v Howard*, 346 NC 68, 79-82, 484 SE2d 528, 535-536 [1997]; *Blair*, 77 SW3d at 146-148). The other line of cases, however, holds that the parental preference applies in cases where the parent voluntarily relinquished custody (*see e.g. Matter of Burney*, 259 NW2d 322, 324 [Iowa 1977]; *Willis*, 733 So 2d at 713; *Custody of a Minor*, 389 Mass 755, 768, 452 NE2d 483, 491 [1983]).

The theory in continuing the parental preference after a voluntary placement is that courts should encourage parents to seek help if and when necessary (*see In re Guardianship of L.L.*, 745 NE2d 222, 233 [Ind 2001]). In *Barnett v Oathout*, the Supreme Court of Mississippi addressed this issue and wrote:

> " 'Because stability in the lives of children is of such great importance, we have carefully weighed the impact of establishing an exception, or a new standard, for such instances. While we do not want to discourage the voluntary relinquishment of custody in dire circumstances where a parent, for whatever reason, is truly unable to provide the care and stability a child needs, neither do we want to encourage an irresponsible parent to relinquish their child's custody to another for convenience

> sake, and then be able to come back into the child's life years later and simply claim the natural parents' presumption as it stands today' " (883 So 2d at 568, quoting *Grant v Martin*, 757 So 2d 264, 266 [Miss 2000]). ****5**

In New York, the parental preference applies where there has been a voluntary placement of the child or an order entered upon the consent of the parties (*see Matter of Lewis v Johnson*, 302 AD2d 756, 757 [2003]; *Cote*, 299 AD2d at 877). Indeed, we wrote in *Gary G.* (248 AD2d at 981) that the extraordinary circumstances rule applies "even if there is an existing order of custody concerning [the] child unless there is a prior determination that extraordinary circumstances exist."

In cases such as this, where there was a litigated custody dispute and a prior determination that extraordinary circumstances exist, the two foundational policies in custody litigation collide (*see C.R.B.*, 959 P2d at 379). In *C.R.B.*, the Supreme Court of Alaska found that the child's needs trump the parental preference where the issue is whether a prior order that granted the nonparent custody after a litigated custody dispute should be modified. The court wrote that the application of the parental preference involves "an inevitable sacrifice of children's interests in cases where a nonparent can better serve thoseinterests, ***54** but a parent's custody is not 'clearly detrimental' " (*id.* at 380); however,

> "[o]nce a court has properly transferred custody from a parent to a nonparent, it does no good to apply the [parental preference] doctrine to weaken the substantial change requirement for modification. The proceeding that gave the nonparent custody will have enabled the parent to exercise the parental preference, and achieved the goal that leads us to treat parent-nonparent cases differently from other custody cases. Having once protected the parent's right to custody, at the risk of sacrificing the child's best interests, we should not then sacrifice the child's need for stability in its care and living arrangements by modifying those arrangements more readily than in a parent-parent case" (*id.*; *see Blair*, 77 SW3d at 145).

We find the reasoning in cases such as *C.R.B.*, *Ferguson*, *Blair* and *Willis* to be persuasive. The parental preference applies in New York until extraordinary circumstances are found, but we conclude that in subsequent proceedings seeking modification of a prior custody order it is appropriate that the best interests of the child come first. Stability is a crucial factor in child development that should not be ignored (*see generally* Annotation, *Continuity of Residence as Factor in Contest Between Parent and Nonparent for Custody of Child Who Has Been Residing With Nonparent—Modern Status*, 15 ALR5th 692).

Thus, we conclude that traditional principles concerning the modification of prior custody orders should apply where, as here, there has been a prior judicial determination of extraordinary circumstances. This Court previously has written that " '[a] party seeking a change of custody bears a heavy burden of proof that the change contemplated is in the child's best interests' " (*Matter of Ammann v Ammann*, 209 AD2d 1032, 1033 [1994], quoting *Collins v Collins*, 115 AD2d 979, 979 [1985]). Indeed, "[i]t is well established that alteration of an established custody arrangement will be ordered only upon a showing of a change [of] circumstances which reflects a real need for change to ensure the best interest[s] of the child" (*Irwin*, 213 AD2d at 773; *see Pudlewski v Pudlewski*, 309 AD2d 1296, 1297 [2003]; *Matter of Daniels v Daniels*, 309 AD2d 1174, 1175 [2003]; *see generally Friederwitzer v Friederwitzer*, 55 NY2d 89, 95 [1982]). Where, as here, the existing custody arrangement ***55** was established by a court order entered following a plenary trial, that arrangement is entitled to greater weight than a disposition entered following a stipulation between the parties (*cf. Matter of Carl J.B. v Dorothy T.*, 186 AD2d 736, 737 [1992]). As *Bennett* makes clear, "a determination that extraordinary circumstances exist is only the beginning, not the end, of judicial inquiry. Extraordinary circumstances alone do not justify depriving a natural parent of ****6** the custody of a child. Instead, once extraordinary circumstances are found, the court must then make the disposition that is in the best interest of the child" (*Bennett*, 40 NY2d at 548).

V

The last testimony in this matter was taken well over a year ago, and the parts of the order on appeal requiring counseling for the parties and Dayona and increasing visitation with respondents were not stayed. At the time the testimony ended, the other child in respondents' home whose behavior was of concern to petitioners was awaiting placement for treatment in an institution. Because of the possibility of significant changes of circumstances since the hearing, we decline to apply the appropriate standard ourselves based on the record before us.

Accordingly, we conclude that the order should be reversed, the petition reinstated and the matter remitted to Family Court to determine following a further hearing, if necessary, whether a change of circumstances warrants modification of custody in the best interests of Dayona.

Green, J.P., Scudder, Gorski and Martoche, JJ., concur.

It is hereby ordered that the order so appealed from be and the same hereby is unanimously reversed, on the law, without costs, the petition is reinstated and the matter is remitted to Family Court, Onondaga County, for further proceedings in accordance with the opinion by Pine, J.

FOOTNOTES

Footnotes

* Other portions of the order, providing for increasing overnight visitation by Dayona with respondents, counseling for Dayona, and joint counseling for the four adults, were not stayed.

26 N.Y.3d 440
Court of Appeals of New York.

In the Matter of Ricardo SUAREZ et al., Appellants,
v.
Melissa WILLIAMS et al., Respondents.

Dec. 16, 2015.

Synopsis

Background: Paternal grandparents commenced proceeding seeking primary physical custody of child. The Family Court, Onondaga County, Michele Pirro Bailey, J., granted joint custody to grandparents and father. The Supreme Court, Appellate Division, Centra, J.P., 128 A.D.3d 20, 5 N.Y.S.3d 759, reversed. Grandparents were granted leave to appeal.

[Holding:] The Court of Appeals, Stein, J., held that mother voluntarily relinquished care and control of her child for more than 24 months, even though she had regular contact with him, and thus extraordinary circumstances existed so that grandparents had standing to seek custody of the child based on an extended disruption of mother's custody.

Reversed and remitted.

West Headnotes (11)

[1] **Child Custody** Parties; intervention

Grandparents may demonstrate standing to seek custody based on extraordinary circumstances, where the child has lived with the grandparents for a prolonged period of time, even if the child had contact with, and spent time with, a parent while the child lived with the grandparents. McKinney's DRL § 72(2).

Cases that cite this headnote

[2] **Child Custody** Right of biological parent as to third persons in general

In order for a nonparent to obtain custody as against a parent, the nonparent must prove the existence of extraordinary circumstances, such as surrender, abandonment, persisting neglect, unfitness, and unfortunate or involuntary disruption of custody over an extended period of time, or other like extraordinary circumstances.

1 Cases that cite this headnote

[3] **Child Custody** Right of biological parent as to third persons in general

Child Custody Welfare and best interest of child

If extraordinary circumstances are established such that a nonparent has standing to seek custody against a parent, the court must make an award of custody based on the best interest of the child.

1 Cases that cite this headnote

[4] **Child Custody** Grandparents

The purpose of statutory provision governing grandparent custody is plain, it creates a clear path, or procedural mechanism, for grandparents to obtain standing when seeking custody. McKinney's DRL § 72(2).

Cases that cite this headnote

[5] **Child Custody** Grounds and factors in general

Statutory provision governing grandparent custody does not create new rights for grandparents, but merely clarifies a method by which grandparents may exercise those rights, and defines an alternative type of extraordinary circumstance applicable only to grandparents, specifically, an extended disruption of custody, in view of their special status. McKinney's DRL § 72(2).

Cases that cite this headnote

[6] **Child Custody** Conduct or Status of Child's Parent or Custodian

The quality and quantity of contact between the parent and child are factors to be considered in the context of the totality of the circumstances when determining whether the parent voluntarily relinquished care and control of the child, and whether the child actually resided with the grandparents for the required "prolonged" period of time under statutory provision governing grandparent custody. McKinney's DRL § 72(2).

Cases that cite this headnote

[7] **Child Custody** Right of biological parent as to third persons in general

Persistent neglect, for purposes of determining whether extraordinary circumstances exist for a nonparent to demonstrate standing to seek custody of a child, requires proof that the parent failed either to maintain substantial, repeated and continuous contact with a child or to plan for the child's future. McKinney's Social Services Law § 384–b(7).

Cases that cite this headnote

[8] **Child Custody** Conduct or Status of Child's Parent or Custodian

Statutory provision, allowing a grandparent to seek custody of a child based on an extended disruption of custody, is available for a grandparent even if the parent has had some contact with the child during the requisite 24–month period. McKinney's DRL § 72(2).

Cases that cite this headnote

[9] **Child Custody** Grounds and factors in general

While courts must determine on a case-by-case basis whether the level of contact between a parent and child precludes a finding of extraordinary circumstances under statutory provision governing grandparent custody, it is sufficient to show that the parent has permitted an extended disruption of custody. McKinney's DRL § 72(2)(a).

Cases that cite this headnote

[10] **Child Custody** Conduct or Status of Child's Parent or Custodian

A parent need not relinquish all care and control of the child in order for a grandparent to establish standing to seek custody of the child based on an extended disruption of custody; even if the parent exercises some control over the child, a parent may still, as a general matter, have voluntarily relinquished care and control of the child to the grandparent to the extent that the grandparent is, in essence, acting as a parent with primary physical custody. McKinney's DRL § 72(2).

Cases that cite this headnote

[11] **Child Custody** Conduct or Status of Child's Parent or Custodian

Child Custody Parties; intervention

Mother voluntarily relinquished care and control of her child for more than 24 months, even though she had regular contact with him, and thus extraordinary circumstances existed so that paternal grandparents had standing to seek custody of the child based on an extended disruption of mother's custody; mother signed documents giving grandparents permission to make medical and educational decisions without any time limitation, grandparents made all decisions about the child while keeping mother informed of their decisions, and mother allowed grandparents to raise child for almost ten years during which she assumed role of noncustodial parent. McKinney's DRL § 72(2).

Cases that cite this headnote

Attorneys and Law Firms

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OPINION OF THE COURT

STEIN, J.

[1] ***444** This custody dispute between a child's mother and paternal grandparents concerns the interpretation and application of Domestic Relations Law § 72(2) and this Court's decision in *Matter of Bennett v. Jeffreys*, 40 N.Y.2d 543, 387 N.Y.S.2d 821, 356 N.E.2d 277 (1976). We hold that grandparents may demonstrate standing to seek custody based on extraordinary circumstances where the child has lived with the grandparents for a prolonged period of time, even if the child had contact with, and spent time with, a parent while the child lived with the grandparents. Hence, we reverse and remit to the Appellate Division for consideration of issues raised, but not reached, by that Court.

****619** ***445** I.

The child at issue here (born 2002) lived with his paternal grandparents, beginning when he was less than 10 days old and continuing until he was almost 10 years old. The child's father moved out of state in 2004 and has had visitation since then. The child's mother lived approximately 12 miles from the grandparents for the child's first few years, until the grandparents moved the mother (and her daughters from a previous relationship) into a trailer that the grandparents purchased and situated in a trailer park across the street from their residence, so she would be close to the child. In a 2006 proceeding in which the

grandparents were not involved, the child's parents obtained a consent order awarding the parents joint legal custody, with primary physical custody to the mother. Nevertheless, the reality of the family's situation did not change; the child continued to reside with the grandparents. Also in 2006, the grandparents moved to an adjoining county. Due to the distance between their homes, the mother had less contact with the child until late 2008, when the grandparents again helped her move closer to them. The grandparents evidently kept the mother informed of the child's activities almost daily. In addition, the mother saw the child regularly including, at times, weekly overnight visits and vacations. In 2010, the mother began a relationship with a new boyfriend, and they gradually began making plans to live together. In 2012, after the father sought custody from the mother and a termination of his child support payments to her, [1] she refused to return the child to the grandparents after a visit, relying on the 2006 custody order granting her primary physical custody. At that time, the mother told the grandparents that they had had the child for many years, it was her "turn now," and they could no longer see him.

As a result, the grandparents commenced this proceeding seeking primary physical custody of the child. [2] Following a 10–day hearing, Family Court found that the mother was generally not credible and that "the [g]randparents' version of where the child lived since birth is the substantiated and more accurate representation of reality" (—— Misc.3d ——, ——, 2013 N.Y. Slip Op. 23478, *5, 23 N.Y.S.3d 533, 539 [2013]). The court found that there had been ***446** an extended disruption of custody between the mother and the child, and that the mother voluntarily relinquished care and control of him to the grandparents—through three written documents and through her behavior—and concluded that this amounted to extraordinary circumstances. The court then considered the child's best interest and granted joint custody to the grandparents and the father, with primary physical custody to the grandparents and visitation to each parent.

The Appellate Division reversed and dismissed the grandparents' petition (128 A.D.3d 20, 5 N.Y.S.3d 759 [4th Dept.2015]). Specifically declining to disturb Family Court's credibility determinations, the Appellate Division found the situation to be akin to joint custody, with the grandparents having primary physical custody and the mother having visitation. Nevertheless, the Court held that the grandparents failed to demonstrate extraordinary circumstances, in light of the mother's presence in the child's life, even though he was primarily living with the grandparents. Thus, the Court concluded that the ****620** grandparents lacked standing to seek custody and dismissed their petition. This Court granted the grandparents leave and a stay pending appeal (25 N.Y.3d 1063, 11 N.Y.S.3d 547, 33 N.E.3d 504 [2015]).

II.

[2] **[3]** In the seminal case of *Matter of Bennett v. Jeffreys*, we created a two-prong inquiry for determining whether a nonparent may obtain custody as against a parent (*see* 40 N.Y.2d at 546–548, 387 N.Y.S.2d 821, 356 N.E.2d 277). First, the nonparent must prove the existence of "extraordinary circumstances" such as "surrender, abandonment, persisting neglect, unfitness, and unfortunate or involuntary disruption of custody over an extended period of time" (*id.* at 546, 387 N.Y.S.2d 821, 356 N.E.2d 277), "or other like extraordinary circumstances" (*id.* at 544, 387 N.Y.S.2d 821, 356 N.E.2d 277). If extraordinary circumstances are established such that the non-parent has standing to seek custody, the court must make an award of custody based on the best interest of the child (*see id.* at 548, 387 N.Y.S.2d 821, 356 N.E.2d 277).

Consistent with that case, Domestic Relations Law § 72(2) contains a specific example of extraordinary circumstances. Originally, Domestic Relations Law § 72 addressed only grandparent visitation. However, in recognition of the important role of grandparents and the increasing number of grandparents raising their grandchildren, the legislature amended the statute in 2003 to include a second subdivision, pertaining to custody (*see* L. 2003, ch. 657, § 2; *Matter of* ***447** *Carton v. Grimm*, 51 A.D.3d 1111, 1112 n., 857 N.Y.S.2d 775 [3d Dept.2008], *lv. denied* 10 N.Y.3d 716, 862 N.Y.S.2d 337, 892 N.E.2d 403 [2008]). That subdivision provides that "[w]here a grandparent ... of a minor child ... can demonstrate to the satisfaction of the court the existence of extraordinary circumstances, such grandparent ... may apply to family court [for custody]," and the court "may make such directions as the best interests of the child may require, for custody rights for such grandparent ... in respect to such child. *An extended disruption of custody, as such term is defined in this section, shall constitute an extraordinary circumstance* " (Domestic Relations Law § 72[2][a] [emphasis added]). The statute then defines "extended disruption of custody" to

> "include, but not be limited to, a prolonged separation of the respondent parent and the child for at least [24] continuous months during which the parent voluntarily relinquished care and control of the child and the child resided in the household of the petitioner grandparent or grandparents, provided, however, that the court may find that extraordinary circumstances exist should the prolonged separation have lasted for less than [24] months" (Domestic Relations Law § 72[2][b]).

The legislative intent, as stated in the bill enacting this amendment, was "to provide guidance regarding the ability of grandparents to obtain standing in custody proceedings involving their grandchildren," but was "in no way intended to limit the state of the law as it relates to the ability of any third party to obtain standing in custody proceedings" against a birth parent (L. 2003, ch. 657, § 1). The sponsors' memoranda articulate the purpose of the bill as being "[t]o define an extraordinary circumstance with respect to the legal rights of certain grandparents who wish to petition the court for custody of their grandchildren" (Senate Introducer Mem. in Support, 2003 N.Y. Senate Bill S4224A; Assembly Sponsor's Mem., 2003 N.Y. Assembly Bill A8302B; *see Matter of Carton,* 51 A.D.3d at 1113, 857 N.Y.S.2d 775). The sponsors emphasized that the bill specifically ****621** states that it is not intended to overrule existing case law relating to third parties obtaining standing in custody cases (*see* Senate Introducer Mem. in Support, 2003 N.Y. Senate Bill S4224A; Assembly Sponsor's Mem., 2003 N.Y. Assembly Bill A8302B). In addressing the law as it existed before the amendment, the sponsors stated that the "[c]urrent statute does not specifically grant grandparents standing to petition the court for custody ***448** of their grandchildren[,] nor does [it] give specific guidance to the court in regard to extraordinary circumstances as they might apply to children who have resided with their grandparents" (Senate Introducer Mem. in Support, 2003 N.Y. Senate Bill S4224A; Assembly Sponsor's Mem., 2003 N.Y. Assembly Bill A8302B).

[4] **[5]** Although the mother contends otherwise, the statute is entirely consistent with *Matter of Bennett v. Jeffreys,* in that it requires that grandparents prove the existence of extraordinary circumstances in order to demonstrate standing when seeking custody against a child's parent. Indeed, the budget report on the bill indicates that it "simply clarifies in statute that grandparents specifically can petition for custody" (Budget Rep. on Bills, Bill Jacket, L. 2003, ch. 657 at 5). Thus, the purpose of the statute is plain—it creates a clear path, or procedural mechanism, for grandparents to obtain standing when seeking custody (*see Matter of E.S. v. P.D.,* 8 N.Y.3d 150, 157, 831 N.Y.S.2d 96, 863 N.E.2d 100 [2007]; *Matter of Wilson v. McGlinchey,* 2 N.Y.3d 375, 380, 779 N.Y.S.2d 159, 811 N.E.2d 526 [2004]; *see also Debra H. v. Janice R.,* 14 N.Y.3d 576, 597, 904 N.Y.S.2d 263, 930 N.E.2d 184 [2010]). The statute does not create new rights for grandparents, but merely clarifies a method by which grandparents may exercise those rights, and defines an alternative type of extraordinary circumstance applicable only to grandparents—specifically, an extended disruption of custody—in view of their special status (*see Matter of Tolbert v. Scott,* 15 A.D.3d 493, 495–496, 790 N.Y.S.2d 495 [2d Dept.2005]). [3]

III.

Domestic Relations Law § 72(2) sets forth three "elements" required to demonstrate the extraordinary circumstance of an "extended disruption of custody," specifically: (1) a 24–month separation of the parent and child, which is identified as "prolonged," (2) the parent's voluntary relinquishment of care and control of the child during such period, and (3) the residence of the child in the grandparents' household. Regarding the third element, inasmuch as both Family Court and the Appellate Division found that the child primarily lived with ***449** the grandparents for almost 10 years, and that factual finding is supported by the record, we may not disturb it (*see Matter of E.S.,* 8 N.Y.3d at 158, 831 N.Y.S.2d 96, 863 N.E.2d 100; *Matter of Gabrielle HH.,* 1 N.Y.3d 549, 550, 772 N.Y.S.2d 643, 804 N.E.2d 964 [2003]). Consequently, only the first two elements are seriously in dispute here.

The mother argues that the separation of the parent and child must be nearly complete and that the parent must relinquish *all* care and control, with little or no contact between the parent and child, in order for the first two elements to be established. She contends that no prolonged separation occurred here because ****622** she had regular contact with the child. She also contends

that she did not relinquish care and control because she cared for the child on regular visits, including overnights and vacations, and because the grandparents obtained, and acted with, her permission when making decisions about him. [4]

[6] Contrary to the mother's contention, a lack of contact is not a separate element under the statute. Indeed, there is no explicit statutory reference to contact or the lack thereof. Rather, the quality and quantity of contact between the parent and child are simply factors to be considered in the context of the totality of the circumstances when determining whether the parent voluntarily relinquished care and control of the child, and whether the child actually resided with the grandparents for the required "prolonged" period of time. Indeed, some Appellate Division cases have identified a variety of factors for courts to consider in determining whether extraordinary circumstances exist, such as "the length of time the child has lived with the nonparent, the quality of that relationship and the length of time the biological parent allowed such custody to continue without trying to assume the primary parental role" (*Matter of Bevins v. Witherbee*, 20 A.D.3d 718, 719, 798 N.Y.S.2d 245 [3d Dept.2005]; ***450** *see Matter of Curless v. McLarney*, 125 A.D.3d 1193, 1195, 4 N.Y.S.3d 666 [3d Dept.2015]; *Matter of Aida B. v. Alfredo C.*, 114 A.D.3d 1046, 1048, 980 N.Y.S.2d 601 [3d Dept.2014]; *Matter of Marcus CC. v. Erica BB.*, 107 A.D.3d 1243, 1244, 967 N.Y.S.2d 503 [3d Dept.2013], appeal dismissed 22 N.Y.3d 911, 975 N.Y.S.2d 731, 998 N.E.2d 394 [2013]; *Matter of Michael G.B. v. Angela L.B.*, 219 A.D.2d 289, 294, 642 N.Y.S.2d 452 [4th Dept.1996]). All of these factors are components of the totality of the circumstances for the court to consider, and also relate to the enumerated elements under the statute.

[7] It would be illogical to construe the statute to mean that, in order to establish an extended disruption of custody, the grandparent must demonstrate that the parent had no contact with the child for 24 months. If that were the case, the statute would be superfluous or redundant of the extraordinary circumstances specifically enumerated in *Matter of Bennett v. Jeffreys*. Indeed, the level of contact between the parent and child is relevant to several different categories of extraordinary circumstances under that case. For example, *Matter of Bennett v. Jeffreys* refers to abandonment as an extraordinary circumstance (*see* 40 N.Y.2d at 546, 387 N.Y.S.2d 821, 356 N.E.2d 277). Pursuant to Social Services Law § 384–b (5), abandonment occurs—in the context of a complete termination of parental rights—when a parent evinces an intent to forgo parental rights and obligations as manifested by a failure to visit the child and communicate ****623** with the child or guardian. This Court has held that, for purposes of determining whether extraordinary circumstances exist to demonstrate standing to seek custody of a child, the definition of abandonment does not differ from the traditional definition (*see Matter of Dickson v. Lascaris*, 53 N.Y.2d 204, 209, 440 N.Y.S.2d 884, 423 N.E.2d 361 [1981]). Similarly, *Matter of Bennett v. Jeffreys* refers to persistent neglect as a variety of extraordinary circumstances (*see* 40 N.Y.2d at 546, 387 N.Y.S.2d 821, 356 N.E.2d 277). Persistent neglect requires proof that the parent "failed either to maintain *substantial*, repeated and continuous *contact* with a child or to plan for the child's future" (*Matter of Ferguson v. Skelly*, 80 A.D.3d 903, 905, 914 N.Y.S.2d 428 [3d Dept.2011] [emphasis added], *lv. denied* 16 N.Y.3d 710, 2011 WL 1584758 [2011]; *see* Social Services Law § 384–b [7]). Thus, where a parent has no significant contact with his or her child for 24 months, the avenues of persistent neglect or abandonment presumably would be available under *Matter of Bennett v. Jeffreys*, even without the benefit of Domestic Relations Law § 72(2).

[8] **[9]** In view of the foregoing, if we interpret the definition of "extended disruption of custody" under Domestic Relations Law § 72(2) to mean that the parent must not have had any ***451** contact, or at least any significant contact, with the child for at least 24 months, then this statutory ground of extraordinary circumstances would essentially be eviscerated, or at best redundant and unnecessary. This would contravene the legislative purpose, and would be contrary to the well-established rule that courts should not interpret a statute in a manner that would render it meaningless (*see Matter of Brown v. Wing*, 93 N.Y.2d 517, 523, 693 N.Y.S.2d 475, 715 N.E.2d 479 [1999]; *Matter of Industrial Commr. of State of N.Y. v. Five Corners Tavern*, 47 N.Y.2d 639, 646–647, 419 N.Y.S.2d 931, 393 N.E.2d 1005 [1979]). Consequently, to give meaning to the separate statutory avenue of establishing standing, Domestic Relations Law § 72(2) must be available for a grandparent even if the parent has had some contact with the child during the requisite 24–month period. To hold otherwise would not only conflict with the legislature's intent, but would also deter grandparents from promoting a relationship between the parent and the child while the child resides with them, contrary to this state's public policy of encouraging and strengthening parent-child relationships. [5] While courts must determine on a case-by-case basis whether the level of contact between the parent and child precludes a finding of extraordinary circumstances, it is sufficient to show that the parent has permitted—as reflected in the statutory

designation of the particular extraordinary circumstance at issue—an "extended disruption of *custody* " (Domestic Relations Law § 72[2][a] [emphasis added]).

[10] For essentially the same reasons, a parent need not relinquish *all* care and control of the child. Even if the parent exercises some control over the child—for example during visitation—a parent may still, as a general matter, have voluntarily relinquished care and control of the child to the grandparent to the extent that the grandparent is, in essence, acting as a ****624** parent with primary physical custody. The key is whether the parent makes important decisions affecting the child's life, as opposed to merely providing routine care on visits.

[11] Here, the mother argues that the grandparents were only acting with her permission when making decisions regarding ***452** the child. She concedes that she signed three documents, each giving the grandparents permission to make such decisions, including medical and educational decisions, without any time limitation, but contends that the documents prove that she retained ultimate control over all decisions. Family Court concluded that the documents, and the mother's conduct, showed that she relinquished her authority and responsibility to make the decisions. The Appellate Division, on the other hand, concluded that the grandparents relied on the mother's permission (128 A.D.3d at 25, 5 N.Y.S.3d 759). In our view, Family Court's interpretation of the documents, and their implications here, is more accurate. The grandparents obtained the documents because there was no custody order giving the grandparents the legal right to make such decisions, although the child was in their physical custody a majority of the time, and they needed to be prepared for all types of situations. Nevertheless, the mother freely signed over virtually all decision-making rights indefinitely—she did not limit the permission to times when she was unavailable—demonstrating her intent that the grandparents "permanently assume the parental responsibility" of caring for the child (*Matter of Michael G.B.,* 219 A.D.2d at 294, 642 N.Y.S.2d 452).

As for the parties' conduct, the grandparents spoke with the mother almost daily about the child. The mother claims that they did so to seek her permission before making decisions about the child. However, the evidence is more consistent with Family Court's conclusion that the grandparents made all decisions about the child and merely kept the mother informed of the decisions that they had made or were about to make. For example, the mother and her boyfriend testified that, at least as early as 2011, she wanted to enroll the child in a school in the district where she lived, rather than the district of the grandparents' residence. The grandparents desired to keep the child in their district, where he had always attended school. The mother did not make any change in the child's school enrollment until the summer of 2012, after this proceeding had commenced. In addition, the mother could have expressly revoked her written permission, or specifically limited the authorization to making medical decisions in emergency situations, but she never did so. Instead, her conduct, and that of the grandparents, supports Family Court's finding that "in reality [the mother] relinquished her parental control and decisionmaking authority in writing and in practice to the ***453** [g]randparents" (—— Misc.3d ——, ——, 2013 N.Y. Slip Op. 23478, *10, 23 N.Y.S.3d 533, 544 [2013]).

Furthermore, while there arguably may have been a reason for the mother to refrain from seeking physical custody during the time that she was caring for her own ailing parents, that situation did not arise until 2006, several years after the child began living with the grandparents. Additionally, although one of the mother's parents died and the other went into a nursing home in 2009, the mother allowed the grandparents to continue raising the child thereafter and she did not seek physical custody of him until 2012. No reasonable explanation was provided for her failure to attempt to gain physical custody after 2009 (*see Matter of Michaellica Lee W.,* 106 A.D.3d 639, 639–640, 965 N.Y.S.2d 504 [1st Dept.2013]). [6]

****625** In sum, the evidence more closely comports with Family Court's finding that the mother voluntarily relinquished care and control of the child for more than 24 months, even though she had regular contact and visitation with him (*see Matter of Curless,* 125 A.D.3d at 1196, 4 N.Y.S.3d 666; *Matter of Battisti v. Battisti,* 121 A.D.3d 1196, 1197–1198, 993 N.Y.S.2d 804 [3d Dept.2014]; *see also Matter of Marcus CC.,* 107 A.D.3d at 1244, 967 N.Y.S.2d 503). The mother allowed the grandparents to assume control over, and responsibility for the care of, the child while he resided with them for a prolonged period of years, during which she assumed the role of a noncustodial parent in virtually every way (*see Matter of Traci M.S. v. Darlene C.,* 37 A.D.3d 1083, 1084, 829 N.Y.S.2d 353 [4th Dept.2007]). Where, as here, the mother has effectively transferred custody of the

child to the grandparents for a prolonged period of time, the circumstances rise to the level of extraordinary, as required ***454** under our law to confer standing upon the grandparents to petition the courts to formally obtain legal custody.

We reiterate that the conferral of standing, through the demonstration of extraordinary circumstances, is only the first step of the inquiry where a nonparent seeks custody against a parent. The second step addresses the best interest of the child. Here, Family Court found that it was in the child's best interest to remain in the primary physical custody of the grandparents. However, inasmuch as the Appellate Division did not reach that question, it must do so on remittal.

In conclusion, the grandparents established their standing to seek custody of the child by demonstrating extraordinary circumstances, namely an extended disruption of the mother's custody, in accordance with *Matter of Bennett v. Jeffreys* and Domestic Relations Law § 72(2). Accordingly, the Appellate Division order should be reversed, without costs, and the matter remitted to that court for further proceedings in accordance with this opinion.

Chief Judge LIPPMAN and Judges PIGOTT, RIVERA, ABDUS–SALAAM and FAHEY concur.
Order reversed, without costs, and matter remitted to the Appellate Division, Fourth Department, for further proceedings in accordance with the opinion herein.

All Citations

26 N.Y.3d 440, 44 N.E.3d 915, 23 N.Y.S.3d 617, 2015 N.Y. Slip Op. 09231

Footnotes

1 Although the father was regularly paying child support to the mother, she did not provide the grandparents with any money for the child's care.

2 The father withdrew his custody petition against the mother and supported the grandparents' petition.

3 To the extent the grandparents and attorney for the child argue that the Appellate Division decision could be read as finding the statute to be unconstitutional, we note that the statute's constitutionality was not challenged in either that Court or Family Court. Moreover, our reading of the Appellate Division decision leads us to conclude that the constitutional issue was not addressed therein. Thus, that issue is not before us.

4 The mother also erroneously argues that the standard for extraordinary circumstances requires the parent to engage in gross misconduct or utter irresponsibility. This Court has used such language, but we did so in a case decided almost 20 years before Domestic Relations Law § 72(2) was enacted. That case involved a mother who had turned her child over to potential adoptive parents after agreeing to an adoption—which would have resulted in a permanent termination of all parental rights—and, soon thereafter, changed her mind and tried to regain care and control of her child (*see Matter of Male Infant L.*, 61 N.Y.2d 420, 427, 474 N.Y.S.2d 447, 462 N.E.2d 1165 [1984]). The language requiring gross misconduct or utter irresponsibility should not be taken out of context to further heighten the standard for establishing standing in all nonparent custody cases, where the parents—although potentially being deprived of custody—otherwise retain their parental rights.

5 Here, the grandparents called the mother nearly every day to keep her updated on the child's activities. They also brought the mother and her daughters on family vacations, invited them to family holiday gatherings, and relocated them twice. This conduct, primarily initiated by the grandparents, kept the mother in closer contact with the child. It would be incongruous to then deny the grandparents standing based on their efforts at facilitating that contact.

6 For purposes of determining extraordinary circumstances, this situation can be distinguished from those in which a parent has a compelling reason to allow a nonparent to assume custody for a more limited and defined period of time. For example, no extraordinary circumstances were found where a father asked a grandfather to assume custody while the father “got [his] life together,” after which the father completed substance abuse treatment, anger management, and parenting classes and obtained steady employment—all while continuously attempting to maintain contact with the children—before he tried to regain custody (*see Matter of Ferguson v. Skelly*, 80 A.D.3d 903, 904–905, 914 N.Y.S.2d 428 [3d Dept.2011], *lv. denied* 16 N.Y.3d 710, 2011 WL 1584758 [2011]). Similarly, it may be necessary for a single parent who is enlisted in the military to cede custody while deployed. In such situations, a parent can

enter into an agreement memorializing a period of temporary custody, or can include limiting language in written authorizations—unlike the authorizations here, which explicitly stated that they were "open and ongoing" and had "no expiration date."

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133 A.D.3d 1302, 20 N.Y.S.3d 784, 2015 N.Y. Slip Op. 08535

**1 In the Matter of Richard Stent, Respondent
v
Mary Schwartz et al., Appellants.

Supreme Court, Appellate Division, Fourth Department, New York
1022, 14-01052, 14-01082
November 20, 2015

CITE TITLE AS: Matter of Stent v Schwartz

HEADNOTE

Parent, Child and Family
Custody
Extraordinary Circumstances Justified Custody Award to Half Brother—Educational Neglect, Poor Hygiene, and Parents' Indifference and Irresponsibility

Bridget L. Field, Rochester, for respondent-appellant Dan Schwartz.
Keliann M. Argy, Orchard Park, for respondent-appellant Mary Schwartz.
Jacqueline M. Grasso, Attorney for the Child, Batavia.

Appeals from an order of the Family Court, Genesee County (Eric R. Adams, J.), entered June 4, 2014 in a proceeding pursuant to Family Court Act article 6. The order granted custody of the subject child to petitioner with visitation to respondents.

It is hereby ordered that the order so appealed from is affirmed without costs.

Memorandum: Respondents, the mother and the father of the child who is the subject of this proceeding, both appeal from an order that granted custody of the child to petitioner, the child's half brother. Initially, we agree with the mother and the father that Family Court erred in drawing a negative inference against them based on their failure to testify. The mother and the father were both called as witnesses and gave ***1303** testimony for petitioner, and they were also questioned by their own attorneys and the Attorney for the Child. The court therefore erred in drawing a negative inference against them inasmuch as they did in fact testify at the hearing (*see Matter of Raymond D.*, 45 AD3d 1415, 1415-1416 [2007]).

We nevertheless agree with the court's determination that petitioner met his burden of establishing that extraordinary circumstances exist to warrant an inquiry into whether it is in the best interests of the child to award him custody (*see Matter of Scala v Parker*, 304 AD2d 858, 859 [2003]; *see generally Matter of Bennett v Jeffreys*, 40 NY2d 543, 548 [1976]). It is well-settled that "as between a parent and nonparent, the parent has a superior right to custody that cannot be denied unless the nonparent establishes that the parent has relinquished that right because of 'surrender, abandonment, persisting neglect, unfitness or other like extraordinary circumstances' " (*Matter of Gary G. v Roslyn P.*, 248 AD2d 980, 981 [1998], quoting *Bennett*, 40 NY2d at 544). Here, the evidence established that the mother and the father changed residences frequently over a period of 18 months, and they were evicted from one residence and were homeless for several months, living in a tent or their vehicle. The child changed schools five times in four school districts over that same time period and, with each change in school, the child missed at least several days and sometimes several weeks of school. Indeed, we note that "[u]nrebutted evidence of excessive school absences [is] sufficient to establish . . . educational neglect" (*Matter of Gabriella G. [Jeannine G.]*, 104 AD3d 1136, 1137 [2013] [internal quotation marks omitted]). The evidence also supports the court's conclusion that the child had poor hygiene. Thus, the record establishes that the mother and the father have exhibited "behavior evincing utter indifference and

irresponsibility," and the court therefore properly concluded that extraordinary circumstances exist (*Matter of Male Infant L.*, 61 NY2d 420, 427 [1984]; *see Matter of Darrow v Darrow*, 106 AD3d 1388, 1391-1392 [2013]; *Scala*, 304 AD2d at 859-860; *see also Matter of Braun v Decicco*, 117 AD3d 1453, 1454 [2014], *lv dismissed in part and denied in part* 24 NY3d 927 [2014]).

****2** It is well settled that "once extraordinary circumstances are found, the court must then make the disposition that is in the best interest[s] of the child" (*Bennett*, 40 NY2d at 548), and we agree with the court that the child's best interests are served by awarding petitioner custody of the child with visitation to the mother and the father (*see Matter of Vincent A.B. v Karen T.*, 30 AD3d 1100, 1101 [2006], *lv denied* 7 NY3d 711 [2006]). A ***1304** best interests analysis considers numerous factors, " 'including the continuity and stability of the existing custody arrangement, the quality of the child's home environment and that of the [party] seeking custody, the ability of each [party] to provide for the child's emotional and intellectual development, the financial status and ability of each [party] to provide for the child, and the individual needs and expressed desires of the child' " (*Matter of Michael P. v Judi P.*, 49 AD3d 1158, 1159 [2008]; *see generally Fox v Fox*, 177 AD2d 209, 210 [1992]). Petitioner lived with the child and the mother and the father until 2012, and he has had regular visitation with the child since May 2013. Petitioner has full-time employment and his own residence and, unlike the mother and the father, he has shown the ability to budget and prioritize to provide for the child. Petitioner has also planned for the child's schooling and medical needs. We therefore conclude on the record before us that the court's custody determination has a sound and substantial basis in the record (*see Matter of Loukopoulos v Loukopoulos*, 68 AD3d 1470, 1472-1473 [2009]; *Vincent A.B.*, 30 AD3d at 1101-1102; *see generally Matter of Goossen v Goossen*, 72 AD3d 1591, 1591 [2010]).

All concur except Carni and DeJoseph, JJ., who dissent and vote to reverse in accordance with the following memorandum.

Carni and DeJoseph, JJ. (dissenting). We respectfully dissent. In our view, Family Court erred in granting custody of the subject child to petitioner, and we therefore would reverse the order and dismiss the petition.

While we agree with the majority that the court erred in drawing a negative inference against respondents on the basis that they "declined to testify at the fact-finding hearing" inasmuch as respondents in fact testified at the hearing (*see Matter of Raymond D.*, 45 AD3d 1415, 1415-1416 [2007]), we conclude that the court erred in awarding custody of the child to petitioner because petitioner failed to demonstrate the existence of extraordinary circumstances (*see generally Matter of Bennett v Jeffreys*, 40 NY2d 543, 544 [1976]). "A finding of extraordinary circumstances is rare, and the circumstances must be such that they 'drastically affect the welfare of the child' " (*Matter of Jenny L.S. v Nicole M.*, 39 AD3d 1215, 1215 [2007], *lv denied* 9 NY3d 801 [2007], quoting *Bennett*, 40 NY2d at 549; *see Matter of Aylward v Bailey*, 91 AD3d 1135, 1136 [2012]). Absent a threshold showing of extraordinary circumstances, "the question of best interests does not arise and the natural parent[s] must be awarded custody" (*Matter of Male Infant L.*, 61 NY2d 420, 429 [1984]; *see Matter of Jody H. v Lynn M.*, 43 AD3d 1318, 1318 [2007]). ***1305**

Here, we conclude that the evidence at the hearing concerning respondents' alleged deficiencies as parents fell short of establishing unfitness, persisting neglect, or similar misconduct constituting extraordinary circumstances (*see Aylward*, 91 AD3d at 1136-1137; *Matter of Culver v Culver*, 190 AD2d 960, 961-962 [1993]; *see also Jenny L.S.*, 39 AD3d at 1216; *cf. Matter of Braun v Decicco*, 117 AD3d 1453, 1454 [2014], *lv dismissed in part and denied in part* 24 NY3d 927 [2014]). The fact that respondents moved between various temporary residences with the child for some time after being evicted from their apartment is not, by itself, sufficient to establish unfitness (*see Matter of Mildred PP. v Samantha QQ.*, 110 AD3d 1160, 1161-1162 [2013]; *Matter of Darrow v Darrow*, 106 AD3d 1388, 1392 [2013]; *see generally Male Infant L.*, 61 NY2d at 430), and the record does not establish that their living situation was ever unsafe (*cf. Matter of Van Dyke v Cole*, 121 AD3d 1584, 1585-1586 [2014]; *Darrow*, 106 AD3d at 1392), or that the child's medical care was being neglected (*see Matter of Jerry Q. v Malissa R.*, 287 AD2d 810, 811 [2001]).

In our view, the child's school absences and hygiene do not rise to the level of extraordinary circumstances, and petitioner's testimony that the child would be better off living with him also does not establish extraordinary circumstances (*see Bennett*, 40 NY2d at 548; *Jody H.*, 43 AD3d at 1319). In view of petitioner's failure to demonstrate the existence of extraordinary

circumstances, the court erred in awarding him custody of the child (*see generally Male Infant L.*, 61 NY2d at 429; *Jody H.*, 43 AD3d at 1318). Present—Centra, J.P., Peradotto, Carni, Whalen and DeJoseph, JJ.

McKinney's Consolidated Laws of New York Annotated
Domestic Relations Law (Refs & Annos)
Chapter 14. Of the Consolidated Laws (Refs & Annos)
Article 5. The Custody and Wages of Children (Refs & Annos)

McKinney's DRL § 71

§ 71. Special proceeding or habeas corpus to obtain visitation rights in respect to certain infant siblings

Currentness

Where circumstances show that conditions exist which equity would see fit to intervene, a brother or sister or, if he or she be a minor, a proper person on his or her behalf of a child, whether by half or whole blood, may apply to the supreme court by commencing a special proceeding or for a writ of habeas corpus to have such child brought before such court, or may apply to the family court pursuant to subdivision (b) of section six hundred fifty-one of the family court act; and on the return thereof, the court, by order, after due notice to the parent or any other person or party having the care, custody, and control of such child, to be given in such manner as the court shall prescribe, may make such directions as the best interest of the child may require, for visitation rights for such brother or sister in respect to such child.

Credits
(Added L.1989, c. 318, § 1.)

McKinney's D. R. L. § 71, NY DOM REL § 71
Current through L.2019, chapter 144. Some statute sections may be more current, see credits for details.

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77 N.Y.2d 651, 572 N.E.2d 27, 569 N.Y.S.2d 586, 59 USLW 2686

In the Matter of Alison D., Appellant,
v.
Virginia M., Respondent.

Court of Appeals of New York
Argued March 20, 1991;
Decided May 2, 1991

CITE TITLE AS: Matter of Alison D. v Virginia M.

SUMMARY

Appeal, by permission of the Appellate Division of the Supreme Court in the Second Judicial Department, from an order of that court, entered March 2, 1990, which affirmed a judgment of the Supreme Court (James D. Benson, J.), entered in Dutchess County, dismissing a habeas corpus proceeding to obtain visitation rights.

Matter of Alison D. v Virginia M., 155 AD2d 11, affirmed.

HEADNOTES

Parent, Child and Family
Visitation
Rights of Nonparent--Standing to Seek Visitation with Child Properly in Custody of Biological Parent

([1]) Petitioner, who is not the biological or adoptive parent of a child properly in the custody of his biological mother, does not have standing to seek visitation with the child under Domestic Relations Law § 70. Petitioner is not a “parent” within the meaning of section 70. She has no right under section 70 to seek visitation and, thereby, limit or diminish the right of the concededly fit biological parent to choose with whom her child associates. To allow the courts to award visitation--a limited form of custody--to a third person would necessarily impair the parents' right to custody and control of their child. Section 70 should not be read to include categories of nonparents who have developed a relationship with a child or who have had prior relationships with a child's parents and who wish to continue visitation with the child.

TOTAL CLIENT SERVICE LIBRARY REFERENCES

Am Jur 2d, Habeas Corpus, § 118.

Domestic Relations Law §70.

NY Jur 2d, Domestic Relations, §§292, 293, 366.

ANNOTATION REFERENCES

Visitation rights of persons other than natural parents or grandparents. 1 ALR4th 1270.

POINTS OF COUNSEL

Paula L. Ettelbrick, Marian Rosenberg and *Debra L. Rothberg* for appellant.

I. The court below erred in holding that ***652** appellant was not a parent entitled to assert a claim for visitation. *(Doe v Doe,* 92 Misc 2d 184; *Matter of Mark V. v Gale P.,* 143 Misc 2d 487;*Matter of Plato's Cave Corp. v State Liq. Auth.,*68 NY2d 791; *Matter of "Male F.",* 97 Misc 2d 505; *Rankin v Shanker,* 23 NY2d 111; *Matter of Hogan v Culkin,* 18 NY2d 330; *Braschi v Stahl Assocs. Co.,* 74 NY2d 201; *Matter of Rich v Kaminsky,* 254 App Div 6;*Finlay v Finlay,* 240 NY 429;*Matter of Humphrey v Humphrey,* 103 Misc 2d 175.)

II. Virginia M. is equitably estopped from refusing visitation between Alison D. and A.D.M. *(Metropolitan Life Ins. Co. v Childs Co.,* 230 NY 285, 231 NY 551; *Matter of Karin T. v Michael T.,* 127 Misc 2d 14; *Wener v Wener,* 35 AD2d 50; *Gursky v Gursky,* 39 Misc 2d 1083.)

Anthony G. Maccarini for respondent.

I. The lower court was correct in ruling that petitioner-appellant lacked standing to institute an action for visitation. *(Matter of Pierson,* 126 AD2d 729; *Lo Presti v Lo Presti,* 40 NY2d 522; *Matter of Bennett v Jeffreys,* 40 NY2d 543; *Matter of Roland F. v Brezenoff,* 108 Misc 2d 133; *Matter of Ronald FF. v Cindy GG.,* 70 NY2d 141; *Stanley v Illinois,* 405 US 645; *Doe v Doe,* 92 Misc 2d 184; *Matter of Mark V. v Gale P.,* 143 Misc 2d 487.)

II. The courts should not redefine who is a parent. *(Russello v United States,* 464 US 16; *People v Eulo,* 63 NY2d 341; *We're Assocs. Co. v Cohen, Stracher & Bloom,* 65 NY2d 148; *Matter of Manhattan Pizza Hut v New York State Human Rights Appeal Bd.,* 51 NY2d 506; *Van Amerogen v Donnini,* 156 AD2d 103; *Matter of Karin T. v Michael T.,* 127 Misc 2d 14;*Matter of Morningstar,* 143 Misc 620;*Betz v Horr,* 276 NY 83;*Matter of Jennifer,* 142 Misc 2d 912; *Matter of Long v Adirondack Park Agency,* 76 NY2d 416.)

III. In loco parentis status does not give standing to assert a claim for visitation. *(Matter of Ronald FF. v Cindy GG.,* 70 NY2d 141; *Matter of Trapp v Trapp,* 126 Misc 2d 30; *Matter of Melissa M.,* 101 Misc 2d 407; *Matter of Orlando F.,* 40 NY2d 103.)

IV. The doctrine of equitable estoppel is inapplicable to visitation matters. *(Wener v Wener,* 35 AD2d 50; *Gursky v Gursky,* 39 Misc 2d 1083; *Matter of Karin T. v Michael T.,* 127 Misc 2d 14.)

V. The only constitutional rights in question here are the rights of the legal parent to raise her child as she sees fit. *(Wisconsin v Yoder,* 406 US 205; *Baer v Town of Brookhaven,* 73 NY2d 942; *Braschi v Stahl Assocs. Co.,* 74 NY2d 201; *Stanley v Illinois,* 405 US 645; *Caban v Mohammed,* 441 US 380; *Pierce v Society of Sisters,* 268 US 510; *Meyer v Nebraska,* 262 US 390; *Santosky* ***653** *v Kramer,* 455 US 745.)

VI. The trial court properly declined to appoint an attorney for the child. *(Smith v Organization of Foster Families,* 431 US 816.)

William B. Rubenstein, of the Pennsylvania and District of Columbia Bars, admitted *pro hac vice, Nan D. Hunter* and *Robert Levy* for The American Civil Liberties Union and another, *amici curiae.*

A restrictive reading of "parent" which denies petitioner standing, burdens the constitutional rights of the child by establishing an irrebuttable presumption that visitation by a coparent is *never* in the child's best interest. *(Wisconsin v Yoder,* 406 US 205; *Stanley v Illinois,* 405 US 645; *Prince v Massachusetts,* 321 US 158; *Meyer v Nebraska,* 262 US 390; *Quilloin v Walcott,* 434 US 246; *Matter of Ronald FF. v Cindy GG.,* 70 NY2d 141; *Duchesne v Sugarman,* 566 F2d 817; *Smith v Organization of Foster Families,* 431 US 816; *Rivera v Marcus,* 696 F2d 1016; *Baer v Town of Brookhaven,* 73 NY2d 942.)

Conrad K. Harper, Jane E. Booth, Janice Goodman and *Carol R. Sherman* for The Association of the Bar of the City of New York, *amicus curiae.*

Petitioner-appellant Alison D., who has functioned as A.D.M.'s parent, has standing to bring this habeas corpus petition to determine visitation rights. *(People ex rel. Duryee v Duryee,* 188 NY 440;*Diemer v Diemer,* 8 NY2d 206; *Matter of Lincoln v Lincoln,* 24 NY2d 270; *Matter of Town of New Castle v Kaufmann,* 72 NY2d 684; *Braschi v Stahl Assocs. Co.,* 74 NY2d 201; *Baer v Town of Brookhaven,* 73 NY2d 942; *McMinn v Town of Oyster Bay,* 66 NY2d 544; *Group House v Board of Zoning & Appeals,* 45 NY2d 266; *City of White Plains v Ferraioli,* 34 NY2d 300; *Matter of Ronald FF. v Cindy GG.,* 70 NY2d 141.)

Lynn Hecht Schafran, Alison Wetherfield and *Sally F. Goldfarb* of the District of Columbia and Wisconsin Bars, admitted *pro hac vice,* for NOW Legal Defense and Education Fund and another, *amici curiae.*

I. Alison D. has standing to seek visitation under Domestic Relations Law § 70 pursuant to a functional definition of parenthood. *(Zablocki v Redhail,* 434 US 374; *Stanley v Illinois,* 405 US 645; *Prince v Massachusetts,* 321 US 158; *Pierce v Society of Sisters,* 268 US 510; *Meyer v Nebraska,* 262 US 390; *Moore v East Cleveland,* 431 US 494; *City of White Plains v Ferraioli,*

34 NY2d 300; *Baer v Town of Brookhaven,* 73 NY2d 942; *McMinn v Town of Oyster Bay,* 66 NY2d 544; ***654** *Group House v Board of Zoning & Appeals,* 45 NY2d 266.)

II. A functional definition of parenthood is necessary to protect the rights of lesbian and gay families. *(Frances B. v Mark B.,*78 Misc 2d 112;*Di Stefano v Di Stefano,* 60 AD2d 976; *M.A.B. v R.B.,* 134 Misc 2d 317; *Guinan v Guinan,* 102 AD2d 963.)

III. A functional definition of parenthood is practical and will promote the interests of parents and children. *(Braiman v Braiman,* 44 NY2d 584.)

Janet E. Schomer and *Susan R. Keith* for The Gay and Lesbian Parents Coalition International and others, *amici curiae.*

Lesbian and gay coparents are the functional equivalent of biological parents; thus they are in loco parentis and the lower courts erred in refusing to grant Alison D. standing. *(Matter of Jamal B.,* 119 Misc 2d 808; *Johnson v Jamaica Hosp.,* 62 NY2d 523;*People v Franklin,* 79 AD2d 611; *Braschi v Stahl Assocs. Co.,* 74 NY2d 201; *Matter of Ronald FF. v Cindy GG.,* 70 NY2d 141; *Matter of Bennett v Jeffreys,* 40 NY2d 543; *Matter of Taylor v Alger,* 129 Misc 2d 1054; *Weiss v Weiss,* 52 NY2d 170.)

Jane A. Levine, David Chambers and *Martha Minow* for Deborah A. Batts and others, *amici curiae.*

I. The court below erred in holding that a person in the position of Alison D. is not a “parent” entitled to be heard on a claim for visitation. *(Matter of Ronald FF. v Cindy GG.,* 70 NY2d 141; *Matter of Bennett v Jeffreys,* 40 NY2d 543; *Braschi v Stahl Assocs. Co.,* 74 NY2d 201.)

II. This case should not be controlled by *Matter of Ronald FF. v Cindy GG.,* which is both distinguishable and unwise. *(Matter of Ronald FF. v Cindy GG.,* 70 NY2d 141; *Matter of Mark v Gale P.,* 143 Misc 2d 487.)

Loren M. Warboys for Youth Law Center, *amicus curiae.*

I. The child has a substantial interest in this matter. *(Wisconsin v Yoder,* 406 US 205; *Pierce v Society of Sisters,* 268 US 510; *Meyer v Nebraska,* 262 US 390; *Santosky v Kramer,* 455 US 745; *May v Anderson,* 345 US 528; *Caban v Mohammed,* 441 US 380; *Weiss v Weiss,* 52 NY2d 170; *Duchesne v Sugarman,* 566 F2d 817; *Smith v Organization of Foster Families,* 431 US 816; *Lehr v Robertson,* 463 US 248.)

II. The child's interest should have been presented to the Court. *(Lassiter v Department of Social Servs.,* 452 US 18.)

OPINION OF THE COURT

Per Curiam.

At issue in this case is whether petitioner, a biological ***655** stranger to a child who is properly in the custody of his biological mother, has standing to seek visitation with the child under Domestic Relations Law § 70. Petitioner relies on both her established relationship with the child and her alleged agreement with the biological mother to support her claim that she has standing. We agree with the Appellate Division that, although petitioner apparently nurtured a close and loving relationship with the child, she is not a parent within the meaning of Domestic Relations Law § 70. Accordingly, we affirm.

I

Petitioner Alison D. and respondent Virginia M. established a relationship in September 1977 and began living together in March 1978.[*] In March 1980, they decided to have a child and agreed that respondent would be artificially inseminated. Together, they planned for the conception and birth of the child and agreed to share jointly all rights and responsibilities of child-rearing. In July 1981, respondent gave birth to a baby boy, A.D.M., who was given petitioner's last name as his middle name and respondent's last name became his last name. Petitioner shared in all birthing expenses and, after A.D.M.'s birth, continued to provide for his support. During A.D.M.'s first two years, petitioner and respondent jointly cared for and made decisions regarding the child.

In November 1983, when the child was 2 years and 4 months old, petitioner and respondent terminated their relationship and petitioner moved out of the home they jointly owned. Petitioner and respondent agreed to a visitation schedule whereby petitioner continued to see the child a few times a week. Petitioner also agreed to continue to pay one half of the mortgage and major household expenses. By this time, the child had referred to both respondent and petitioner as “mommy”. Petitioner's visitation with the child continued until 1986, at which time respondent bought out petitioner's interest in the house and then began to restrict petitioner's visitation with the child. In 1987 petitioner moved to Ireland to pursue career opportunities, but

continued her attempts to communicate with the child. Thereafter, respondent terminated all contact between petitioner and the child, returning all of petitioner's gifts and letters. No dispute exists that ***656** respondent is a fit parent. Petitioner commenced this proceeding seeking visitation rights pursuant to Domestic Relations Law § 70.

Supreme Court dismissed the proceeding concluding that petitioner is not a parent under Domestic Relations Law § 70 and, given the concession that respondent is a fit parent, petitioner is not entitled to seek visitation pursuant to section 70. The Appellate Division affirmed, with one Justice dissenting, and granted leave to appeal to our Court.

II

Pursuant to Domestic Relations Law § 70 "either parent may apply to the supreme court for a writ of habeas corpus to have such minor child brought before such court; and [the court] may award the natural guardianship, charge and custody of such child to either parent ... as the case may require". Although the Court is mindful of petitioner's understandable concern for and interest in the child and of her expectation and desire that her contact with the child would continue, she has no right under Domestic Relations Law § 70 to seek visitation and, thereby, limit or diminish the right of the concededly fit biological parent to choose with whom her child associates. She is not a "parent" within the meaning of section 70.

Petitioner concedes that she is not the child's "parent"; that is, she is not the biological mother of the child nor is she a legal parent by virtue of an adoption. Rather she claims to have acted as a "de facto" parent or that she should be viewed as a parent "by estoppel". Therefore, she claims she has standing to seek visitation rights. These claims, however, are insufficient under section 70. Traditionally, in this State it is the child's mother and father who, assuming fitness, have the right to the care and custody of their child, even in situations where the nonparent has exercised some control over the child with the parents' consent *(see, Matter of Ronald FF. v Cindy GG.,*70 NY2d 14***l***, 144, citing *People ex rel. Kropp v Shepsky,* 305 NY 465, 468-469). "It has long been recognized that, as between a parent and a third person, parental custody of a child may not be displaced absent grievous cause or necessity" *(Matter of Ronald FF. v Cindy GG., supra,* at 144; *see also, Matter of Bennett v Jeffreys,* 40 NY2d 543, 549). To allow the courts to award visitation--a limited form of custody--to a third person would necessarily impair the parents' ***657** right to custody and control *(id.).* Petitioner concedes that respondent is a fit parent. Therefore she has no right to petition the court to displace the choice made by this fit parent in deciding what is in the child's best interests.

Section 70 gives *parents* the right to bring proceedings to ensure their proper exercise of their care, custody and control *(see, Matter of Roland F. v Brezenoff,* 108 Misc 2d 133, 134-135). Where the Legislature deemed it appropriate, it gave other categories of persons standing to seek visitation and it gave the courts the power to determine whether an award of visitation would be in the child's best interests *(see, e.g.,*Domestic Relations Law § 71 [special proceeding or habeas corpus to obtain visitation rights for siblings]; § 72 [special proceeding or habeas corpus to obtain visitation rights for grandparents]; *see, Lo Presti v Lo Presti,* 40 NY2d 522, 526-527). We decline petitioner's invitation to read the term parent in section 70 to include categories of nonparents who have developed a relationship with a child or who have had prior relationships with a child's parents and who wish to continue visitation with the child *(accord, Nancy S. v Michele G.,* 228 Cal App 3d 831, 279 Cal Rptr 212 [1st Dist, Mar. 20, 1991]). While one may dispute in an individual case whether it would be beneficial to a child to have continued contact with a nonparent, the Legislature did not in section 70 give such nonparent the opportunity to compel a fit parent to allow them to do so *(see, Matter of Ronald FF. v Cindy GG.,* 70 NY2d 141, *supra; compare,* Oregon Rev Stat Ann § 109.119 [1] [giving "(a)ny person including but not limited to a foster parent, stepparent, grandparent ... who has established emotional ties creating a child-parent relationship with a child" the right to seek visitation or other right of custody]).

Accordingly, the order of the Appellate Division should be affirmed, with costs.

Kaye, J.

(Dissenting).

The Court's decision, fixing biology [1] as the key to visitation rights, has impact far beyond this particular controversy, one that may affect a wide spectrum of relationships--including those of longtime heterosexual stepparents, "common-law" and nonheterosexual partners such as involved here, and even participants in scientific reproduction procedures. Estimates that more than 15.5 million children do ***658** not live with two biological parents, and that as many as 8 to 10 million children are born into families with a gay or lesbian parent, suggest just how widespread the impact may be *(see,* Polikoff, *This Child Does Have Two Mothers: Redefining Parenthood to Meet the Needs of Children in Lesbian-Mother and other Nontraditional Families,* 78 Geo LJ 459, 461, n 2 [1990]; Bartlett, *Rethinking Parenthood as an Exclusive Status: The Need for Legal Alternatives When the Premise of the Nuclear Family has Failed,* 70 Va L Rev 879, 880-881 [1984]; *see generally, Developments in the Law--Sexual Orientation and the Law,* 102 Harv L Rev 1508, 1629 [1989]).

But the impact of today's decision falls hardest on the children of those relationships, limiting their opportunity to maintain bonds that may be crucial to their development. The majority's retreat from the courts' proper role--its tightening of rules that should in visitation petitions, above all, retain the capacity to take the children's interests into account--compels this dissent.

In focusing the difference, it is perhaps helpful to begin with what is *not* at issue. This is not a custody case, but solely a visitation petition. The issue on this appeal is not whether petitioner should actually have visitation rights. Nor is the issue the relationship between Alison D. and Virginia M. Rather, the sole issue is the relationship between Alison D. and A.D.M., in particular whether Alison D.'s petition for visitation should even be considered on its merits. I would conclude that the trial court had jurisdiction to hear the merits of this petition.

The relevant facts are amply described in the Court's opinion. Most significantly, Virginia M. agrees that, after long cohabitation with Alison D. and before A.D.M.'s conception, it was "explicitly planned that the child would be theirs to raise together." It is also uncontested that the two shared "financial and emotional preparations" for the birth, and that for several years Alison D. actually filled the role of coparent to A.D.M., both tangibly and intangibly. In all, a parent-child relationship--encouraged or at least condoned by Virginia M.--apparently existed between A.D.M. and Alison D. during the first six years of the child's life.

While acknowledging that relationship, the Court nonetheless proclaims powerlessness to consider the child's interest at all, because the word "parent" in the statute imposes an absolute barrier to Alison D.'s petition for visitation. That ***659** same conclusion would follow, as the Appellate Division dissenter noted, were the coparenting relationship one of 10 or more years, and irrespective of how close or deep the emotional ties might be between petitioner and child, or how devastating isolation might be to the child. I cannot agree that such a result is mandated by section 70, or any other law.

Domestic Relations Law § 70 provides a mechanism for "either parent" to bring a habeas corpus proceeding to determine a child's custody. Other State Legislatures, in comparable statutes, have defined "parent" specifically *(see, e.g.,*Cal Civ Code § 7001 [defining parent-child relationship as between "a child and his natural or adoptive parents"]), and that definition has of course bound the courts *(see, Nancy S. v Michele G.,* 228 Cal App 3d 831, 279 Cal Rptr 212 [Mar. 20, 1991] [applying the statutory definition]). Significantly, the Domestic Relations Law contains no such limitation. Indeed, it does not define the term "parent" at all. That remains for the courts to do, as often happens when statutory terms are undefined.

The majority insists, however, that, the word "parent" in this case can only be read to mean biological parent; the response "one fit parent" now forecloses all inquiry into the child's best interest, even in visitation proceedings. We have not previously taken such a hard line in these matters, but in the absence of express legislative direction have attempted to read otherwise undefined words of the statute so as to effectuate the legislative purposes. The Legislature has made plain an objective in section 70 to promote "the best interest of the child" and the child's "welfare and happiness." (Domestic Relations Law § 70.) Those words should not be ignored by us in defining standing for visitation purposes--they have not been in prior case law.

Domestic Relations Law § 70 was amended in 1964 to broaden the category of persons entitled to seek habeas corpus relief (L 1964, ch 564, § 1). Previously, only a husband or wife living within the State, and legally separated from the spouse, had standing to bring such a proceeding. The courts, however, refused to apply the statute so literally. In amending the statute to

make domicile of the child the touchstone, and eliminate the separation requirement, the Legislature acted to bring section 70 into conformity with what the courts were already doing *(see,* Mem of Joint Legis Comm on Matrimonial and Family Laws, 1964 McKinney's Session Laws of NY, at ***660** 1880 [amendment deleted "needless limitations which are not, in fact, observed by the Courts"]).

This amendment to bring the statute into line with the practice reflects Supreme Court's equitable powers that complement the special habeas statute *(see, Langerman v Langerman,* 303 NY 465, 471;*see generally,*NY Const, art VI, §7 [a]). In *Finlay v Finlay* (240 NY 429, 433), this Court established that where the section 70 writ is denied to the petitioner seeking custody "there would remain his remedy by petition to the chancellor or to the court that has succeeded to the chancellor's prerogative [and] [n]othing in the habeas corpus act affects that jurisdiction." In such an action, the Chancellor "may act at the intervention or on the motion of a kinsman ... but equally he may act at the instance of any one else." (240 NY, at 434.) Jurisdiction rests on the *parens patriae* power--concern for the welfare of the child *(id.; see also, Matter of Bachman v Mejias,* 1 NY2d 575, 581).

As the Court wrote in *Matter of Bennett v Jeffreys* (40 NY2d 543, 546)--even in recognizing the superior right of a biological parent to the custody of her child--"when there is a conflict, the best interest of the child has always been regarded as superior to the right of parental custody. Indeed, analysis of the cases reveals a shifting of emphasis rather than a remaking of substance. This shifting reflects more the modern principle that a child is a person, and not a subperson over whom the parent has an absolute possessory interest."

Apart from imposing upon itself an unnecessarily restrictive definition of "parent," and apart from turning its back on a tradition of reading of section 70 so as to promote the welfare of the children, in accord with the *parens patriae* power, the Court also overlooks the significant distinction between visitation and custody proceedings.

While both are of special concern to the State, custody and visitation are significantly different *(see, Weiss v Weiss,* 52 NY2d 170, 175; *Matter of Ronald FF. v Cindy GG.,* 70 NY2d 141, 144). [2] Custody disputes implicate a parent's right to rear a child--with the child's corresponding right to be raised by a parent *(see, Matter of Bennett v Jeffreys,* 40 NY2d, at 546, ***661** *supra).* Infringement of that right must be based on the fitness--more precisely the lack of fitness--of the custodial parent.

Visitation rights also implicate a right of the custodial parent, but it is the right to choose with whom the child associates *(see, Matter of Ronald FF. v Cindy GG.,* 70 NY2d, at 144, *supra).* Any burden on the exercise of that right must be based on the child's overriding need to maintain a particular relationship *(see, Weiss v Weiss,* 52 NY2d, at 174-175, *supra).* Logically, the fitness concern present in custody disputes is irrelevant in visitation petitions, where continuing contact with the child rather than severing of a parental tie is in issue. For that reason, we refused to extend the *Bennett* "extraordinary circumstances" doctrine--which relates to the fitness of the custodial parent--to visitation petitions *(Matter of Ronald FF. v Cindy GG.,* 70 NY2d 141, *supra).*

The Court now takes the law a step beyond *Ronald FF.* by establishing the *Bennett* "extraordinary circumstances" test as the only way to reach the child's best interest in a section 70 proceeding. In that *Ronald FF.* determined that extraordinary circumstances are irrelevant in the visitation context, our holding today thus firmly closes the door on all consideration of the child's best interest in visitation proceedings such as the one before us, unless petitioner is a biological parent.

Of course there must be some limitation on who can petition for visitation. Domestic Relations Law § 70 specifies that the person must be the child's "parent," and the law additionally recognizes certain rights of biological and legal parents. Arguments that every dedicated caretaker could sue for visitation if the term "parent" were broadened, or that such action would necessarily effect sweeping change throughout the law, overlook and misportray the Court's role in defining otherwise undefined statutory terms to effect particular statutory purposes, and to do so narrowly, for those purposes only.

Countless examples of that process may be found in our case law, the Court looking to modern-day realities in giving definition to statutory concepts. *(See, e.g., People v Eulo,* 63 NY2d 341, 354 [defining "death" for purposes of homicide prosecutions].)

Only recently, we defined the term "family" in the eviction provisions of the rent stabilization laws so as to advance the legislative objective, making abundantly clear that the definition was limited to the statute in issue and did not effect a wholesale change in the law *(see, Braschi v Stahl Assocs. Co.*, 74 NY2d 201, 211-213). ***662**

In discharging this responsibility, recent decisions from other jurisdictions, for the most part concerning visitation rights of stepparents, are instructive *(see, e.g., Gribble v Gribble*, 583 P2d 64 [Utah]; *Spells v Spells*, 250 Pa Super 168, 378 A2d 879). For example in *Spells* (250 Pa Super, at 172-173, 378 A2d, at 881-882), the court fashioned a test for "parental status" or "in loco parentis" requiring that the petitioner demonstrate actual assumption of the parental role and discharge of parental responsibilities. It should be required that the relationship with the child came into being with the consent of the biological or legal parent, and that the petitioner at least have had joint custody of the child for a significant period of time *(see, Rethinking Parenthood as an Exclusive Status, op. cit.*, 70 Va L Rev, at 945-946). Other factors likely should be added to constitute a test that protects all relevant interests--much as we did in *Braschi.* Indeed, the criteria described by the Court in *Braschi* to be applied on a case-by-case basis later became the nucleus of formal standards *(see,*9 NYCRR 2520.6).

It is not my intention to spell out a definition but only to point out that it is surely within our competence to do so. It is indeed regrettable that we decline to exercise that authority in this visitation matter, given the explicit statutory objectives, the courts' power, and the fact that all consideration of the child's interest is, for the future, otherwise absolutely foreclosed.

I would remand the case to Supreme Court for an exercise of its discretion in determining whether Alison D. stands in loco parentis to A.D.M. and, if so, whether it is in the child's best interest to allow her the visitation rights she claims.

Chief Judge Wachtler and Judges Simons, Alexander, Titone, Hancock, Jr., and Bellacosa concur in Per Curiam opinion; Judge Kaye dissents and votes to reverse in a separate opinion.
Order affirmed, with costs. ***663**

Footnotes

* Given the procedural posture of the case, the facts are those alleged by petitioner in her habeas corpus petition.

1 While the opinion speaks of biological *and legal* parenthood, this Court has not yet passed on the legality of adoption by a second mother.

2 The majority's opinion rests on a fundamental inconsistency. It cannot be that visitation is the same as custody--"a limited form of custody" (majority opn, at 656)--and yet at the same time different from custody in that the "extraordinary circumstances" doctrine is inapplicable *(Matter of Ronald FF. v Cindy GG.*, 70 NY2d 141; *see also, Matter of Mark V. v Gale P.*, 143 Misc 2d 487, 489).

8 N.Y.3d 150, 863 N.E.2d 100, 831 N.Y.S.2d 96, 2007 N.Y. Slip Op. 01336

In the Matter of E.S., Respondent
v
P.D., Appellant.

Court of Appeals of New York
Argued January 3, 2007
Decided February 15, 2007

CITE TITLE AS: Matter of E.S. v P.D.

SUMMARY

Appeal, on constitutional grounds, from an order of the Appellate Division of the Supreme Court in the Second Judicial Department, entered March 28, 2006. The Appellate Division order, insofar as appealed from, affirmed a judgment of the Supreme Court, Suffolk County (Sandra L. Sgroi, J.; *see* 6 Misc 3d 1030 [A], 2004 NY Slip Op 51846[U]), which had granted the petition and awarded petitioner grandmother reasonable visitation rights with her grandchild.

Matter of E.S. v P.D., 27 AD3d 757, affirmed.

HEADNOTES

Parent, Child and Family
Visitation Rights of Grandparents

([1]) Section 72 (1) of the Domestic Relations Law was properly applied in granting petitioner grandmother visitation with her grandchild. Petitioner had automatic standing to seek visitation under section 72 (1) based upon the death of the child's mother, and record evidence supported the determination of the courts below that visitation between petitioner and the child was in the child's best interest. Supreme Court was properly mindful of respondent father's right to rear the child as he saw fit, but determined that the grandmother had established an extraordinarily close relationship with the child during the nearly five-year period that she had lived with him and respondent, and that the relationship with the grandmother was central to the child's well-being.

Appeal
Court of Appeals

([2]) In a proceeding pursuant to Domestic Relations Law § 72 (1) in which petitioner sought reasonable visitation with her grandchild, findings of fact made by the trial court which were expressly affirmed by the Appellate Division and had the requisite evidentiary support were conclusive and binding on the Court of Appeals.

Parent, Child and Family
Visitation Rights of Grandparents

Facial Constitutionality of Grandparent Visitation Statute

([3]) Domestic Relations Law § 72 (1), which provides a procedural mechanism for grandparents to acquire standing to seek visitation with a minor grandchild, was not rendered facially unconstitutional by the decision of the United States Supreme Court in *Troxel v Granville* (530 US 57 [2000]). The statute at issue in *Troxel* permitted any person to petition for visitation rights and authorized the trial court to grant such rights in the best interest of the child. The Supreme Court held that application of the statute violated the mother's due process right to make decisions concerning the care, custody and control of her children. Section 72 (1) accords deference to a parent's decisions. ***151**

Parent, Child and Family
Visitation Rights of Grandparents
Constitutionality of Grandparent Visitation Statute as Applied

([4]) Domestic Relations Law § 72 (1) was constitutionally applied to award petitioner grandmother reasonable visitation with her grandchild. Although the trial court, mindful of respondent father's parental prerogatives, employed the strong presumption that the father's wishes represented the child's best interests, as required by the statute, the grandmother surmounted the presumption. For over three years following the death of the child's mother, the grandmother was the child's surrogate, live-in mother. Following consideration of the circumstances bearing upon whether it was in the child's best interest for his relationship with the grandmother to continue--e.g., the reasonableness of the father's objections to the grandmother's access to the child, her caregiving skills and attitude toward the father, the law guardian's assessment, the child's wishes--the court granted visitation.

RESEARCH REFERENCES

Am Jur 2d, Appellate Review § 698; Am Jur 2d, Divorce and Separation § 977.

Carmody-Wait 2d, Appeals to the Court of Appeals §§ 71:96, 71:105; Carmody-Wait 2d, Child Custody and Visitation in Matrimonial Actions § 118A:99.

4 Law and the Family New York (2d ed) § 1:20.

McKinney's, Domestic Relations Law § 72 (1).

NY Jur 2d, Appellate Review § 663; NY Jur 2d, Domestic Relations §§ 408–410.

Siegel, NY Prac § 529.

ANNOTATION REFERENCE

Grandparents' visitation rights where child's parents are living. 71 ALR5th 99.

FIND SIMILAR CASES ON WESTLAW

Database: NY-ORCS

Query: grand! /3 visitation & standing & presumption

POINTS OF COUNSEL

William V. O'Leary, Albany, for appellant.
I. Section 72 of the Domestic Relations Law is unconstitutional. (*People ex rel. Sisson v Sisson,* 271 NY 285; *Troxel v Granville,* 530 US 57; *Reno v Flores,* 507 US 292; *Meyer v Nebraska,* 262 US 390; *Pierce v Society of Sisters,* 268 US 510; *Prince v Massachusetts,* 321 US 158; *M. L. B. v S. L. J.,* 519 US 102; *Parham v J.R.,* 442 US 584; *Hodgson v Minnesota,* 497 US 417; *Stanley v Illinois,* 405 US 645.) II. The grandmother's application should have been dismissed as she was not denied visitation. (***152** *Troxel v Granville,* 530 US 57; *Matter of David M. v Lisa M.,* 207 AD2d 623; *Matter of Hertz v Hertz,* 291 AD2d 91.) III. The grandmother's application should have been denied as it was in reality a request for visitation on behalf of parties who were without standing. (*Matter of Fitzpatrick v Youngs,* 186 Misc 2d 344.) IV. The lower courts ignored or misapplied this Court's holdings that family dysfunction and animosity constitute grounds to deny grandparent visitation. (*Matter of Doe v Smith,* 156 Misc 2d 942; *Matter of Wilson v McGlinchey,* 2 NY3d 375; *Matter of DiBerardino v DiBerardino,* 229 AD2d 539; *Matter of Gloria R. v Alfred R.,* 209 AD2d 179; *Meiselman v Crown Hgts. Hosp.,* 285 NY 389; *People ex rel. Sibley v Sheppard,* 54 NY2d 320; *Matter of Coulter v Barber,* 214 AD2d 195; *Matter of Smith v Jones,* 155 Misc 2d 254; *Matter of Tropea v Tropea,* 87 NY2d 727.) V. The scope and unfettered nature of the grandmother's visitation is both excessive and contrary to the child's best interest.
Thomas K. Campagna, P.C., Ronkonkoma (*Thomas K. Campagna* of counsel), for respondent.
I. Section 72 of the Domestic Relations Law is constitutional. (*Matter of Jonee,* 181 Misc 2d 822; *Moore v East Cleveland,* 431 US 494; *Rivera v Marcus,* 696 F2d 1016; *Harley v City of New York,* 36 F Supp 2d 136; *Parham v J.R.,* 442 US 584; *Santosky v Kramer,* 455 US 745; *Matter of Principato v Lombardi,* 19 AD3d 602; *People ex rel. Sibley v Sheppard,* 54 NY2d 320; *Matter of Hertz v Hertz,* 291 AD2d 91; *Matter of Emanuel S. v Joseph E.,* 78 NY2d 178.) II. The grandmother properly petitioned the court for visitation. (*Matter of Emanuel S. v Joseph E.,* 78 NY2d 178; *Matter of Principato v Lombardi,* 19 AD3d 602.) III. The grandmother properly petitioned the court on behalf of herself. IV. The court correctly granted visitation based upon the lack of family dysfunction and animosity. (*Matter of Doe v Smith,* 156 Misc 2d 942; *Matter of Wilson v McGlinchey,* 2 NY3d 375; *Matter of DiBerardino v DiBerardino,* 229 AD2d 539; *Matter of Principato v Lombardi,* 19 AD3d 602; *Lo Presti v Lo Presti,* 40 NY2d 522.) V. The scope and nature of the visitation are within the child's best interests.
Robert D. Gallo, Sayville, and *Judy Poznik,* Law Guardians.
I. Section 72 of the Domestic Relations Law is constitutional per se and as applied. (*Troxel v Granville,* 530 US 57; *Matter of Hertz v Hertz,* 291 AD2d 91; *Matter of Morgan v Grzesik,* 287 AD2d 150; *Matter of Ehrlich v Ressner,* 55 AD2d 953; *United States v Salerno,* 481 US 739; *Matter of Van Berkel v Power,* 16 NY2d 37; *People v Barber,* 289 NY 378; *Matter of Bennett v Jeffreys,* 40 NY2d 543; *Matter of Davis v Davis,* 188 Misc 2d 81; ***153** *Washington v Glucksberg,* 521 US 702.) II. The Appellate Division did not abuse its discretion in ordering grandparent visitation after inquiry into all of the relevant facts. (*Matter of Emanuel S. v Joseph E.,* 78 NY2d 178; *Matter of Wilson v McGlinchey,* 2 NY3d 375; *Matter of Weis v Rivera,* 29 AD3d 812; *Matter of Principato v Lombardi,* 19 AD3d 602; *Matter of Eggleton v Clark,* 11 AD3d 459; *People ex rel. Sibley v Sheppard,* 54 NY2d 320; *Matter of Follum v Follum,* 302 AD2d 861; *Matter of Kenyon v Kenyon,* 251 AD2d 763; *Matter of Coulter v Barber,* 214 AD2d 195; *Matter of Smith v Jones,* 155 Misc 2d 254.) III. The death of the child's mother provided the maternal grandmother with automatic standing. (*Matter of Emanuel S. v Joseph E.,* 78 NY2d 178; *Matter of Weis v Rivera,* 29 AD3d 812; *Matter of Principato v Lombardi,* 19 AD3d 602; *Matter of Eggleton v Clark,* 11 AD3d 459.) IV. The extraordinary relationship between the grandparent and grandchild justifies unfettered, substantial and regular visitation.
Andrew Cuomo, Attorney General, Albany (*Nancy A. Spiegel, Caitlin J. Halligan, Daniel Smirlock* and *Patrick J. Walsh* of counsel), amicus curiae.
Because Domestic Relations Law § 72 (1) is narrowly drawn to further a legitimate state interest and gives due deference to the wishes of fit parents concerning the care and custody of their children, it is constitutional. (*United States v Salerno,* 481 US 739; *Matter of Moran Towing Corp. v Urbach,* 99 NY2d 443; *People v Stuart,* 100 NY2d 412; *Matter of Van Berkel v Power,* 16 NY2d 37; *Troxel v Granville,* 530 US 57; *Matter of Hertz v Hertz,* 291 AD2d 91; *Matter of Morgan v Grzesik,* 287 AD2d 150; *Matter of Wilson v McGlinchey,* 2 NY3d 375; *Matter of David M. v Lisa M.,* 207 AD2d 623; *Matter of Hantman v Heller,* 213 AD2d 637.)

OPINION OF THE COURT

Read, J.

We are asked to decide whether the grandparent in this case was properly granted visitation with her grandson pursuant to section 72 (1) of the Domestic Relations Law, and, if so, whether this provision is constitutional in view of the United States Supreme Court's decision in *Troxel v Granville* (530 US 57 [2000]). For the reasons that follow, we conclude that section 72 (1) was followed here, and is constitutional, both on its face and as applied.

I.

A.D. (mother) married P.D. (father) in 1992; their son C.D. was born in ****2** November 1993. In June 1997, A.D. was diagnosed ***154** with cancer of the breast and spine. A.D.'s mother E.S. (grandmother), who lived in East Hampton, Long Island, was asked to move into the marital home in Huntington to care for her terminally ill daughter and the child. Grandmother cleaned the house, shopped, cooked household meals and looked after the child when A.D.'s illness prevented her from doing so.

After A.D.'s death in March 1998, father invited grandmother to stay on to help out with the then-four-year-old child's care and household duties. Grandmother agreed, and father, grandmother and the child lived together amicably in the Huntington home for the ensuing 3½ years. During that time, grandmother comforted, supported and cared for the motherless child. She got him ready for school, put him to bed, read with him, helped him with his homework, cooked his meals, laundered his clothes and drove him to school and to doctor's appointments and various activities, including gym class, karate class, bowling, soccer, Little League baseball and swimming class. She arranged and transported him to away-from-home or supervised at-home play dates; she took him to the public library and introduced him to the game of chess. From 1998 through 2001, the child and father spent entire summers at grandmother's home in East Hampton, where the child's maternal first cousins and other family members were frequently present as well.

By the fall of 2001, the relationship between grandmother and father had begun to sour. The reasons for this are disputed, but father and grandmother apparently differed over such matters as how to handle the child's sometime unwillingness to eat the food prepared for him at mealtime, and how strictly to enforce his bedtime, his tooth brushing regimen, homework routines and the like. In general, grandmother seems to have been more indulgent than father, who consequently came to view her as sabotaging his parental authority and competing with him for control over the household and, more importantly, the child. On February 24, 2002 father demanded that grandmother move out of the Huntington home immediately. Grandmother claims to have been completely surprised by this turn of events. She strenuously objected to leaving without at least saying goodbye to the child, who was away on a play date at the time, but she ultimately bowed to father's wishes and left with most of her belongings.

For the next seven or eight weeks, father forbade any contact between grandmother and the child. From April through ***155** December 2002, father allowed sporadic visits, which were limited in length and tightly supervised, and occasional telephone calls. According to grandmother, an incident in December 2002, when she experienced a four-hour wait for a scheduled visit with the child, was the "last straw." She decided to seek judicial intervention, a decision that she characterizes as having been arrived at most reluctantly. Accordingly, in January 2003, grandmother, who was 78 years old at the time, commenced this proceeding ****3** pursuant to Domestic Relations Law § 72 and Family Court Act § 651 for an order granting reasonable visitation with the child, who was then nine years old. Father opposed grandmother's request, and cross-moved for an order prohibiting grandmother from any contact whatsoever with the child.

Supreme Court appointed a law guardian for the child and conducted a lengthy, multi-day hearing. Among the numerous witnesses who testified were grandmother, father, his mother and stepmother, and two of the child's former babysitters. Supreme Court also held an in camera interview with the child in the presence of the law guardian, and considered the law guardian's report and recommendation. On December 1, 2004, Supreme Court granted judgment to grandmother, and ordered visitation according to a detailed schedule. Supreme Court concluded that

> "[a]lthough mindful of [father]'s right to rear [the child] as he sees fit, and of his stated concern that [grandmother] undermines his parental authority, the Court finds that he has failed to present any credible evidence warranting either the termination of the relationship between [grandmother] and [the child] or the imposition of restrictions on the right of visitation. Instead, the evidence in the record establishes the existence of a very close, loving relationship between [grandmother] and [the child],

and that [the child]'s best interest is served by granting [grandmother] regular, unfettered visitation" (6 Misc 3d 1030[A], 2004 NY Slip Op 51846[U], *15).

Upon father's appeal, the Appellate Division affirmed Supreme Court's judgment, but modified certain terms of the visitation schedule in deference to father's wishes, relying on *Troxel*. In response to father's constitutional challenge, the Appellate Division observed that

"[c]ontrary to the father's contention, this Court ***156** has determined that New York State's grandparent visitation statute, Domestic Relations Law § 72, is not facially invalid under [*Troxel*] even though it does not specifically require that parental decisions are to be given 'special weight.' Our visitation statute, narrowly drafted to only afford a grandparent standing to sue ****4** for visitation when a child's parent has died or where 'conditions exist which equity would see fit to intervene' (Domestic Relations Law § 72) and additionally requiring that after standing has been conferred, that the grandparent establish why visitation is in the child's best interest, necessarily gives the parent's decision presumptive weight" (27 AD3d 757, 758-759 [2d Dept 2006] [citations omitted]).

The Appellate Division further rejected father's argument that Supreme Court abused its discretion in awarding visitation to grandmother.

II.

Section 72 (1) of the Domestic Relations Law states that

"[w]here either or both of the parents of a minor child, residing within this state, is or are deceased, or where circumstances show that conditions exist which equity would see fit to intervene, a grandparent or the grandparents of such child may apply to [supreme or family court] and . . . the court, by order, after due notice to the parent or any other person or party having the care, custody, and control of such child, to be given in such manner as the court shall prescribe, may make such directions as the best interest of the child may require, for visitation rights for such grandparent or grandparents in respect to such child."

Section 72 (1) derogates from the common-law rule that "grandparents [have] no standing to assert rights of visitation against a custodial parent" (*Matter of Emanuel S. v Joseph E.*, 78 NY2d 178, 180 [1991]). The statute "rests on the humanitarian concern that [v]isits with a grandparent are often a precious part of a child's experience and there are benefits which devolve upon the grandchild . . . which he cannot derive from any other relationship" (*id.* at 181 [internal quotation marks and citations omitted]).

***157** Section 72 (1) "does not create an absolute or automatic right of visitation. Instead, the statute provides a procedural mechanism for grandparents to acquire standing to seek ****5** visitation with a minor grandchild" (*Matter of Wilson v McGlinchey*, 2 NY3d 375, 380 [2004] [internal quotation marks and citation omitted]). When grandparents seek visitation under section 72 (1), the court must undertake a two-part inquiry. "First, [the court] must find standing based on death or equitable circumstances"; and "[i]f [the court] concludes that the grandparents have established the right to be heard, then it must determine if visitation is in the best interest of the grandchild" (*Matter of Emanuel S.*, 78 NY2d at 181).

But the courts should not lightly intrude on the family relationship against a fit parent's wishes. The presumption that a fit parent's decisions are in the child's best interests is a strong one. And while, as we made clear in *Wilson*, the problems created by parent-grandparent antagonism cannot be ignored, an acrimonious relationship is generally not sufficient cause to deny visitation. "It is almost too obvious to state that, in cases where grandparents must use legal procedures to obtain visitation rights, some degree of animosity exists between them and the party having custody of the child or children. Were it otherwise, visitation could be achieved by agreement" (*Lo Presti v Lo Presti*, 40 NY2d 522, 526 [1976]).

([1]), ([2]) Here, grandmother has automatic standing under section 72 (1) on account of A.D.'s death. Further, record evidence supports the determination of the courts below that visitation between grandmother and the child is in the child's best interest. The father in this case is a competent parent, and Supreme Court was therefore properly "mindful" in the first instance of his right to rear the child as he saw fit. Supreme Court determined, however, that grandmother established "an extraordinarily close

relationship [with the child] during the nearly five-year period that she lived with him and [father]" (6 Misc 3d 1030[A], 2004 NY Slip Op 51846[U], *14). Further, grandmother "clearly appreciate[d] and respect[ed] the separate roles that she and [father] play[ed] in [the child's] life, and wishe[d] to improve her relationship with [father] for the sake of [the child]," and there was "no credible evidence in the record substantiating [father's] claim that [grandmother] [sought] to usurp his role as [the child's] parent" (*id*.). Supreme Court also found that father's complaints about grandmother's caregiving skills ***158** were "contrived" and his claims of ill will exaggerated and "tailored to raise the specter of family dysfunction" (*id*.). Supreme Court agreed with the law guardian's "determination that the relationship with [grandmother] [was] central to [the child's] well[-]being," and noted that the child, who is gifted, had "articulated a deep love for and attachment to" grandmother (*id*.). The Appellate Division affirmed the trial court's findings of fact, and we may not revisit them (*see* Karger, Powers of the New York Court of Appeals § 13:10, at 489 [rev 3d ed] ["(F)indings of fact made by the *nisi prius* court which have been expressly affirmed by the Appellate Division and have the requisite evidentiary support are . . . conclusive and binding on the Court"]). In light of these factual findings, there is no reason to disturb the best-interest determination in this case. There was no abuse of discretion; the courts below correctly applied ****6** section 72 (1).

III.

Father contends that Domestic Relations Law § 72 (1) is facially unconstitutional in light of *Troxel*. "A party mounting a facial constitutional challenge bears the substantial burden of demonstrating that in any degree and in every conceivable application, the law suffers wholesale constitutional impairment" (*Matter of Moran Towing Corp. v Urbach*, 99 NY2d 443, 448 [2003] [internal quotation marks and citation omitted]). Moreover, the challenger "must surmount the presumption of constitutionality accorded to legislative enactments by proof beyond a reasonable doubt" (*id.* at 448 [internal quotation marks and citation omitted]).

The Washington statute at issue in *Troxel* permitted " '[a]ny person' to petition [the trial court] for visitation rights 'at any time,' and authorize [d] that court to grant such visitation rights whenever 'visitation may serve the best interest of the child' " (*Troxel*, 530 US at 60, quoting Wash Rev Code § 26.10.160 [3]). In *Troxel*, paternal grandparents petitioned for visitation with their grandchildren pursuant to this statute. The mother did not oppose all visitation, but sought to limit it. The trial court awarded visitation to the grandparents, "settl[ing] on a middle ground" between what the grandparents requested and the mother offered (*Troxel* at 71). The intermediate appeals court reversed on statutory grounds and dismissed the petition. The Washington Supreme Court then affirmed on a different ground-- that the statute ***159** was facially invalid under the Federal Constitution because it unconstitutionally infringed on the fundamental right of parents to rear their children.

The Supreme Court affirmed the petition's dismissal, while declining to hold the Washington statute unconstitutional on its face. Justice O'Connor's plurality opinion held, however, that "the application of [the statute] to [the mother] and her family violated [the mother's] due process right to make decisions concerning the care, custody, and control of her daughters" (*id.* at 75). The plurality considered it critical that there were no allegations or findings of the mother's unfitness as a parent because

> "so long as a parent adequately cares for his or her children (*i.e.*, is fit), there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children" (*id.* at 68-69).

As a result,

> "the decision whether . . . an intergenerational relationship would be beneficial in any specific case is for the parent to make in the first instance. And, if a fit parent's decision ****7** of the kind at issue here becomes subject to judicial review, the court must accord at least *some special weight* to the parent's own determination" (*id.* at 70 [emphasis added]).

The problem in *Troxel* was therefore not that the trial court intervened, but that it failed to employ "the traditional presumption that a fit parent will act in the best interest of his or her child" when it did (*id.* at 69). On the contrary, the trial court effectively

applied a presumption in favor of grandparent visitation, placing on the parent "the burden of *disproving* that visitation would be in the best interest" of her children (*id.*).

([3]) Reasoning from *Troxel*, we conclude that section 72 (1) is facially constitutional. As Justice Altman aptly put it, section 72 (1)

> "can be, and has been, interpreted to accord deference to a parent's decision, although the statute itself does not specifically require such deference. Further, [section 72 (1)] is drafted much more ***160** narrowly than the Washington statute [considered in *Troxel*]. If the United States Supreme Court did not declare the 'breathtakingly broad' Washington statute to be facially invalid, then certainly the more narrowly drafted New York statute is not unconstitutional on its face. In fact, the Court indicated that it would be hesitant to hold specific nonparental visitation statutes unconstitutional per se because 'much state-court adjudication in this context occurs on a case-by-case basis.' *Troxel* does not prohibit judicial intervention when a fit parent refuses visitation, but only requires that a court accord 'some special weight to the parent's own determination' when applying a nonparental visitation statute" (*Matter of Hertz v Hertz*, 291 AD2d 91, 94 [2d Dept 2002] [citations omitted]; *see also Matter of Morgan v Grzesik*, 287 AD2d 150 [4th Dept 2001]).

Courts in other states have likewise read their grandparent visitation statutes to encompass the constitutional protections necessary to safeguard parental rights (*see Hiller v Fausey*, 588 Pa 342, 361-363, 904 A2d 875, 887-888 [2006]; *In re Estate of S.T.T.*, 144 P3d 1083, 1093 [Utah 2006]; *Blixt v Blixt*, 437 Mass 649, 657-658, 774 NE2d 1052, 1060 [2002]). Indeed, the plurality's decision in *Troxel* seemed to suggest that the Washington Supreme Court might have similarly chosen to interpret its statute more narrowly.

([4]) Finally, father also argues that section 72 (1) was unconstitutionally applied in this case. We disagree. Unlike *Troxel*, the trial court here did not presuppose that grandparent visitation was warranted as the jumping-off point for fact-finding and best-interest analysis. Instead, the court, emphasizing that it was "mindful" of father's parental prerogatives, employed the strong presumption that the parent's wishes represent the child's best interests, as our statute ****8** requires (*see Troxel*, 530 US at 69). While this presumption creates a high hurdle, the grandmother in this case surmounted it: from the time the child was almost four until he was seven, grandmother was his surrogate, live-in mother. The court then properly went on to consider all of the many circumstances bearing upon whether it was in the child's best interest for his relationship with grandmother to continue--e.g., the reasonableness of father's objections to grandmother's access to the child, her caregiving skills and ***161** attitude toward father, the law guardian's assessment, the child's wishes--before making a judgment granting visitation.

Accordingly, the order of the Appellate Division, insofar as appealed from, should be affirmed, with costs.

Chief Judge Kaye and Judges Ciparick, Graffeo, Smith and Pigott concur; Judge Jones taking no part.

Order, insofar as appealed from, affirmed, with costs.

28 N.Y.3d 1, 61 N.E.3d 488, 39 N.Y.S.3d 89, 2016 N.Y. Slip Op. 05903

**1 In the Matter of Brooke S.B., Respondent,

v

Elizabeth A.C.C., Respondent. R. Thomas Rankin, Esq., Attorney for the Child, Appellant.

In the Matter of Estrellita A., Respondent,

v

Jennifer L.D., Appellant.

Court of Appeals of New York
91, 92
Argued June 2, 2016
Decided August 30, 2016

CITE TITLE AS: Matter of Brooke S.B. v Elizabeth A.C.C.

SUMMARY

Appeal, in the first above-entitled proceeding, by permission of the Court of Appeals, from an order of the Appellate Division of the Supreme Court in the Fourth Judicial Department, entered June 19, 2015. The Appellate Division affirmed an order of the Family Court of Chautauqua County (Judith S. Claire, J.), which had dismissed a petition for custody and visitation in a Family Court Act article 6 proceeding.

Appeal, in the second above-entitled proceeding, by permission of the Court of Appeals, from an order of the Appellate Division of the Supreme Court in the Second Judicial Department, entered December 24, 2014. The Appellate Division affirmed an order of the Family Court of Suffolk County (Theresa Whelan, J.), which had, insofar as appealed from, granted a petition to the extent of awarding petitioner visitation in a Family Court Act article 6 proceeding. The appeal to the Appellate Division brought up for review the denial, by that Family Court (op 40 Misc 3d 219 [2013]), of respondent's motion to dismiss the petition for lack of standing.

Matter of Brooke S.B. v Elizabeth A.C.C., 129 AD3d 1578, reversed.

*2 *Matter of Estrellita A. v Jennifer L.D.*, 123 AD3d 1023, affirmed.

HEADNOTES

Parent, Child and Family
Custody
Standing of Non-Biological, Non-Adoptive Parent

([1]) *Matter of Alison D. v Virginia M.* (77 NY2d 651 [1991]), which held that, in an unmarried couple, a partner without a biological or adoptive relation to a child is not the child's "parent" for purposes of standing to seek custody or visitation under the statute, notwithstanding their established relationship with the child, is overruled. In light of more recently delineated legal principles, including conferring parental standing based on equity in the context of adoption and support proceedings and the enactment of same-sex marriage in New York, the narrow definition of "parent" established in *Alison D.* had become unworkable when applied to increasingly varied familial relationships.

Parent, Child and Family
Custody
Standing of Non-Biological, Non-Adoptive Parent

([2]) Where, in an unmarried couple, a partner without a biological or adoptive relation to a child proves by clear and convincing evidence that he or she agreed with the biological parent of the child to conceive and raise the child as co-parents, the non-biological, non-adoptive partner has standing to seek visitation and custody as the child's "parent" under Domestic Relations Law § 70 (a). Accordingly, in separate Family Court Act article 6 proceedings where each petitioner—the non-biological, non-adoptive partner—alleged that she entered into a pre-conception agreement with the respondent biological parent to conceive and raise a child as co-parents, the allegations, if proved by clear and convincing evidence, were sufficient to establish petitioners' standing to seek custody and visitation under the statute. Because both cases were necessarily decided based on the facts presented, it would be premature to consider adopting a test for situations in which a couple did not enter into a pre-conception agreement. Additionally, the ultimate determination of whether the custody or visitation rights sought by the non-biological, non-adoptive parent should be granted rested in the sound discretion of the court, which determines the best interests of the child.

Parent, Child and Family
Custody
Standing of Non-Biological, Non-Adoptive Parent

([3]) In a Family Court Act article 6 proceeding brought by the partner in an unmarried couple without a biological or adoptive relation to the other partner's biological child, the Appellate Division order affirming Family Court's dismissal of the petition on constraint of *Matter of Alison D. v Virginia M.* (77 NY2d 651 [1991]) was reversed and the matter remitted to Family Court for further proceedings, as that decision has been overruled and no longer prevents the courts below from determining standing. Where, in an unmarried couple, a partner without a biological or adoptive relation to a child proves by clear and convincing evidence that he or she agreed with the biological parent of the child to conceive and raise the child as co-parents, the non-biological, non-adoptive partner has standing to seek visitation and custody as the child's "parent" under Domestic Relations Law § 70 (a). Accordingly, *Alison D.* no longer poses any obstacle to the consideration by the courts below of standing by equitable estoppel if petitioner proves by clear ***3** and convincing evidence her allegation that a pre-conception agreement existed.

Parent, Child and Family
Custody
Standing of Non-Biological, Non-Adoptive Parent

([4]) In a Family Court Act article 6 proceeding brought by the partner in an unmarried couple who did not have a biological or adoptive relation to the other partner's biological child but had been ordered to pay child support, the courts below correctly resolved the question of standing by recognizing petitioner's standing to seek visitation as a "parent" under Domestic Relations Law § 70 (a) based on judicial estoppel. Respondent had obtained an order in the child support proceeding between the parties based on her successful argument that petitioner was a parent to the child, and was therefore estopped from taking the inconsistent position that petitioner was not, in fact, a parent to the child for purposes of visitation.

RESEARCH REFERENCES

Am Jur 2d, Parent and Child §§ 26, 29, 31, 32, 36.

Carmody-Wait 2d, Child Custody and Visitation in Matrimonial Actions §§ 118A:2, 118A:75, 118A:117.

McKinney's, Domestic Relations Law § 70 (a).

NY Jur 2d, Domestic Relations §§ 336, 338, 339, 365, 478, 488.

ANNOTATION REFERENCE

See ALR Index under Children and Minors; Custody and Support of Children; Visits and Visitation.

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Query: parent /s standing /s custody visitation & pre-conception /4 agree!

POINTS OF COUNSEL

Warshaw Burstein, LLP, New York City (*Eric I. Wrubel, Linda Genero Sklaren* and *Alex R. Goldberg* of counsel), and *Goodell & Rankin*, Jamestown (*R. Thomas Rankin* of counsel), for appellant in the first above-entitled proceeding.
I. Parentage by estoppel—rejected by *Matter of Alison D. v Virginia M.* (77 NY2d 651 [1991]) and *Debra H. v Janice R.* (14 NY3d 576 [2010])—has been used by New York courts for more than half a century to hold that non-adoptive, non-biological men are parents as a matter of law. (*Matter of Commissioner of Social Servs. v Julio J.*, 20 NY3d 995; *Matter of* ***4** *Shondel J. v Mark D.*, 7 NY3d 320; *Matter of Sharon GG. v Duane HH.*, 63 NY2d 859; *Matter of Luis Hugo O. v Paola O.*, 129 AD3d 976; *Matter of Angelo A.R. v Tenisha N.W.*, 108 AD3d 561; *Matter of Starla D. v Jeremy E.*, 95 AD3d 1605; *Matter of Antonio H. v Angelic W.*, 51 AD3d 1022; *Matter of Greg S. v Keri C.*, 38 AD3d 905; *Matter of Bruce W.L. v Carol A.P.*, 46 AD3d 1471; *Matter of Diana E. v Angel M.*, 20 AD3d 370.) II. Equitable estoppel should be extended to custody and visitation proceedings for purposes of establishing standing for parents unrelated to children by biology or adoption. (*Matter of Ettore I. v Angela D.*, 127 AD2d 6; *Matter of Sharon GG. v Duane HH.*, 95 AD2d 466; *State of New York ex rel. H. v P.*, 90 AD2d 434; *Hill v Hill*, 20 AD2d 923; *Brite v Brite*, 61 Misc 2d 10; *Matter of Anonymous*, 50 AD2d 890; *Matter of Tropea v Tropea*, 87 NY2d 727; *Matter of Lincoln v Lincoln*, 24 NY2d 270; *Matter of Juan R. v Necta V.*, 55 AD2d 33; *Kramer v Griffith*, 119 AD3d 655.) III. The Marriage Equality Act and the decision of the United States Supreme Court in *Obergefell v Hodges* (576 US —, 135 S Ct 2584 [2015]) obviated the bright-line rule of *Matter of Alison D. v Virginia M.* (77 NY2d 651 [1991]) and *Debra H. v Janice R.* (14 NY3d 576 [2010]), which tied parenthood solely to biology or adoption. (*Hernandez v Robles*, 7 NY3d 338; *Langan v St. Vincent's Hosp. of N. Y.*, 25 AD3d 90; *Gonzalez v Green*, 14 Misc 3d 641.) IV. Stare decisis is not a bar to overruling the obsolete, unjust precedent of *Matter of Alison D. v Virginia M.* (77 NY2d 651 [1991]). (*People v Bing*, 76 NY2d 331; *Gallagher v St. Raymond's R. C. Church*, 21 NY2d 554; *Silver v Great Am. Ins. Co.*, 29 NY2d 356; *Gelbman v Gelbman*, 23 NY2d 434; *People v Rudolph*, 21 NY3d 497; *People v Epton*, 19 NY2d 496; *Matter of Lewis*, 25 NY3d 456; *People v Taylor*, 9 NY3d 129; *People v Saunders*, 85 NY2d 339; *Grace Plaza of Great Neck v Elbaum*, 82 NY2d 10.) V. Petitioner has made out a prima facia case of parentage by estoppel, giving her standing to bring a petition for custody and visitation with the child. (*Cron v Hargro Fabrics*, 91 NY2d 362; *Sanders v Winship*, 57 NY2d 391; *Morone v Morone*, 50 NY2d 481; *Underpinning & Found. Constructors v Chase Manhattan Bank, N.A.*, 46 NY2d 459; *Westhill Exports v Pope*, 12 NY2d 491.)

Susan L. Sommer, Lambda Legal Defense and Education Fund, Inc., New York City, *Blank Rome LLP*, New York City (*Margaret Canby* and *Caroline Krauss-Browne* of counsel), and *Brett M. Figlewski, The LGBT Bar Association of Greater New York*, New York City, for Brooke S.B., respondent in the first above-entitled proceeding.

I. This Court should not adhere to ***5** outmoded and unworkable precedents that unjustly deny standing to parents like Brooke S.B. (*Matter of Alison D. v Virginia M.*, 77 NY2d 651; *Debra H. v Janice R.*, 14 NY3d 576; *Lawrence v Texas*, 539 US 558; *Bowers v Hardwick*, 478 US 186; *People v Peque*, 22 NY3d 168; *Bing v Thunig*, 2 NY2d 656; *People v Bing*, 76 NY2d 331; *People v Hobson*, 39 NY2d 479; *Silver v Great Am. Ins. Co.*, 29 NY2d 356; *Gelbman v Gelbman*, 23 NY2d 434.) II. Brooke S.B. is entitled to standing as a parent under both Domestic Relations Law § 70's express terms and common law. (*Eschbach v Eschbach*, 56 NY2d 167; *Braschi v Stahl Assoc. Co.*, 74 NY2d 201; *Matter of Jacob*, 86 NY2d 651; *Matter of Village of Chestnut Ridge v Howard*, 92 NY2d 718; *Troxel v Granville*, 530 US 57; *Perry-Rogers v Fasano*, 276 AD2d 67; *Counihan v Bishop*, 111 AD3d 594; *Laura WW. v Peter WW.*, 51 AD3d 211; *Matter of H.M. v E.T.*, 14 NY3d 521; *Yonaty v Mincolla*, 97 AD3d 141.) III. This Court's rulings recognizing the parental status of a non-biological parent like Brooke S.B. for purposes of child support but not for purposes of custody and visitation are irreconcilable and disserve a child's compelling interest in the emotional support of a second parent. (*Matter of Shondel J. v Mark D.*, 7 NY3d 320; *Matter of Juanita A. v Kenneth Mark N.*, 15 NY3d 1; *Mahoney-Buntzman v Buntzman*, 12 NY3d 415; *Matter of Sharon GG. v Duane HH.*, 95 AD2d 466; *Jean Maby H. v Joseph H.*, 246 AD2d 282; *Hiross v Hiross*, 224 AD2d 662; *Matter of Gilbert A. v Laura A.*, 261 AD2d 886; *Matter of Lorie F. v Raymond F.*, 239 AD2d 659; *Matter of Boyles v Boyles*, 95 AD2d 95; *Matter of Christopher S. v Ann Marie S.*, 173 Misc 2d 824.) IV. Inaction by the legislature calls for the courts to address, not ignore, the needs of this child. (*Windsor v United States*, 699 F3d 169; *Bourquin v Cuomo*, 85 NY2d 781; *Clark v Cuomo*, 66 NY2d 185; *Matter of Mashnouk v Miles*, 55 NY2d 80.) V. This Court should adopt standards, as many other states' courts have, recognizing the parental status of a person who, with the consent of a child's biological or adoptive parent, functions as the child's intended second parent. (*Matter of Shondel J. v Mark D.*, 7 NY3d 320; *Matter of Juanita A. v Kenneth Mark N.*, 15 NY3d 1; *Matter of Multari v Sorrell*, 287 AD2d 764.) VI. Recognizing the standing of bonded intended parents would enhance, not diminish, certainty and stability for children and their parents. (*Debra H. v Janice R.*, 14 NY3d 576; *Matter of Alison D. v Virginia M.*, 77 NY2d 651; *Matter of Tropea v Tropea*, 87 NY2d 727; *Matter of Bonfiglio v Bonfiglio*, 134 AD2d 426; *Stanley v Illinois*, 405 US 645.) VII. Neither the availability of marriage and civil ***6** union, nor of second-parent adoption, cures the injustice of refusing standing to Brooke S.B. (*Zablocki v Redhail*, 434 US 374; *Godfrey v Spano*, 13 NY3d 358; *M. L. B. v S. L. J.*, 519 US 102; *Matter of Sebastian*, 25 Misc 3d 567; *Plyler v Doe*, 457 US 202; *Debra H. v Janice R.*, 14 NY3d 576; *Matter of Behrens v Rimland*, 32 AD3d 929; *Matter of Janis C. v Christine T.*, 294 AD2d 496; *Beth R. v Donna M.*, 19 Misc 3d 724.) VIII. Denying M.B. and Brooke S.B. the right to enforce their parent-child relationship violates the New York and U.S. Constitutions. (*Planned Parenthood of Central Mo. v Danforth*, 428 US 52; *Smith v Organization of Foster Families For Equality & Reform*, 431 US 816; *Lehr v Robertson*, 463 US 248; *Michael H. v Gerald D.*, 491 US 110; *Prince v Massachusetts*, 321 US 158; *Troxel v Granville*, 530 US 57; *Matter of E.S. v P.D.*, 8 NY3d 150; *Gomez v Perez*, 409 US 535; *Weber v Aetna Casualty & Surety Co.*, 406 US 164; *Levy v Louisiana*, 391 US 68.)

Sherry A. Bjork, Frewsburg, for Elizabeth A.C.C., respondent in the first above-entitled proceeding.

I. The argument for equitable estoppel is not applicable to this case and should not be extended to putative parents in custody and visitation proceedings concerning children with whom they lack a biological or adoptive relation. (*Matter of A.F. v K.H.*, 121 AD3d 683; *Debra H. v Janice R.*, 14 NY3d 576; *Matter of Shondel J. v Mark D.*, 7 NY3d 320; *Nassau Trust Co. v Montrose Concrete Prods. Corp.*, 56 NY2d 175; *Matter of Palmatier v Dane*, 97 AD3d 864; *Matter of Behrens v Rimland*, 32 AD3d 929; *Matter of Janis C. v Christine T.*, 294 AD2d 496; *Matter of Multari v Sorrell*, 287 AD2d 764.) II. The definition of "parent" set forth in *Matter of Alison D. v Virginia M.* (77 NY2d 651 [1991]), is not obsolete in light of the Marriage Equality Act, Domestic Relations Law § 10-a, and the decision of the United States Supreme Court in *Obergefell v Hodges* (576 US —, 135 S Ct 2584 [2015]), which implicitly recognizes that biology and adoption are no longer the sole means to establish parentage. III. Constitutional due process and equal protection guarantees do not require courts to grant standing to a putative parent to bring a custody and visitation proceeding concerning a child with whom the putative parent lacks a biological or adoptive relation, where the biological or adoptive parent has consented to the formation of a parent-child relationship between the putative parent and the child, and the putative parent has assumed the full panoply of parental functions. IV. Constitutional due process and equal protection guarantees do not

give a child the right to maintain a relationship with a person unrelated to the child through ***7** biology or adoption, who, with the consent of the child's biological or adoptive parent, has developed a parent-child relationship with the child and who has assumed the full panoply of parental functions. V. A partner of an unmarried parent can be denied standing to seek custody and visitation even where the unmarried parent has consented to the establishment of a parental relationship between the parent's partner and child; and the partner assumed the obligations of parenthood, resulting in formation of a bonded parental relationship with the child. (*People ex rel. Kropp v Shepsky*, 305 NY 465; *Matter of Bennett v Jeffreys*, 40 NY2d 543.) VI. *Matter of Alison D. v Virginia M.* (77 NY2d 651 [1991]), approved in dicta in *Debra H. v Janice R.* (14 NY3d 576 [2010]), should be not be overruled by the Court. (*Wendy G-M. v Erin G-M.*, 45 Misc 3d 574.)
Quatela, Hargraves & Chimeri, PLLC, Hauppauge (*Christopher J. Chimeri* and *Margaret Schaefler* of counsel), for appellant in the second above-entitled proceeding.
A hearing court may not grant visitation to non-parents absent the fit biological parent's consent and respondent lacked standing absent statutory criteria. (*Perry-Rogers v Fasano*, 276 AD2d 67; *Meyer v Nebraska*, 262 US 390; *Troxel v Granville*, 530 US 57; *Matter of Darlene T.*, 28 NY2d 391; *Matter of Bennett v Jeffreys*, 40 NY2d 543; *Debra H. v Janice R.*, 14 NY3d 576; *Matter of Alison D. v Virginia M.*, 77 NY2d 651; *Matter of Multari v Sorrell*, 287 AD2d 764; *Matter of Palmatier v Dane*, 97 AD3d 864; *Matter of A.F. v K.H.*, 121 AD3d 683.)
Kramer Levin Naftalis & Frankel LLP, New York City (*Andrew J. Estes* and *Jeffrey S. Trachtman* of counsel), and *Gervase & Mintz P.C.*, Garden City (*Susan G. Mintz* of counsel), for respondent in the second above-entitled proceeding.
I. Estrellita A. has standing to seek visitation because she was adjudicated a parent in the support matter at Jennifer L.D.'s request. (*Debra H. v Janice R.*, 14 NY3d 576; *Matter of Alison D. v Virginia M.*, 77 NY2d 651; *Matter of H.M. v E.T.*, 14 NY3d 521; *Perry-Rogers v Fasano*, 276 AD2d 67; *Matter of Shondel J. v Mark D.*, 7 NY3d 320; *Counihan v Bishop*, 111 AD3d 594; *Troxel v Granville*, 530 US 57; *Meyer v Nebraska*, 262 US 390; *Matter of Tropea v Tropea*, 87 NY2d 727; *Weiss v Weiss*, 52 NY2d 170.) II. The Family Court and the Appellate Division properly applied judicial estoppel to prevent Jennifer L.D. from challenging Estrellita A.'s status as a legal parent. (*Anonymous v Anonymous*, 137 AD2d 739; *Ford Motor Credit Co. v Colonial Funding Corp.*, 215 AD2d 435; *Matter of* ***8** *Mukuralinda v Kingombe*, 100 AD3d 1431; *Mahoney-Buntzman v Buntzman*, 12 NY3d 415; *Crespo v Crespo*, 309 AD2d 727; *Perkins v Perkins*, 226 AD2d 610; *Matter of A.F. v K.H.*, 121 AD3d 683; *Gabrelian v Gabrelian*, 108 AD2d 445; *CDR Créances S.A.S. v Cohen*, 23 NY3d 307; *Alvarez v Snyder*, 264 AD2d 27.) III. Even if, arguendo, the Family Court decision was inconsistent with *Debra H. v Janice R.* (14 NY3d 576 [2010]) or *Matter of Alison D. v Virginia M.* (77 NY2d 651 [1991]), this Court should modify, abrogate, or overrule those decisions to recognize standing here. (*Matter of Bennett v Jeffreys*, 40 NY2d 543; *Matter of Gilbert A. v Laura A.*, 261 AD2d 886; *Telaro v Telaro*, 25 NY2d 433; *Matter of Shondel J. v Mark D.*, 7 NY3d 320; *People v Peque*, 22 NY3d 168; *People v Bing*, 76 NY2d 331; *Matter of Angelo A.R. v Tenisha N.W.*, 108 AD3d 561; *Matter of Bruce W.L. v Carol A.P.*, 46 AD3d 1471; *Matter of Enrique G. v Lisbet E.*, 2 AD3d 288; *Matter of Lorie F. v Raymond F.*, 239 AD2d 659.)
Legal Aid Society of Suffolk County, Inc., Central Islip (*John B. Belmonte* and *Robert C. Mitchell* of counsel), Attorney for the Child, in the second above-entitled proceeding.
I. Applying the principle of estoppel against inconsistent positions to determine respondent had standing as a parent to seek custody of or visitation with H.E.A.-D. does not violate the precedents of this honorable Court. (*Matter of Alison D. v Virginia M.*, 77 NY2d 651; *Matter of Shondel J. v Mark D.*, 7 NY3d 320; *Matter of H.M. v E.T.*, 14 NY3d 521; *Debra H. v Janice R.*, 14 NY3d 576; *Matter of Multari v Sorrell*, 287 AD2d 764; *Anonymous v Anonymous*, 137 AD2d 739; *New Hampshire v Maine*, 532 US 742.) II. If this Court determines that applying the principle of estoppel against inconsistent positions to determine respondent has standing as a parent to seek custody of or visitation with H.E.A.-D. violates the rule of law in *Matter of Alison D. v Virginia M.* (77 NY2d 651 [1991]) and *Debra H. v Janice R.* (14 NY3d 576 [2010]), then this Court should overrule those cases because they deny the rights of the child without due process of law. (*Matter of Bennett v Jeffreys*, 40 NY2d 543.)
Suzanne B. Goldberg, Columbia Law School, New York City, for Richard J. Adago and others, amici curiae in the first above-entitled proceeding.
I. Family law academics overwhelmingly endorse a functional approach to recognizing the legal family. II. Adoption of a functional approach to recognizing parent-child relationships in jurisdictions across the country, including New York, confirms the approach's viability and simplicity. ***9** (*People v Damiano*, 87 NY2d 477; *People v Taylor*, 9 NY3d 129;

People v Hobson, 39 NY2d 479; *People v Bing*, 76 NY2d 331; *Burnet v Coronado Oil & Gas Co.*, 285 US 393; *Bing v Thunig*, 2 NY2d 656; *Matter of Shondel J. v Mark D.*, 7 NY3d 320; *Matter of Bennett v Jeffreys*, 40 NY2d 543; *Finlay v Finlay*, 240 NY 429; *Debra H. v Janice R.*, 14 NY3d 576.)

Cleary Gottlieb Steen & Hamilton LLP, New York City (*Carmine D. Boccuzzi* and *Daniel D. Queen* of counsel), for National Association of Social Workers and others, amici curiae in the first and second above-entitled proceedings.

I. Parent-child attachment relationships are critical to a child's healthy development. II. The absence of a biological or adoptive connection between Brooke S.B. and Estrellita A. and the children did not affect the development of attachment relationships. III. Terminating the children's attachment relationships with Brooke S.B. and Estrellita A. would result in emotional harm to the children. IV. The children's health and welfare are best served by nurturing and maintaining their relationships with Brooke S.B. and Estrellita A. as well as their biological mothers.

Ropes & Gray LLP, New York City (*Christopher Thomas Brown* and *Michael Y. Jo* of counsel), *Ropes & Gray LLP*, Boston, Massachusetts (*Kathryn E. Wilhelm* and *Joshua D. Rovenger* of counsel), *National Center for Lesbian Rights*, San Francisco, California, *American Civil Liberties Union*, New York City, *New York Civil Liberties Union*, New York City, and *New York City Gay and Lesbian Anti-Violence Project*, New York City, for National Center for Lesbian Rights and others, amici curiae in the first above-entitled proceeding.

I. New York lags behind other states by denying unmarried non-biological parents standing to protect their relationships with their children. (*Laura WW. v Peter WW.*, 51 AD3d 211.) II. Recognizing the standing of unmarried non-biological parents to seek custody or visitation rights would not violate the constitutional rights of biological parents. III. Granting unmarried non-biological parents the right to seek custody and visitation is necessary to protect the rights of such parents and their children under the United States Constitution. (*Lehr v Robertson*, 463 US 248; *Matter of Robert O. v Russell K.*, 80 NY2d 254; *Smith v Organization of Foster Families For Equality & Reform*, 431 US 816; *Michael H. v Gerald D.*, 491 US 110; *M. L. B. v S. L. J.*, 519 US 102; *Zablocki v Redhail*, 434 US 374; *Shapiro v Thompson*, 394 US 618; *Little v Streater*, 452 US 1; ***10** *Stanley v Illinois*, 405 US 645; *Planned Parenthood of Central Mo. v Danforth*, 428 US 52.)

Ropes & Gray LLP, New York City (*Christopher Thomas Brown* and *Michael Y. Jo* of counsel), *Ropes & Gray LLP*, Boston, Massachusetts (*Kathryn E. Wilhelm* and *Joshua D. Rovenger* of counsel), *National Center for Lesbian Rights,* San Francisco, California, *American Civil Liberties Union*, New York City, and *New York City Gay and Lesbian Anti-Violence Project*, New York City, for National Center for Lesbian Rights and others, amici curiae in the second above-entitled proceeding. In this case, both the Family Court and the Second Department correctly found that Estrellita A. is a parent to her child and is therefore responsible for child support and entitled to visitation. (*Matter of H.M. v E.T.*, 14 NY3d 521.)

Latham & Watkins LLP, New York City (*Virginia F. Tent*, *Grant F. Wahlquist* and *Katelyn M. Beaudette* of counsel), for Association of the Bar of the City of New York and others, amici curiae in the first above-entitled proceeding.

I. The current interpretation of Domestic Relations Law § 70 under *Matter of Alison D. v Virginia M.* (77 NY2d 651 [1991]) and its progeny harms parents like Brooke S.B. and children like M.B. (*People ex rel. Glendening v Glendening*, 259 App Div 384; *Debra H. v Janice R.*, 14 NY3d 576; *People ex rel. Spreckels v deRuyter*, 150 Misc 323; *Ullman v Ullman*, 151 App Div 419; *Linda R. v Richard E.*, 162 AD2d 48; *People ex rel. Watts v Watts*, 77 Misc 2d 178; *Troxel v Granville*, 530 US 57.) II. *Matter of Alison D. v Virginia M.* (77 NY2d 651 [1991]) and its progeny violate the constitutional rights of LGBT parents and their children. (*Stanley v Illinois*, 405 US 645; *Meyer v Nebraska*, 262 US 390; *Planned Parenthood of Central Mo. v Danforth*, 428 US 52; *Troxel v Granville*, 530 US 57; *Smith v Organization of Foster Families For Equality & Reform*, 431 US 816; *Lehr v Robertson*, 463 US 248; *Windsor v United States*, 699 F3d 169; *Matter of C.M. v C.H.*, 6 Misc 3d 361; *Matter of Gilbert A. v Laura A.*, 261 AD2d 886; *Matter of Christopher S. v Ann Marie S.*, 173 Misc 2d 824.) III. Equity demands that Brooke S.B., and those like her, be recognized as parents. (*Nassau Trust Co. v Montrose Concrete Prods. Corp.*, 56 NY2d 175; *Metropolitan Life Ins. Co. v Childs Co.*, 230 NY 285; *Triple Cities Constr. Co. v Maryland Cas. Co.*, 4 NY2d 443; *Romano v Metropolitan Life Ins. Co.*, 271 NY 288; *Rothschild v Title Guar. & Trust Co.*, 204 NY 458; *White v La Due & Fitch, Inc.*, 303 NY 122; *Matter of Sandfort v Sandfort*, 278 App Div 331; ***11** *Finlay v Finlay*, 240 NY 429; *Matter of Rich v Kaminsky*, 254 App Div 6; *Matter of Shondel J. v Mark D.*, 7 NY3d 320.) IV. The *In re Custody of H.S.H.-K.* (193 Wis 2d 649, 533 NW2d 419 [1995]) test provides a model for assessing the claims of parents like Brooke S.B. (*Debra H. v Janice R.*, 14 NY3d 576; *Kujek v Goldman*, 150 NY 176; *Matter of Molinari v Tuthill*, 59 AD3d 722; *Matter of Shreve v Shreve*, 229 AD2d 1005.)

Latham & Watkins LLP, New York City (*Virginia F. Tent*, *Grant F. Wahlquist* and *Katelyn M. Beaudette* of counsel), for Association of the Bar of the City of New York and others, amici curiae in the second above-entitled proceeding.
I. *Matter of Alison D. v Virginia M.* (77 NY2d 651 [1991]) adopted an unconstitutional and unnecessarily restrictive definition of "parent." (*People ex rel. Glendening v Glendening*, 259 App Div 384; *People ex rel. Spreckels v deRuyter*, 150 Misc 323; *Troxel v Granville*, 530 US 57.) II. Equity demands that Estrellita A. be recognized as a parent. (*White v La Due & Fitch, Inc.*, 303 NY 122; *Matter of Sandfort v Sandfort*, 278 App Div 331; *Finlay v Finlay*, 240 NY 429; *Matter of Rich v Kaminsky*, 254 App Div 6; *Matter of Shondel J. v Mark D.*, 7 NY3d 320; *Anonymous v Anonymous*, 137 AD2d 739; *Davis v Citibank, N.A.*, 116 AD3d 819; *Matter of Mukuralinda v Kingombe*, 100 AD3d 1431; *Mahoney-Buntzman v Buntzman*, 12 NY3d 415; *Debra H. v Janice R.*, 14 NY3d 576.) III. The *In re Custody of H.S.H.-K.* (193 Wis 2d 649, 533 NW2d 419 [1995]) test provides a model for assessing the claims of parents like Estrellita A.
David P. Miranda, New York State Bar Association, Albany, and *Paul, Weiss, Rifkind, Wharton & Garrison, LLP*, New York City (*Roberta A. Kaplan* and *Nila M. Merola* of counsel), for New York State Bar Association, amicus curiae in the first above-entitled proceeding.
I. The Court is not bound by past precedent that is manifestly unjust. (*Silver v Great Am. Ins. Co.*, 29 NY2d 356; *Bing v Thunig*, 2 NY2d 656; *Payne v Tennessee*, 501 US 808; *Helvering v Hallock*, 309 US 106; *People v Hobson*, 39 NY2d 479; *Moragne v States Marine Lines, Inc.*, 398 US 375; *People v Rudolph*, 21 NY3d 497; *People v Epton*, 19 NY2d 496; *Woods v Lancet*, 303 NY 349; *Funk v United States*, 290 US 371.) II. *Matter of Alison D. v Virginia M.* (77 NY2d 651 [1991]) is outmoded and should be overturned. (*Troxel v Granville*, 530 US 57; *Braschi v Stahl Assoc. Co.*, 74 NY2d 201; *Matter of Jacob*, 86 NY2d 651; *Counihan v Bishop*, 111 AD3d 594; *Wendy G-M. v Erin G-M.*, 45 Misc 3d 574; *Matter of Leora F. v Sofia D.*, 167 Misc 2d 840; *Anonymous v Anonymous*, 20 AD3d 333; *Matter of* ***12** *Multari v Sorrell*, 287 AD2d 764; *Beth R. v Donna M.*, 19 Misc 3d 724; *Matter of C.M. v C.H.*, 6 Misc 3d 361.) III. *Matter of Alison D. v Virginia M.* (77 NY2d 651 [1991]) "bright-line rule" creates more uncertainty and has been rejected by other states. (*Debra H. v Janice R.*, 14 NY3d 576.) IV. Application of *Matter of Alison D. v Virginia M.* (77 NY2d 651 [1991]) is increasingly untenable and illogical. (*Matter of Shondel J. v Mark D.*, 7 NY3d 320; *Matter of H.M. v E.T.*, 14 NY3d 521; *Kalechman v Drew Auto Rental*, 33 NY2d 397; *Anonymous v Anonymous*, 20 AD3d 333; *Matter of Janis C. v Christine T.*, 294 AD2d 496; *Matter of Cindy P. v Danny P.*, 206 AD2d 615; *Matter of Gilbert A. v Laura A.*, 261 AD2d 886; *Jean Maby H. v Joseph H.*, 246 AD2d 282; *Matter of Christopher S. v Ann Marie S.*, 173 Misc 2d 824; *Moragne v States Marine Lines, Inc.*, 398 US 375.)
Loeb & Loeb, LLP, New York City (*Eugene R. Licker* of counsel), for American Academy of Adoption Attorneys and others, amici curiae in the first above-entitled proceeding.
I. This Court's decisions regarding standing under Domestic Relations Law § 70 affect significant numbers of couples conceiving children through assisted reproductive technology. (*Matter of Alison D. v Virginia M.*, 77 NY2d 651.) II. A child's emotional bond to their "parent" is not dependent on whether they are genetically related to that person. (*Matter of Jacob*, 86 NY2d 651.) III. Adoption is not a proper litmus test for parenthood for purposes of Domestic Relations Law § 70. (*Matter of Jacob*, 86 NY2d 651; *T.V. v New York State Dept. of Health*, 88 AD3d 290; *Matter of Sebastian*, 25 Misc 3d 567; *Matter of J.J.*, 44 Misc 3d 297; *Itskov v New York Fertility Inst., Inc.*, 11 Misc 3d 68.) IV. This Court should apply a facts and circumstances test to determine parenthood. (*Debra H. v Janice R.*, 14 NY3d 576; *Matter of Suarez v Williams*, 26 NY3d 440; *Matter of Granger v Misercola*, 21 NY3d 86; *Matter of Tropea v Tropea*, 87 NY2d 727; *Matter of Shondel J. v Mark D.*, 7 NY3d 320; *Matter of Chaya S. v Frederick Herbert L.*, 90 NY2d 389; *People ex rel. Sibley v Sheppard*, 54 NY2d 320; *Matter of Corey L v Martin L*, 45 NY2d 383; *Matter of Boden v Boden*, 42 NY2d 210; *Matter of Stuart*, 280 NY 245.)
Cahill Gordon & Reindel LLP, New York City (*S. Penny Windle, Kerry Burns, Cindy Hong* and *Rebecca Salk* of counsel), for Sanctuary for Families and others, amici curiae in the first above-entitled proceeding.
I. Applying a functional standard to determine parental standing would have unintended negative consequences for parents and children. (***13** *Prince v Massachusetts*, 321 US 158; *Troxel v Granville*, 530 US 57; *Stanley v Illinois*, 405 US 645; *Pierce v Society of Sisters*, 268 US 510; *Meyer v Nebraska*, 262 US 390; *Debra H. v Janice R.*, 14 NY3d 576; *Matter of Alison D. v Virginia M.*, 77 NY2d 651; *Matter of Fountain v Fountain*, 83 AD2d 694; *Caban v Mohammed*, 441 US 380.) II. The Court should recognize the parental rights of Brooke S.B. without adopting a dangerous functional standard to determine parental standing in New York. (*Matter of Jacob*, 86 NY2d 651; *Debra H. v Janice R.*, 14 NY3d

576; *Matter of Bennett v Jeffreys*, 40 NY2d 543; *Jean Maby H. v Joseph H.*, 246 AD2d 282; *Matter of Shondel J. v Mark D.*, 7 NY3d 320.)

Fried, Frank, Harris, Shriver & Jacobson LLP, New York City (*Jennifer L. Colyer, Justin J. Santolli* and *Naz E. Wehrli* of counsel), for Lawyers for Children and another, amici curiae in the first and second above-entitled proceedings.

I. The continuity of the parent-child attachment bond is critical to a child's development and well-being and should be preserved in the child's best interest. (*Matter of Tropea v Tropea*, 87 NY2d 727.) II. *Matter of Alison D. v Virginia M.* (77 NY2d 651 [1991]) has imposed unjustifiable hardships on children and should be overturned. (*Matter of C.M. v C.H.*, 6 Misc 3d 361; *Beth R. v Donna M.*, 19 Misc 3d 724; *Anonymous v Anonymous*, 20 AD3d 333; *Matter of Multari v Sorrell*, 287 AD2d 764.) III. New York courts have the necessary competence to adjudicate claims of non-biological, intended parenthood. (*Matter of Juanita A. v Kenneth Mark N.*, 15 NY3d 1; *Matter of Shondel J. v Mark D.*, 7 NY3d 320; *Matter of Baby Boy C.*, 84 NY2d 91; *Matter of H.M. v E.T.*, 76 AD3d 528, 14 NY3d 521; *Jean Maby H. v Joseph H.*, 246 AD2d 282; *Matter of Christopher S. v Ann Marie S.*, 173 Misc 2d 824; *Matter of Christian N. v Shante Jovan B.*, 132 AD3d 470.) IV. The availability of second-parent adoption or the right for same-sex couples to marry does not adequately protect children. (*Debra H. v Janice R.*, 14 NY3d 576.)

OPINION OF THE COURT

Abdus-Salaam, J.

These two cases call upon us to assess the continued vitality of the rule promulgated in *Matter of Alison D. v Virginia M.* (77 NY2d 651 [1991])—namely that, in an unmarried couple, a partner without a biological or adoptive relation to a child is not that child's "parent" for purposes of standing to seek custody or visitation under Domestic Relations Law § 70 (a), notwithstanding their "established relationship with the child" ***14** (77 NY2d at 655). Petitioners in these cases, who similarly lack any biological or adoptive connection to the subject children, argue that they should have standing to seek custody and visitation pursuant to Domestic Relations Law § 70 (a). We agree that, in light of more recently delineated legal principles, the definition of "parent" established by this Court 25 years ago in *Alison D.* has become unworkable when applied to increasingly varied familial relationships. Accordingly, today, we overrule *Alison D.* and hold that where a partner shows by clear and convincing evidence that the parties agreed to conceive a child and to raise the child together, the non-biological, non-adoptive partner has standing to seek visitation and custody under Domestic Relations Law § 70.

I.

Matter of Brooke S.B. v Elizabeth A.C.C.

Petitioner and respondent entered into a relationship in 2006 and, one year later, announced their engagement. [1] At the time, however, this was a purely symbolic gesture; same-sex couples could not legally marry in New York. Petitioner and respondent lacked the resources to travel to another jurisdiction to enter into a legal arrangement comparable to marriage, and it was then unclear whether New York would recognize an out-of-state same-sex union.

Shortly thereafter, the couple jointly decided to have a child and agreed that respondent would carry the child. In 2008, respondent became pregnant through artificial insemination. During respondent's pregnancy, petitioner regularly attended prenatal doctor's appointments, remained involved in respondent's care, and joined respondent in the emergency ****2** room when she had a complication during the pregnancy. Respondent went into labor in June 2009. Petitioner stayed by her side and, when the subject child, a baby boy, was born, petitioner cut the umbilical cord. The couple gave the child petitioner's last name.

The parties continued to live together with the child and raised him jointly, sharing in all major parental responsibilities. Petitioner stayed at home with the child for a year while respondent returned to work. The child referred to petitioner as "Mama B."

***15** In 2010, the parties ended their relationship. Initially, respondent permitted petitioner regular visits with the child. In late 2012, however, petitioner's relationship with respondent deteriorated and, in or about July 2013, respondent effectively terminated petitioner's contact with the child.

Subsequently, petitioner commenced this proceeding seeking joint custody of the child and regular visitation. Family Court appointed an attorney for the child. That attorney determined that the child's best interests would be served by allowing regular visitation with petitioner.

Respondent moved to dismiss the petition, asserting that petitioner lacked standing to seek visitation or custody under Domestic Relations Law § 70 as interpreted in *Alison D.* because, in the absence of a biological or adoptive connection to the child, petitioner was not a "parent" within the meaning of the statute. Petitioner and the attorney for the child opposed the motion, contending that, in light of the legislature's enactment of the Marriage Equality Act (*see* L 2011, ch 95; Domestic Relations Law § 10-a) and other changes in the law, *Alison D.* should no longer be followed. They further argued that petitioner's long-standing parental relationship with the child conferred standing to seek custody and visitation under principles of equitable estoppel.

After hearing argument on the motion, Family Court dismissed the petition. While commenting on the "heartbreaking" nature of the case, Family Court noted that petitioner did not adopt the child and therefore granted respondent's motion to dismiss on constraint of *Alison D*. The attorney for the child appealed. [2]

The Appellate Division unanimously affirmed (*see* 129 AD3d 1578, 1578-1579 [4th Dept 2015]). The Court concluded that, because petitioner had not married respondent, had not adopted the child, and had no biological relationship to the child, *Alison D.* prohibited Family Court from ruling that petitioner had standing to seek custody or visitation (*see id.* at 1579). We granted the attorney for the child leave to appeal (*see* 26 NY3d 901 [2015]).

Matter of Estrellita A. v Jennifer L.D.

Petitioner and respondent entered into a relationship in 2003 and moved in together later that year. In 2007, petitioner and ***16** respondent registered as domestic partners, and thereafter, they agreed to have a child. The couple jointly decided that respondent would bear the child and that the donor should share petitioner's ethnicity. In February 2008, respondent became pregnant through artificial insemination. During the pregnancy, petitioner attended medical appointments with respondent. In November 2008, respondent gave birth to a baby girl. Petitioner cut the umbilical cord. The couple agreed that the child should call respondent "Mommy" and petitioner "Mama."

The child resided with the couple in their home and, over the next three years, the parties shared a complete range of parental responsibilities. However, in May 2012, petitioner and respondent ended their relationship, and petitioner moved out in September 2012. Afterward, petitioner continued to have contact with the child.

In October 2012, respondent commenced a proceeding in Family Court seeking child support from petitioner. Petitioner denied liability. While the support case was pending, petitioner filed a petition in Family Court that, as later amended, sought visitation with the child. The court appointed an attorney for the child.

After a hearing, Family Court granted respondent's child support petition and remanded the matter to a support magistrate to determine petitioner's support obligation. The court held that "the uncontroverted facts establish[ed]" that petitioner was "a parent" to the child and, as such, "chargeable with the support of the child." Petitioner then amended her visitation petition to indicate that she "ha[d] been adjudicated the parent" of the child and therefore was a legal parent for visitation purposes.

Thereafter, respondent moved to dismiss the visitation petition on the ground that petitioner did not have standing to seek custody or visitation under Domestic Relations Law § 70 as interpreted in *Alison D*. The attorney for the child supported visitation and opposed respondent's motion to dismiss. Petitioner also opposed respondent's motion to dismiss, asserting that *Alison D.* and our decision in *Debra H. v Janice R.* (14 NY3d 576 [2010]) did not foreclose a finding of standing based on judicial estoppel, as the prior judgment in the support proceeding determined that petitioner was a legal parent to the subject child. Respondent contended that the prerequisites for judicial estoppel had not been met.

***17** Family Court denied respondent's motion to dismiss the visitation petition (*see* 40 Misc 3d 219, 219-225 [Fam Ct, Suffolk County 2013]). Citing *Alison D.* and *Debra H.*, the court acknowledged that petitioner did not have standing to petition for visitation based on equitable estoppel or her general status as a de facto parent (*see id.* at 225). However, given respondent's successful support petition, the court concluded that the doctrine of judicial estoppel conferred standing on petitioner to request visitation with the child (*see id.* at 225). The court distinguished ****3** *Alison D.* and *Debra H.*, reasoning that, in those cases, the Court "did not address the situation . . . where one party has asserted inconsistent positions" (*id.*). Here, in light of respondent's initial claim that petitioner was the child's legal parent in the support proceeding, the court "ma[de] a finding that respondent [wa]s judicially estopped from asserting that petitioner [wa]s not a parent based upon her sworn petition and testimony in a prior court proceeding where she took a different position because her interest in that case was different" (*id.*). Respondent filed an interlocutory appeal, which was dismissed by the Appellate Division.

Subsequently, Family Court held a hearing on the petition. The court found that petitioner's regular visitation and consultation on matters of import with respect to the child would serve the child's best interests. Respondent appealed.

Family Court's order was unanimously affirmed (*see* 123 AD3d 1023, 1023-1027 [2d Dept 2014]). The Appellate Division determined that, while Domestic Relations Law § 70, as interpreted in *Alison D.*, confers standing to seek custody or visitation only on a biological or adoptive parent, *Alison D.* does not preclude recognition of standing based upon the doctrine of judicial estoppel. Under that doctrine, the Court found, "a party who assumes a certain position in a prior legal proceeding and secures a favorable judgment therein is precluded from assuming a contrary position in another action simply because his or her interests have changed" (*id.* at 1026 [internal quotation marks and citations omitted]). The Appellate Division agreed with Family Court that the requirements of judicial estoppel had been met: respondent's position in the support proceeding was inconsistent with her position in the visitation proceeding; respondent had won a favorable judgment based on her earlier position; and allowing respondent to maintain an inconsistent position in the visitation proceeding would prejudice petitioner (*see id.* at 1026). Accordingly, the ***18** Appellate Division concluded that respondent was judicially estopped from denying petitioner's standing as a "parent" of the child within the meaning of Domestic Relations Law § 70 (*see id.* at 1026-1027). We granted respondent leave to appeal (*see* 26 NY3d 901 [2015]).

II.

Domestic Relations Law § 70 provides:

> "Where a minor child is residing within this state, *either parent* may apply to the supreme court for a writ of habeas corpus to have such minor child brought before such court; and on the return thereof, the court, on due consideration, may award the natural guardianship, charge and custody of such child to either parent for such time, under such regulations and restrictions, and with such provisions and directions, as the case may require, and may at any time thereafter vacate or modify such order. In all cases there shall be no prima facie right to the custody of the child in either parent, but the court shall determine solely what is for the *best interest of the child, and what will best promote its welfare and happiness*, and make award accordingly" ****4** (Domestic Relations Law § 70 [a] [emphases added]).

Only a "parent" may petition for custody or visitation under Domestic Relations Law § 70, yet the statute does not define that critical term, leaving it to be defined by the courts. [3]

In *Alison D.* (77 NY2d 651), we supplied a definition. In that case, Alison D. and Virginia M. were in a long-term relationship and decided to have a child (*see Alison D.*, 77 NY2d at 655). They agreed that Virginia M. would carry the baby and that they would jointly raise the child, sharing parenting responsibilities (*see id.*). After the child was born, Alison D. acted as a parent in all major respects, providing financial, emotional and practical support (*see id.*). Even after the couple ended their relationship and moved out of their shared home, Alison D. continued to regularly visit the child until he was about six years old, at which point Virginia M. terminated contact between them (*see id.*).

***19** Alison D. petitioned for visitation pursuant to Domestic Relations Law § 70 (*see id.* at 656). In support of the petition, Alison D. argued that, although Virginia M. was concededly a fit parent, Alison D. nonetheless had standing to seek visitation with the child (*see id.*). The lower courts dismissed Alison D.'s petition for lack of standing, ruling that only a biological parent—and not a de facto parent—is a legal "parent" with standing to seek visitation under Domestic Relations Law § 70 (*see id.*; *see also Matter of Alison D. v Virginia M.*, 155 AD2d 11, 13-16 [2d Dept 1990]).

We affirmed the lower courts' dismissal of Alison D.'s petition for lack of standing (*see Alison D.*, 77 NY2d at 655, 657). We decided that the word "parent" in Domestic Relations Law § 70 should be interpreted to preclude standing for a de facto parent who, under a theory of equitable estoppel, might otherwise be recognized as the child's parent for visitation purposes (*see id.* at 656-657). Specifically, we held that "a biological stranger to a child who is properly in the custody of his biological mother" has no "standing to seek visitation with the child under Domestic Relations Law § 70" (*id.* at 654-655).

We rested our determination principally on the need to preserve the rights of biological parents (*see id.* at 656-657). Specifically, we reasoned that, "[t]raditionally, in this State it is the child's mother and father who, assuming fitness, have the right to the care and custody of their child" (*id.* at 656). We therefore determined that the statute should not be read to permit a de facto parent to seek visitation of a child in a manner that "would necessarily impair the parents' right to custody and control" (*id.* at 656-657).

Additionally, we suggested that, because the legislature expressly allowed certain ****5** non-parents—namely, grandparents and siblings—to seek custody or visitation (*see* Domestic Relations Law §§ 71-72), it must have intended to exclude de facto parents or parents by estoppel (*see Alison D.*, 77 NY2d at 657). And so, because Alison D. had no biological or adoptive connection to the subject child, she had no standing to seek visitation and "no right to petition the court to displace the choice made by this fit parent in deciding what is in the child's best interests" (*id.*).

Judge Kaye dissented on the ground that a person who "stands in loco parentis" should have standing to seek visitation under Domestic Relations Law § 70 (*see id.* at 657-662 ***20** [Kaye, J., dissenting]). Observing that the Court's decision would "fall[ ] hardest" on the millions of children raised in nontraditional families—including families headed by same-sex couples, unmarried opposite-sex couples, and stepparents—the dissent argued that the majority had "turn[ed] its back on a tradition of reading section 70 so as to promote the welfare of the children" (*id.* at 658-660). The dissent asserted that, because Domestic Relations Law § 70 did not define "parent"—and because the statute made express reference to the "best interest of the child"—the Court was free to craft a definition that accommodated the welfare of the child (*id.*). According to the dissent, well-established principles of equity—namely, "Supreme Court's equitable powers that complement" Domestic Relations Law § 70—supplied jurisdiction to act out of "concern for the welfare of the child" (*id.* at 660; *see Matter of Bachman v Mejias*, 1 NY2d 575, 581 [1956]; *Finlay v Finlay*, 240 NY 429, 433-434 [1925]; *Langerman v Langerman*, 303 NY 465, 471 [1952]).

At the same time, Judge Kaye in her dissent recognized that

> "there must be some limitation on who can petition for visitation. Domestic Relations Law § 70 specifies that the person must be the child's 'parent,' and the law additionally recognizes certain rights of biological and legal parents. . . .

> "It should be required that the relationship with the child came into being with the consent of the biological or legal parent" (*Alison D.*, 77 NY2d at 661-662 [Kaye, J., dissenting] [citations omitted]).

The dissent also noted that a properly constituted test should likely include other factors as well, to ensure that all relevant interests are protected (*see id.* at 661-662 [Kaye, J., dissenting]). Judge Kaye further stated in the dissent that she would have remanded *Alison D.* so that the lower court could engage in a two-part inquiry: first, to determine whether Alison D. stood "in loco parentis" under whatever test the Court devised; and then, "if so, whether it is in the child's best interest to allow her the visitation rights she claims" (*id.* at 662).

In 1991, same-sex partners could not marry in this state. Nor could a biological parent's unmarried partner adopt the child. As a result, a partner in a same-sex relationship not biologically related to a child was entirely precluded from obtaining standing to seek custody or visitation of that child under our definition of "parent" supplied in *Alison D.*

***21** Four years later, in *Matter of Jacob* (86 NY2d 651 [1995]), we had occasion to decide whether "the unmarried partner of a child's biological mother, whether heterosexual or ****6** homosexual, who is raising the child together with the biological parent, can become the child's second parent by means of adoption" (*id.* at 656). We held that the adoptions sought in *Matter of Jacob*—"one by an unmarried heterosexual couple, the other by the lesbian partner of the child's mother"—were "fully consistent with the adoption statute" (*id.*). We reasoned that, while the adoption statute "must be strictly construed," our "primary loyalty must be to the statute's legislative purpose—the child's best interest" (*id.* at 657-658). The outcome in *Matter of Jacob* was to confer standing to seek custody or visitation upon unmarried, non-biological partners—including a partner in a same-sex relationship—who adopted the child, even under our restrictive definition of "parent" set forth in *Alison D.* (*id.* at 659).

Thereafter, in *Matter of Shondel J. v Mark D.* (7 NY3d 320 [2006]), we applied a similar analysis, holding that a "man who has mistakenly represented himself as a child's father may be estopped from denying paternity, and made to pay child support, when the child justifiably relied on the man's representation of paternity, to the child's detriment" (*id.* at 324). We based our decision on "the best interests of the child," emphasizing "[t]he potential damage to a child's psyche caused by suddenly ending established parental support" (*id.* at 324, 330). [4]

Despite these intervening decisions that sought a means to take into account the best interests of the child in adoption and support proceedings, we declined to revisit *Alison D.* when confronted with a nearly identical situation almost 20 years later. *Debra H.*, as did *Alison D.*, involved an unmarried same-sex couple. Petitioner alleged that they agreed to have a child, and to that end, Janice R. was artificially inseminated and bore the child. Debra H. never adopted the child. After the couple ended their relationship, Debra H. petitioned for custody and visitation (*Debra H.*, 14 NY3d at 586-588). We declined to expand the definition of "parent" for purposes of ***22** Domestic Relations Law § 70, noting that "*Alison D.*, in conjunction with second-parent adoption, creates a bright-line rule that promotes certainty in the wake of domestic breakups" (*id.* at 593).

Nonetheless, in *Debra H.*, we arrived at a different result than in *Alison D*. Ultimately, we invoked the common-law doctrine of comity to rule that, because the couple had entered into a civil union in Vermont prior to the child's birth—and because the union afforded Debra H. parental status under Vermont law—her parental status should be recognized under ****7** New York law as well (*see id.* at 598-601). Seeing no obstacle in New York's public policy or comity doctrine to the recognition of the non-biological mother's standing, we declared that "New York will recognize parentage created by a civil union in Vermont," thereby granting standing to Debra H. to petition for custody and visitation of the subject child (*id.* at 600-601).

In a separate discussion, we also "reaffirm[ed] our holding in *Alison D.*" (*id.* at 589). We acknowledged the apparent tension in our decision to authorize parentage by estoppel in the support context (*see Shondel J.*, 7 NY3d 320) and yet

deny it in the visitation and custody context (*see Alison D.*, 77 NY2d 651), but we decided that this incongruity did not fatally undermine *Alison D.* (*see Debra H.*, 14 NY3d at 592-593).

Chief Judge Lippman and Judge Ciparick concurred in the result, agreeing with the majority's comity analysis but asserting that *Alison D.* should be overruled (*see id.* at 606-609 [Ciparick, J., concurring]). This concurrence asserted that *Alison D.* had indeed caused the widespread harm to children predicted by Judge Kaye's dissent (*see id.* at 606-607). Noting the inconsistency between *Alison D.* and the Court's ruling in *Shondel J.*, the concurrence concluded that "[s]upport obligations flow from parental rights; the duty to support and the rights of parentage go hand in hand and it is nonsensical to treat the two things as severable" (*id.* at 607). According to the concurrence, Supreme Court had "inherent equity powers and authority pursuant to Domestic Relations Law § 70 to determine who is a parent and what will serve the child's best interests" (*id.* at 609). Echoing the dissent in *Alison D.*, and "taking into consideration the social changes" that occurred since that decision, the concurrence called for a "flexible, multi-factored" approach to determine whether a parental relationship had been established (*id.* at 608).

A separate concurrence by Judge Smith in that case acknowledged the same social changes and proposed that, in the interest ***23** of insuring that "each child begins life with two parents," an appropriate test would focus on whether "a child is conceived through [artificial insemination] by one member of a same-sex couple living together, with the knowledge and consent of the other" (*id.* at 611-612). Judge Smith observed that "[e]ach of these couples made a commitment to bring a child into a two-parent family, and it is unfair to the children to let the commitment go unenforced" (*id.* at 611).

III.

We must now decide whether, as respondents claim, the doctrine of stare decisis warrants retention of the rule established in *Alison D.* Under stare decisis, a court's decision on an issue of law should generally bind the court in future cases that present the same issue (*see People v Rodriguez*, 25 NY3d 238, 243 [2015]; *People v Taylor*, 9 NY3d 129, 148-149 [2007]). The doctrine "promotes predictability in the law, engenders reliance on our decisions, encourages judicial restraint and reassures the public that our decisions arise from a continuum of legal principle rather than the personal caprice of the members of this Court" (****8** *People v Peque*, 22 NY3d 168, 194 [2013]). But in the rarest of cases, we may overrule a prior decision if an extraordinary combination of factors undermines the reasoning and practical viability of our prior decision (*see People v Rudolph*, 21 NY3d 497, 500-503 [2013]; *see id.* at 505-507 [Graffeo, J., concurring]; *People v Reome*, 15 NY3d 188, 191-195 [2010]; *People v Feingold*, 7 NY3d 288, 291-296 [2006]).

Long before our decision in *Alison D.*, New York courts invoked their equitable powers to ensure that matters of custody, visitation and support were resolved in a manner that served the best interests of the child (*see Finlay*, 240 NY at 433; *Wilcox v Wilcox*, 14 NY 575, 578-579 [1856]; *see generally Guardian Loan Co. v Early*, 47 NY2d 515, 520 [1979]; *People ex rel. Lemon v Supreme Ct. of State of N. Y.*, 245 NY 24, 28 [1927]; *De Coppet v Cone*, 199 NY 56, 63 [1910]). Consistent with these broad equitable powers, our courts have historically exercised their "inherent equity powers and authority" in order to determine "who is a parent and what will serve a child's best interests" (*Debra H.*, 14 NY3d at 609 [Ciparick, J., concurring]; *see also* NY Const, art VI, § 7 [a]).

Domestic Relations Law § 70 evolved in harmony with these equitable practices. The statute expanded in scope from a law narrowly conferring standing in custody and visitation matters ***24** upon a legally separated, resident "husband and wife" pair (L 1909, ch 19) to a broader measure granting standing to "either parent" without regard to separation (L 1964, ch 564). The legislature made many of these changes to conform to the courts' preexisting equitable practices (*see* L 1964, ch 564, § 1; Mem of Joint Legis Comm on Matrimonial and Family Laws, Bill Jacket, L 1964, ch 564 at 6). Tellingly, the statute has never mentioned, much less purported to limit, the court's equitable powers, and even after its original enactment, courts continued to employ principles of equity to grant custody, visitation or related extra-statutory relief (*see People ex rel. Meredith v Meredith*, 272 App Div 79, 82-90 [2d Dept 1947], *affd* 297 NY 692 [1947]; *Matter of Rich v Kaminsky*, 254 App Div 6, 7-9 [1st Dept 1938]; *cf. Langerman*, 303 NY at 471-472; *Finlay*, 240 NY at 430-434).

Departing from this tradition of invoking equity, in *Alison D.*, we narrowly defined the term "parent," thereby foreclosing "all inquiry into the child's best interest" in custody and visitation cases involving parental figures who lacked biological or adoptive ties to the child (*Alison D.*, 77 NY2d at 659 [Kaye, J., dissenting]). And, in the years that followed, lower courts applying *Alison D.* were "forced to . . . permanently sever strongly formed bonds between children and adults with whom they have parental relationships" (*Debra H.*, 14 NY3d at 606 [Ciparick, J., concurring]). By "limiting their opportunity to maintain bonds that may be crucial to their development," the rule of *Alison D.* has "fall[en] hardest on the children" (*Alison D.*, 77 NY2d at 658 [Kaye, J., dissenting]).

As a result, in the 25 years since *Alison D.* was decided, this Court has gone to great lengths to escape the inequitable results dictated by a needlessly narrow interpretation of ****9** the term "parent." Now, we find ourselves in a legal landscape wherein a non-biological, non-adoptive "parent" may be estopped from disclaiming parentage and made to pay child support in a filiation proceeding (*Shondel J.*, 7 NY3d 320), yet denied standing to seek custody or visitation (*Alison D.*, 77 NY2d at 655). By creating a disparity in the support and custody contexts, *Alison D.* has created an inconsistency in the rights and obligations attendant to parenthood. Moreover, *Alison D.*'s foundational premise of heterosexual parenting and nonrecognition of same-sex couples is unsustainable, particularly in light of the enactment of same-sex marriage in New York State, and the United States Supreme Court's holding in ***25** *Obergefell v Hodges* (576 US —, 135 S Ct 2584 [2015]), which noted that the right to marry provides benefits not only for same-sex couples, but also the children being raised by those couples.

Under the current legal framework, which emphasizes biology, it is impossible—without marriage or adoption—for both former partners of a same-sex couple to have standing, as only one can be biologically related to the child (*see Alison D.*, 77 NY2d at 656). By contrast, where both partners in a heterosexual couple are biologically related to the child, both former partners will have standing regardless of marriage or adoption. It is this context that informs the Court's determination of a proper test for standing that ensures equality for same-sex parents and provides the opportunity for their children to have the love and support of two committed parents.

The Supreme Court has emphasized the stigma suffered by the "hundreds of thousands of children [who] are presently being raised by [same-sex] couples" (*Obergefell*, 576 US at —, 135 S Ct at 2600-2601). By "fixing biology as the key to visitation rights" (*Alison D.*, 77 NY2d at 657-658 [Kaye, J., dissenting]), the rule of *Alison D.* has inflicted disproportionate hardship on the growing number of nontraditional families across our state. At the time *Alison D.* was decided, estimates suggested that "more than 15.5 million children [did] not live with two biological parents, and that as many as 8 to 10 million children are born into families with a gay or lesbian parent" (*id.*). Demographic changes in the past 25 years have further transformed the elusive concept of the "average American family" (*Troxel v Granville*, 530 US 57, 63-64 [2000]); recent census statistics reflect the large number of same-sex couples residing in New York, and that many of New York's same-sex couples are raising children who are related to only one partner by birth or adoption (*see* Gary J. Gates & Abigail M. Cooke, The Williams Institute, *New York Census Snapshot: 2010* at 1-3).

Relatedly, legal commentators have taken issue with *Alison D.* for its negative impact on children. A growing body of social science reveals the trauma children suffer as a result of separation from a primary attachment figure—such as a de facto parent—regardless of that figure's biological or adoptive ties to the children (*see* Amanda Barfield, Note, *The Intersection of Same-Sex and Stepparent Visitation*, 23 JL & Pol'y 257, 259-260 [2014]; Ayelet Blecher-Prigat, ****10** ***26** *Rethinking Visitation: From a Parental to a Relational Right*, 16 Duke J Gender L & Pol'y 1, 7 [2009]; Suzanne B. Goldberg, *Family Law Cases as Law Reform Litigation: Unrecognized Parents and the Story of Alison D. v Virginia M.*, 17 Colum J Gender & L 307 [2008]; Mary Ellen Gill, Note, *Third Party Visitation in New York: Why the Current Standing Statute Is Failing Our Families*, 56 Syracuse L Rev 481, 488-489 [2006]; Joseph G. Arsenault, Comment, *"Family" but not "Parent": The Same-Sex Coupling Jurisprudence of the New York Court of Appeals*, 58 Alb L Rev 813, 834, 836 [1995]; *see also* brief for National Association of Social Workers as amicus curiae at 13-17 [collecting articles]).

We must, however, protect the substantial and fundamental right of biological or adoptive parents to control the upbringing of their children (*see Alison D.*, 77 NY2d at 656-657; *Troxel v Granville*, 530 US 57, 65 [2000]). For certainly, "the interest of parents in the care, custody, and control of their children . . . is perhaps the oldest of the fundamental liberty interests," and any infringement on that right "comes with an obvious cost" (*Troxel*, 530 US at 64-65). But here we do not consider whether to allow a third party to contest or infringe on those rights; rather, the issue is who qualifies as a "parent" with coequal rights. Nevertheless, the fundamental nature of those rights mandates caution in expanding the definition of that term and makes the element of consent of the biological or adoptive parent critical.

([1]) While "parents and families have fundamental liberty interests in preserving" intimate family-like bonds, "so, too, do children have these interests" (*Troxel*, 530 US at 88-89 [Stevens, J., dissenting]), which must also inform the definition of "parent," a term so central to the life of a child. The "bright-line" rule of *Alison D.* promotes the laudable goals of certainty and predictability in the wake of domestic disruption (*Debra H.*, 14 NY3d at 593-594). But bright lines cast a harsh light on any injustice and, as predicted by Judge Kaye, there is little doubt by whom that injustice has been most finely felt and most finely perceived (*see Alison D.*, 77 NY2d at 658 [Kaye, J., dissenting]). We will no longer engage in the "deft legal maneuvering" necessary to read fairness into an overly-restrictive definition of "parent" that sets too high a bar for reaching a child's best interest and does not take into account equitable principles (*see Debra H.*, 14 NY3d at 606-608 [Ciparick, J., concurring]). Accordingly, we overrule *Alison D.*

***27 IV.**

Our holding that Domestic Relations Law § 70 permits a non-biological, non-adoptive parent to achieve standing to petition for custody and visitation requires us to specify the limited circumstances in which such a person has standing as a "parent" under Domestic Relations Law § 70 (*see Alison D.*, 77 NY2d at 661 [Kaye, J., dissenting]; *Troxel*, 530 US at 67). Because of the fundamental rights to which biological and adoptive parents are undeniably entitled, any encroachment on the rights of such parents and, especially, any test to expand who is a parent, must be, as Judge Kaye acknowledged in her dissent in *Alison D.*, appropriately narrow.

Petitioners and some of the amici urge that we endorse a functional test for ****11** standing, which has been employed in other jurisdictions that recognize parentage by estoppel in the custody and/or visitation context (*see In re Custody of H.S.H-K.*, 193 Wis 2d 649, 694-695, 533 NW2d 419, 435-436 [1995] [visitation only]; *see also Conover v Conover*, 448 Md 548, 576-577, 141 A3d 31, 47-48 [2016] [collecting cases from other jurisdictions that have adopted the functional test in contexts of custody or visitation]). The functional test considers a variety of factors, many of which relate to the post-birth relationship between the putative parent and the child. Amicus Sanctuary for Families proposes a different test that hinges on whether petitioner can prove, by clear and convincing evidence, that a couple "jointly planned and explicitly agreed to the conception of a child with the intention of raising the child as co-parents" (brief for Sanctuary for Families as amicus curiae at 39).

Although the parties and amici disagree as to what test should be applied, they generally urge us to adopt a test that will apply in determining standing as a parent for all non-biological, non-adoptive, non-marital "parents" who are raising children. We reject the premise that we must now declare that one test would be appropriate for all situations, or that the proffered tests are the only options that should be considered.

([2]) Petitioners in the two cases before us have alleged that the parties entered into a pre-conception agreement to conceive and raise a child as co-parents. We hold that these allegations, if proved by clear and convincing evidence, are sufficient to establish standing. Because we necessarily decide these cases based on the facts presented to us, it would be premature for us to consider adopting a test for situations in which a couple ***28** did not enter into a pre-conception agreement. Accordingly, we do not now decide whether, in a case where a biological or adoptive parent consented to the creation of a parent-like relationship between his or her partner and child after conception, the partner can establish standing to seek visitation and custody.

Inasmuch as the conception test applies here, we do not opine on the proper test, if any, to be applied in situations in which a couple has not entered into a pre-conception agreement. We simply conclude that, where a petitioner proves by clear and convincing evidence that he or she has agreed with the biological parent of the child to conceive and raise the child as co-parents, the petitioner has presented sufficient evidence to achieve standing to seek custody and visitation of the child. Whether a partner without such an agreement can establish standing and, if so, what factors a petitioner must establish to achieve standing based on equitable estoppel are matters left for another day, upon a different record.

Additionally, we stress that this decision addresses only the ability of a person to establish standing as a parent to petition for custody or visitation; the ultimate determination of whether those rights shall be granted rests in the sound discretion of the court, which will determine the best interests of the child.

V.

We conclude that a person who is not a biological or adoptive parent may obtain ****12** standing to petition for custody or visitation under Domestic Relations Law § 70 (a) in accordance with the test outlined above.

([3])In *Brooke S.B.*, our decision in *Alison D.* prevented the courts below from determining standing because the petitioner was not the biological or adoptive parent of the child. That decision no longer poses any obstacle to those courts' consideration of standing by equitable estoppel here, if Brooke S.B. proves by clear and convincing evidence her allegation that a pre-conception agreement existed. Accordingly, in *Brooke S.B.*, the order of the Appellate Division should be reversed, without costs, and the matter remitted to Family Court for further proceedings in accordance with this opinion.

([4])In *Estrellita A.*, the courts below correctly resolved the question of standing by recognizing petitioner's standing based on judicial estoppel. In the child support proceeding, respondent ***29** obtained an order compelling petitioner to pay child support based on her successful argument that petitioner was a parent to the child. Respondent was therefore estopped from taking the inconsistent position that petitioner was not, in fact, a parent to the child for purposes of visitation. Under the circumstances presented here, Family Court properly invoked the doctrine of judicial estoppel to recognize petitioner's standing to seek visitation as a "parent" under Domestic Relations Law § 70 (a). Accordingly, in *Estrellita A.*, the order of the Appellate Division should be affirmed, without costs.

Pigott, J. (concurring). While I agree with the application of judicial estoppel in *Matter of Estrellita A. v Jennifer L.D.*, and that the Appellate Division's decision in *Matter of Brooke S.B. v Elizabeth A.C.C.* should be reversed and the case remitted to Supreme Court for a hearing, I cannot join the majority's opinion overruling *Matter of Alison D. v Virginia M.* (77 NY2d 651 [1991]). The definition of "parent" that we applied in that case was consistent with the legislative history of Domestic Relations Law § 70 and the common law, and despite several opportunities to do so, the legislature has never altered our conclusion. Rather than craft a new definition to achieve a result the majority perceives as more just, I would retain the rule that parental status under New York law derives from marriage, biology or adoption and decide *Brooke S.B.* on the basis of extraordinary circumstances. As we have said before, "any change in the meaning of 'parent' under our law should come by way of legislative enactment rather than judicial revamping of precedent" (*Debra H. v Janice R.*, 14 NY3d 576, 596 [2010]).

It has long been the rule in this state that, absent extraordinary circumstances, only parents have the right to seek custody or visitation of a minor child (*see* Domestic Relations Law § 70 [a] ["Where a minor child is residing within this state, either parent may apply to the . . . court for a writ of habeas corpus to have such minor child brought before such court; and on the return thereof, the court . . . may award the natural guardianship, charge and custody of such child to either parent"]). The legislature has not seen the need to define that term, and in the absence of a statutory definition, our Court has consistently interpreted it in the most obvious and ****13** colloquial sense to mean a child's natural parents or parents by adoption (*see e.g. People ex rel. Portnoy v Strasser*, 303 NY 539, 542 [1952] ["No court can, for any but the gravest reasons, transfer a child from its ***30** natural parent to any other person"]; *People ex rel. Kropp v Shepsky*, 305

NY 465, 470 [1953]; *see also* Domestic Relations Law § 110 [defining adoption as a legal act whereby an adult acquires the rights and responsibilities of a parent with respect to the adoptee]). Thus, in *Matter of Ronald FF. v Cindy GG.*, we held that a man who lacked biological or adoptive ties to a child born out of wedlock could not interfere with a fit biological mother's right to determine who may associate with her child because he was not a "parent" within the meaning of Domestic Relations Law § 70 (70 NY2d 141, 142 [1987]).

We applied the same rule to a same-sex couple in *Matter of Alison D. v Virginia M.*, holding that a biological stranger to a child who neither adopted the child nor married the child's biological mother before the child's birth lacked standing to seek visitation (77 NY2d 651, 656-657 [1991]). The petitioner in that case conceded she was not the child's "parent" within the meaning of Domestic Relations Law § 70 but argued that her relationship with the child, as a *nonparent*, entitled her to seek visitation over the objection of the child's indisputably fit biological mother. Framed in those terms, the answer was easy: the petitioner's concession that she was not a parent of the child, coupled with the statutory language in Domestic Relations Law § 70 "giv[ing] *parents* the right to bring proceedings to ensure their proper exercise of [a child's] care, custody and control," deprived the petitioner of standing to seek visitation (*id.* at 657).

Notwithstanding the fact that it may be "beneficial to a child to have continued contact with a nonparent" in some cases (*id.*), we declined to expand the word "parent" in section 70 to include individuals like the petitioner who were admittedly nonparents but who had developed a close relationship with the child. Our reasoning was that, where the legislature had intended to allow other categories of persons to seek visitation, it had expressly conferred standing on those individuals and given courts the power to determine whether an award of visitation would be in the child's best interest (*see id.*). Specifically, the legislature had previously provided that "[w]here circumstances show that conditions exist which equity would see fit to intervene," a brother, sister or grandparent of a child may petition to have such child brought before the court to "make such directions as the best interest of the child may require, for visitation rights for such brother or sister [or grandparent or grandparents] in respect to such child" ***31** (Domestic Relations Law §§ 71, 72 [1]). The legislature had also codified the common-law marital presumption of legitimacy for children conceived by artificial reproduction, so that any child born to a married woman by means of artificial insemination was deemed the legitimate, birth child of both spouses (*see* Domestic Relations Law § 73 [1]). In the absence of further legislative action defining the term "parent" or giving other nonparents the right to petition for visitation, we determined that a non-biological, non-adoptive parent who had not ****14** married the child's biological mother lacked standing under the law (77 NY2d at 657).

Our Court reaffirmed *Alison D.*'s core holding just six years ago in *Debra H. v Janice R.* (14 NY3d 576 [2010]). Confronting many of the same arguments petitioners raise in these appeals, we rejected the impulse to judicially enlarge the term "parent" beyond marriage, biology or adoption. We observed that in the nearly 20 years that had passed since our decision in *Alison D.*, other states had *legislatively* expanded the class of individuals who may seek custody and/or visitation of a child (*see id.* at 596-597, citing Ind Code Ann §§ 31-17-2-8.5, 31-9-2-35.5; Colo Rev Stat Ann § 14-10-123; Tex Fam Code Ann § 102.003 [a] [9]; Minn Stat Ann § 257C.08 [4]; DC Code Ann § 16-831.01 [1]; Or Rev Stat Ann § 109.119 [1]; Wyo Stat Ann § 20-7-102 [a]). Our State had not—and has not, to this day. In the face of such legislative silence, we refused to undertake the kind of policy analysis reserved for the elected representatives of this State, who are better positioned to "conduct hearings and solicit comments from interested parties, evaluate the voluminous social science research in this area . . . , weigh the consequences of various proposals, and make the tradeoffs needed to fashion the rules that best serve the population of our state" (*id.* at 597).

The takeaway from *Debra H.* is that *Alison D.* didn't break any new ground or retreat from a broader understanding of parenthood. It showed respect for the role of the legislature in defining who a parent is, and held, based on the legislative guidance before us, that the term was intended to include a child's biological mother and father, a child's adoptive parents, and, pursuant to a statute enacted in 1974, the spouse of a woman to whom a child was born by artificial insemination. Although many have complained that this standard "is formulaic, or too rigid, or out of step with the times" (*id.* at 594), such criticism is properly directed at the legislature, who ***32** in the 107 years since Domestic Relations Law § 70

was enacted has chosen not to amend that section or define the term "parent" to include persons who establish a loving parental bond with a child, though they lack a biological or adoptive tie.

To be sure, there was a time when our interpretation of "parent" put same-sex couples on unequal footing with their heterosexual counterparts. When *Alison D.* was decided, for example, it was impossible for both members of a same-sex couple to become the legal parents of a child born to one partner by artificial insemination, because same-sex couples were not permitted to marry or adopt. Our Court eventually held that the adoption statute permitted unmarried same-sex partners to obtain second-parent adoptions (*see Matter of Jacob*, 86 NY2d 651, 656 [1995]), but it was not until 2011 that the legislature put an end to all sex-based distinctions in the law (*see* Domestic Relations Law § 10-a).

The legislature's passage of the Marriage Equality Act granted same-sex couples the right to marry and made clear that "[n]o government treatment or legal status, effect, right, benefit, privilege, protection or responsibility relating to marriage . . . shall differ based on the parties to the marriage being or having been of the same sex rather than a different sex" (Domestic Relations Law § 10-a [2]). Having mandated gender neutrality with respect to every legal benefit and obligation arising from marriage, and eliminated every sex-based distinction in the law and common law, the legislature has formally declared its intention that "[s]ame-sex couples should have the same access as others to the protections, responsibilities, rights, obligations, and benefits of civil marriage" (L 2011, ch 95, § 2).

Same-sex couples are now afforded the same legal rights as heterosexual couples and are no longer barred from establishing the types of legal parent-child relationships that the law had previously disallowed. Today, a child born to a married person by means of artificial insemination with the consent of the other spouse is deemed to be the child of both spouses, regardless of the couple's sexual orientation (2-22 NY Civil Practice: Family Court Proceedings § 22.08 [1] [Matthew Bender]; *Laura WW. v Peter WW.*, 51 AD3d 211, 217-218 [3d Dept 2008] [holding that a child born to a married woman is the legitimate child of both parties and that, absent evidence to the contrary, the spouse of the married woman is presumed ***33** to have consented to such status]; *Matter of Kelly S. v Farah M.*, 139 AD3d 90, 103-104 [2d Dept 2016] [finding that the failure to strictly comply with the requirements of Domestic Relations Law § 73 did not preclude recognition of a biological mother's former same-sex partner as a parent to the child conceived by artificial insemination during the couple's domestic partnership]; *Wendy G-M. v Erin G-M.*, 45 Misc 3d 574, 593 [Sup Ct, Monroe County 2014] [applying the marital presumption to a child born of a same-sex couple married in Connecticut]). And if two individuals of the same sex choose not to marry but later conceive a child by artificial insemination, the non-biological parent may now adopt the child through a second-parent adoption.

The Marriage Equality Act and *Matter of Jacob* have erased any obstacles to living within the rights and duties of the Domestic Relations Law. The corollary is, absent further legislative action, an unmarried individual who lacks a biological or adoptive connection to a child conceived after 2011 does not have standing under Domestic Relations Law § 70, regardless of gender or sexual orientation. Unlike the majority, I would leave it to the legislature to determine whether a broader category of persons should be permitted to seek custody or visitation under the law. I remain of the view, as I was in *Debra H.*, that we should not "preempt our Legislature by sidestepping section 70 of the Domestic Relations Law as presently drafted and interpreted in *Alison D.* to create an additional category of parent . . . through the exercise of our common-law and equitable powers" (14 NY3d at 597).

I do agree, however, with the results the majority has reached in these cases. The Marriage Equality Act did not benefit the same-sex couples before us in these appeals, who entered into committed relationships and chose to rear children before they were permitted to exercise what our legislature and the Supreme Court of the United States have now declared a fundamental human right (*see generally Obergefell v Hodges*, 576 US —, 135 S Ct 2584 [2015]). That ****15** Brooke and Elizabeth did not have the same opportunity to marry one another before they decided to have a family means that the couple (and the child born to them through artificial insemination) did not receive the same legal protection our laws would have provided a child born to a heterosexual couple under similar circumstances. That is, the law did not

presume—as it would have for a married heterosexual couple—that any child ***34** born to one of the women during their relationship was the legitimate child of both.

In my view, this inequality and the substantial changes in the law that have occurred since our decision in *Debra H.* constitute extraordinary circumstances that give these petitioners standing to seek visitation (*see Ronald FF.*, 70 NY2d at 144-145 [barring the State from interfering with a parent's "(fundamental) right . . . to choose those with whom her child associates" unless it "shows some compelling State purpose which furthers the child's best interest"]). Namely, each couple agreed to conceive a child by artificial insemination at a time when they were not allowed to marry in New York and intended to raise the child in the type of relationship the couples would have formalized by marriage had our State permitted them to exercise that fundamental human right. On the basis of these facts, I would remit the matter in *Brooke S.B.* to Supreme Court for a hearing to determine whether it would be in the child's best interest to have regular visitation with petitioner. As the majority correctly concludes, the petitioner in *Estrellita A.* has standing by virtue of judicial estoppel (majority op at 29).

Matter of Brooke S.B. v Elizabeth A.C.C.: Order reversed, without costs, and matter remitted to Family Court, Chautauqua County, for further proceedings in accordance with the opinion herein.

Opinion by Judge Abdus-Salaam. Chief Judge DiFiore and Judges Rivera, Stein and Garcia concur. Judge Pigott concurs in a separate concurring opinion. Judge Fahey taking no part.

Matter of Estrellita A. v Jennifer L.D.: Order affirmed, without costs.

Opinion by Judge Abdus-Salaam. Chief Judge DiFiore and Judges Rivera, Stein and Garcia concur. Judge Pigott concurs in a separate concurring opinion. Judge Fahey taking no part.

FOOTNOTES

Footnotes

1 The parties in both cases before us dispute the relevant facts. Given the procedural posture of these cases, our summary of the facts is derived from petitioners' allegations in court filings and relevant decisions of the courts below.

2 Petitioner appealed but, citing her financial condition, proceeded without an attorney. Her appeal was subsequently dismissed.

3 We note that by the use of the term "either," the plain language of Domestic Relations Law § 70 clearly limits a child to two parents, and no more than two, at any given time.

4 Furthermore, in *Matter of H.M. v E.T.* (14 NY3d 521 [2010]), for purposes of child support proceedings, we construed Family Ct Act § 413 (1) (a) in a manner consistent with principles of equitable estoppel by interpreting the term "parents" to include a biological parent's former same-sex partner, notwithstanding the lack of a biological or adoptive connection to the child (*H.M.*, 14 NY3d at 526-527).

McKinney's Consolidated Laws of New York Annotated
Family Court Act (Refs & Annos)
Article 5. Paternity Proceedings (Refs & Annos)
Part 1. Jurisdiction and Duties to Support

McKinney's Family Court Act § 511

§ 511. Jurisdiction

Effective: September 28, 1999
Currentness

Except as otherwise provided, the family court has exclusive original jurisdiction in proceedings to establish paternity and, in any such proceedings in which it makes a finding of paternity, to order support and to make orders of custody or of visitation, as set forth in this article. On its own motion, the court may at any time in the proceedings also direct the filing of a neglect petition in accord with the provisions of article ten of this act. In accordance with the provisions of section one hundred eleven-b of the domestic relations law, the surrogate's court has original jurisdiction concurrent with the family court to determine the issues relating to the establishment of paternity.

Credits
(L.1962, c. 686. Amended L.1971, c. 952, § 1; L.1980, c. 575, § 13; L.1999, c. 533, § 4, eff. Sept. 28, 1999.)

McKinney's Family Court Act § 511, NY FAM CT § 511
Current through L.2019, chapter 144. Some statute sections may be more current, see credits for details.

End of Document

McKinney's Consolidated Laws of New York Annotated
Family Court Act (Refs & Annos)
Article 5. Paternity Proceedings (Refs & Annos)
Part 1. Jurisdiction and Duties to Support

McKinney's Family Court Act § 516-a

§ 516-a. Acknowledgment of paternity

Effective: January 19, 2014
Currentness

(a) An acknowledgment of paternity executed pursuant to section one hundred eleven-k of the social services law or section four thousand one hundred thirty-five-b of the public health law shall establish the paternity of and liability for the support of a child pursuant to this act. Such acknowledgment must be reduced to writing and filed pursuant to section four thousand one hundred thirty-five-b of the public health law with the registrar of the district in which the birth occurred and in which the birth certificate has been filed. No further judicial or administrative proceedings are required to ratify an unchallenged acknowledgment of paternity.

(b)(i) Where a signatory to an acknowledgment of paternity executed pursuant to section one hundred eleven-k of the social services law or section four thousand one hundred thirty-five-b of the public health law had attained the age of eighteen at the time of execution of the acknowledgment, the signatory may seek to rescind the acknowledgment by filing a petition with the court to vacate the acknowledgment within the earlier of sixty days of the date of signing the acknowledgment or the date of an administrative or a judicial proceeding (including, but not limited to, a proceeding to establish a support order) relating to the child in which the signatory is a party. For purposes of this section, the "date of an administrative or a judicial proceeding" shall be the date by which the respondent is required to answer the petition.

(ii) Where a signatory to an acknowledgment of paternity executed pursuant to section one hundred eleven-k of the social services law or section four thousand one hundred thirty-five-b of the public health law had not attained the age of eighteen at the time of execution of the acknowledgment, the signatory may seek to rescind the acknowledgment by filing a petition with the court to vacate the acknowledgment anytime up to sixty days after the signatory's attaining the age of eighteen years or sixty days after the date on which the respondent is required to answer a petition (including, but not limited to, a petition to establish a support order) relating to the child in which the signatory is a party, whichever is earlier; provided, however, that the signatory must have been advised at such proceeding of his or her right to file a petition to vacate the acknowledgment within sixty days of the date of such proceeding.

(iii) Where a petition to vacate an acknowledgment of paternity has been filed in accordance with paragraph (i) or (ii) of this subdivision, the court shall order genetic marker tests or DNA tests for the determination of the child's paternity. No such test shall be ordered, however, upon a written finding by the court that it is not in the best interests of the child on the basis of res judicata, equitable estoppel, or the presumption of legitimacy of a child born to a married woman. If the court determines, following the test, that the person who signed the acknowledgment is the father of the child, the court shall make a finding of paternity and enter an order of filiation. If the court determines that the person who signed the acknowledgment is not the father of the child, the acknowledgment shall be vacated.

(iv) After the expiration of the time limits set forth in paragraphs (i) and (ii) of this subdivision, any of the signatories to an acknowledgment of paternity may challenge the acknowledgment in court by alleging and proving fraud, duress, or material mistake of fact. If the petitioner proves to the court that the acknowledgment of paternity was signed under fraud, duress, or due to a material mistake of fact, the court shall then order genetic marker tests or DNA tests for the determination of the child's paternity. No such test shall be ordered, however, upon a written finding by the court that it is not in the best interests of the child on the basis of res judicata, equitable estoppel, or the presumption of legitimacy of a child born to a married woman. If the court determines, following the test, that the person who signed the acknowledgment is the father of the child, the court shall make a finding of paternity and enter an order of filiation. If the court determines that the person who signed the acknowledgment is not the father of the child, the acknowledgment shall be vacated.

(v) If, at any time before or after a signatory has filed a petition to vacate an acknowledgment of paternity pursuant to this subdivision, the signatory dies or becomes mentally ill or cannot be found within the state, neither the proceeding nor the right to commence the proceeding shall abate but may be commenced or continued by any of the persons authorized by this article to commence a paternity proceeding.

(c) Neither signatory's legal obligations, including the obligation for child support arising from the acknowledgment, may be suspended during the challenge to the acknowledgment except for good cause as the court may find. If the court vacates the acknowledgment of paternity, the court shall immediately provide a copy of the order to the registrar of the district in which the child's birth certificate is filed and also to the putative father registry operated by the department of social services pursuant to section three hundred seventy-two-c of the social services law. In addition, if the mother of the child who is the subject of the acknowledgment is in receipt of child support services pursuant to title six-A of article three of the social services law, the court shall immediately provide a copy of the order to the child support enforcement unit of the social services district that provides the mother with such services.

(d) A determination of paternity made by any other state, whether established through an administrative or judicial process or through an acknowledgment of paternity signed in accordance with that state's laws, must be accorded full faith and credit pursuant to section 466(a)(11) of title IV-D of the social security act (42 U.S.C. § 666(a)(11)).

Credits

(Added L.1985, c. 809, § 20. Amended L.1993, c. 59, § 27; L.1994, c. 170, § 353; L.1997, c. 398, § 81, eff. Nov. 11, 1997; L.2007, c. 462, § 1, eff. Oct. 30, 2007; L.2009, c. 343, § 5, eff. Aug. 11, 2009; L.2013, c. 402, § 1, eff. Jan. 19, 2014.)

McKinney's Family Court Act § 516-a, NY FAM CT § 516-a
Current through L.2019, chapter 144. Some statute sections may be more current, see credits for details.

End of Document

7 N.Y.3d 320, 853 N.E.2d 610, 820 N.Y.S.2d 199, 2006 N.Y. Slip Op. 05238

In the Matter of Shondel J., Respondent
v
Mark D., Appellant.

Court of Appeals of New York
Argued May 11, 2006
Decided July 6, 2006

CITE TITLE AS: Matter of Shondel J. v Mark D.

SUMMARY

Appeal, by permission of the Court of Appeals, from an order of the Appellate Division of the Supreme Court in the Second Judicial Department, entered May 9, 2005. The Appellate Division affirmed an order of the Family Court, Kings County (Stewart H. Weinstein, J.), which had denied respondent's objections to an order of that court directing respondent to pay child support retroactive to August 23, 2000. The appeal brings up for review a prior order of that Appellate Division, entered April 5, 2004 (6 AD3d 437). The Appellate Division had affirmed an order of the Family Court, Kings County (Rachel A. Adams, J.), which determined that respondent was equitably estopped from denying paternity of the subject child.

Matter of Shondel J. v Mark D., 18 AD3d 551, affirmed.

HEADNOTE

Children Born out of Wedlock
Paternity Proceeding
Equitable Estoppel

Respondent, who represented himself as the father of a child born out of wedlock, was equitably estopped from denying paternity even though a blood genetic marker test later confirmed that he was not the child's biological father, and was required to pay child support, since the child justifiably relied on respondent's representation of paternity by forming a bond with him, to the child's detriment. Based upon established precedents, the affirmed findings of fact herein and the legislative recognition of paternity by estoppel, it was in the best interests of the child to equitably estop respondent from denying paternity. Pursuant to Family Court Act § 418 (a), Family Court may deny biological paternity testing based on “res judicata, equitable estoppel or the presumption of legitimacy of a child born to a married woman,” if denial is in the best interests of the child. Although the child's biological paternity had been addressed before Family Court conducted its trial on the issue of estoppel, Family Court was authorized to decide the estoppel issue.

RESEARCH REFERENCES

Am Jur 2d, Estoppel and Waiver §§ 49, 80–85; Am Jur 2d, Illegitimate Children §§ 40–42.

Carmody-Wait 2d, Support Proceedings §§ 119:241, 119:253, 119:254, 119:268.

5 Law and the Family New York (2d ed) § 4:2.

***321** McKinney's, Family Ct Act § 418 (a).

NY Jur 2d, Domestic Relations §§ 706, 713, 732, 755, 769.

ANNOTATION REFERENCE

See ALR Index under Equitable Estoppel; Legitimacy of Children.

FIND SIMILAR CASES ON WESTLAW

Database: NY-ORCS

Query: equitabl* /2 estop! /s deny! /3 paternity

POINTS OF COUNSEL

Ann L. Detiere, New York City, for appellant.
I. Appellant is not a legal parent. (*Matter of Alison D. v Virginia M.,* 77 NY2d 651; *Matter of Michael B.,* 80 NY2d 299; *Troxel v Granville,* 530 US 57; *Matter of Ronald FF. v Cindy GG.,* 70 NY2d 141; *Matter of Janis C. v Christine T.,* 294 AD2d 496; *Michael H. v Gerald D.,* 491 US 110; *Matter of Cindy P. v Danny P.,* 206 AD2d 615; *Matter of C.M. v C.H.,* 6 Misc 3d 361; *Matter of Lee P.S. v Lisa L.,* 301 AD2d 606.) II. Appellant did not equitably adopt the child. (*Matter of Baby Boy C.,* 84 NY2d 91; *Matter of Alison D. v Virginia M.,* 77 NY2d 651; *Matter of Robert Paul P.,* 63 NY2d 233; *Matter of Mazzeo,* 95 AD2d 91; *Matter of D.S.,* 160 Misc 2d 331; *Matter of Male Infant L.,* 282 AD2d 534; *Rodriguez v Morris,* 136 Misc 2d 103; *Middleworth v Ordway,* 191 NY 404; *Gavin v Aitken,* 258 NY 595; *Matter of Thorne,* 155 NY 140.) III. DNA testing is legally decisive of paternity. (*Matter of Betty O. v Joseph O.,* 222 AD2d 508; *Matter of Baby Boy C.,* 84 NY2d 91; *Matter of Sharon GG. v Duane HH.,* 95 AD2d 466; *Matter of Sandra S. v Larry W.,* 175 Misc 2d 122; *Matter of Diana E. v Angel M.,* 20 AD3d 370; *Matter of Montelone v Antia,* 60 AD2d 603; *Matter of Michael B.,* 80 NY2d 299; *Pickett v Brown,* 462 US 1; *Matter of Greene v Giles,* 286 AD2d 390; *Matter of June B. v Edward L.,* 69 AD2d 612.) IV. Equitable paternity is unconstitutional. (*Little v Streater,* 452 US 1; *Michael H. v Gerard D.,* 491 US 110; *Matter of Corey L v Martin L,* 45 NY2d 383; *Troxel v Granville,* 530 US 57; *Matter of Michael B.,* 80 NY2d 299; *Prowda v Wilner,* 217 AD2d 287; *Matter of Ronald FF. v Cindy GG.,* 70 NY2d 141; *Matter of Raquel Marie X.,* 76 NY2d 387; *Matter of M./B. Children,* 7 Misc 3d 272; *Matter of C.M. v C.H.,* 6 Misc 3d 361.) V. Equitable relief is improper. (*Matter of Erie County Dept. of Social Servs. v Greg G.,* 273 AD2d 919; *Matter of Eugene F.G. v Darla D.,* 261 AD2d 958; *Matter of Oneida County Dept. of Social Servs. v Joseph C.,* 289 AD2d 1077; *Matter* ***322** *of Baby Boy C.,* 84 NY2d 91.) VI. The Family Court lacked subject matter jurisdiction. (*Chiacchia & Fleming v Guerra,* 309 AD2d 1213; *Sangiacomo v County of Albany,* 302 AD2d 769; *Matter of Delgado v Howell,* 74 AD2d 848; *Matter of Cattaraugus County Commr. of Social Servs. v Bund,* 259 AD2d 973; *Matter of Harriet II. v Alex LL.,* 292 AD2d 92; *Lepkowski v State of New York,* 1 NY3d 201; *Matter of Allegany County Dept. of Social Servs. v Thomas T.,* 273 AD2d 916; *Matter of Stortecky v Mazzone,* 85 NY2d 518; *Gager v White,* 53 NY2d 475; *Rose v Horton Med. Ctr.,* 5 AD3d 459.) VII. Restitution and legal fees are proper upon any reversal. (*Stone v Stone,* 152 AD2d 560; *Parise v Parise,* 13 AD3d 504.)
Steven P. Forbes, Jamaica, for respondent.
I. The plain language of the Family Court Act compels the conclusion that the Family Court did not lack subject matter jurisdiction to declare appellant the father under the doctrine of equitable estoppel. II. Equitable estoppel is legislatively mandated and constitutionally serves the best interests of the child. (*Jean Maby H. v Joseph H.,* 246 AD2d 282; *Little v Streater,* 452 US 1; *Matter of Alison D. v Virginia M.,* 77 NY2d 651; *Sean H. v Leila H.,* 5 Misc 3d 315; *Matter of Janis C. v Christine T.,* 294 AD2d 496; *Matter of Multari v Sorrell,* 287 AD2d 764; *Matter of Lynda A.H. v Diane T.O.,* 243 AD2d 24; *Anonymous v Anonymous,* 20 AD3d 333; *Matter of Ronald FF. v Cindy GG.,* 70 NY2d 141; *Matter of Sarah S. v James T.,* 299 AD2d 785.) III. The record fully supports the Family Court's determination that appellant should be declared the father of the subject child under the doctrine of equitable estoppel. (*Matter of St. Lawrence County Dept. of Social Servs. v Terry E.,* 229 AD2d 672; *Matter of Albany County Dept. of Social Servs. v Clarence KK.,* 210 AD2d 754; *Jean Maby H. v Joseph H.,* 246 AD2d 282.)

IV. Restitution and legal fees are not appropriate upon any reversal. (*Matter of Colicci v Ruhm*, 20 AD3d 891; *Matter of Dower v Niewiadomski*, 286 AD2d 948; *Baraby v Baraby*, 250 AD2d 201; *Grossman v Ostrow*, 33 AD2d 1006.)
Children's Law Center, Brooklyn (*Barbara H. Dildine*, *Carol Sherman* and *Janet Neustaetter* of counsel), Law Guardian.
The doctrine of equitable estoppel, which is a statutory exception to the right to genetic testing in paternity and child support proceedings, is a vital tool for safeguarding the interests of children in such proceedings and was properly applied by the courts below in the instant case. (*Purificati v Paricos*, 154 AD2d 360; ***323** *Matter of Department of Social Servs. v Thomas J.S.*, 100 AD2d 119; *Schaschlo v Taishoff*, 2 NY2d 408; *Commissioner of Pub. Welfare v Koehler*, 284 NY 260; *Matter of Czajak v Vavonese*, 104 Misc 2d 601; *Albany County Dept. of Social Servs. v John T.*, 170 Misc 2d 506; *Levy v Louisiana*, 391 US 68; *Mills v Habluetzel*, 456 US 91; *Matter of L. Pamela P. v Frank S.*, 59 NY2d 1; *Matter of Weinberg v Omar E.*, 106 AD2d 448.)
Louis Kiefer, Hartford, Connecticut, for US Citizens against Paternity Fraud and another, amici curiae.
I. Did the courts below err in failing to apply the equitable doctrine of unclean hands in this case involving paternity fraud? (*Levy v Braverman*, 24 AD2d 430; *Seagirt Realty Corp. v Chazanof*, 13 NY2d 282; *Verra v Bowman-Verra*, 266 AD2d 682.) II. Did the courts below err in applying equitable estoppel in a case involving paternity fraud? (*Matter of Sharon GG. v Duane HH.*, 63 NY2d 859; *Matter of Christopher S. v Ann Marie S.*, 173 Misc 2d 824; *Department of Social Servs. v Dinkins*, 110 Misc 2d 673; *Matter of Cortland County Dept. of Social Servs. v Thomas ZZ.*, 141 AD2d 119; *Queal v Queal*, 179 AD2d 1070.) III. Did the courts below err by failing to consider the rights of the child to have the correct identification of her biological father and to have the benefits which would flow from that? (*Little v Streater*, 452 US 1; *Rivera v Minnich*, 483 US 574; *Matter of Brian M. v Nancy M.*, 227 AD2d 404; *Weiss v Weiss*, 52 NY2d 170; *Pickett v Brown*, 462 US 1; *Prince v Massachusetts*, 321 US 158; *Matter of Baby Boy C.*, 84 NY2d 91; *Matter of Emanuel S. v Joseph E.*, 78 NY2d 178; *Troxel v Granville*, 530 US 57; *Parham v J.R.*, 442 US 584.) IV. Did the courts below err in applying the "best interests" doctrine in assigning paternity to a nonbiological father? (*Matter of Cindy P. v Danny P.*, 206 AD2d 615; *Matter of C.M. v C.H.*, 6 Misc 3d 361; *Matter of Janis C. v Christine T.*, 294 AD2d 496; *Matter of Alison D. v Virginia M.*, 77 NY2d 651; *Matter of Bessette v Saratoga County Commr. of Social Servs.*, 209 AD2d 838; *Matter of David M. v Lisa M.*, 207 AD2d 623; *Matter of John Andrew B. v Dianna Marie McC.*, 149 Misc 2d 249; *Matter of Multari v Sorrell*, 287 AD2d 764; *Matter of Fitzpatrick v Youngs*, 186 Misc 2d 344; *Lassiter v Department of Social Servs. of Durham Cty.*, 452 US 18.) V. Did the courts below err in failing to make a meaningful inquiry into the identity and whereabouts of the biological father before effectively terminating any future the child might have with her father? (*Matter of Department of Social Servs. v Witzel*, 91 Misc 2d 274; *Little v Streater*, 452 US 1; *Prince v Massachusetts*, 321 US 158; *Lassiter v Department of Social Servs. of Durham Cty.*, 452 US 18; *Santosky v Kramer*, 455 US 745; ***324** *Matter of Daley*, 123 Misc 2d 139.) VI. Did the courts below err in failing to consider the long-term implications of imposing fatherhood on a man who has no interest in being a father? (*Matter of Charles v Charles*, 296 AD2d 547; *Matter of Bennett v Jeffreys*, 40 NY2d 543; *Hammack v Hammack*, 291 AD2d 718.)

OPINION OF THE COURT

Rosenblatt, J.

In this child support proceeding, we hold that a man who has mistakenly represented himself as a child's father may be estopped from denying paternity, and made to pay child support, when the child justifiably relied on the man's representation of paternity, to the ****2** child's detriment. We reach this conclusion based on the best interests of the child as set forth by the Legislature.

I.

In January 1996, Shondel J. gave birth to a daughter in Guyana, where she then resided, and in a birth registration document named Mark D. as the father. Shondel and Mark had dated the previous spring in Guyana and had sexual intercourse.

Although Mark was in New York when the child was born, he provided financial support for the child and returned to Guyana later in the year to see her. In a sworn statement, notarized by the Guyana Consul-General in New York in January 1996, Mark declared that he was "convinced" that he was the child's father and accepted "all paternal responsibilities including child support." In 1998 he signed a Guyana registry, stating that he was her father and authorizing the change of her last name to his.

Mark named the child the primary beneficiary on his life insurance policy, identifying her as his daughter. He also sent Shondel money monthly for the child's support from her birth until June 1999 and then less regularly through the summer of 2000.

In August 2000, Shondel commenced a Family Court Act article 5 proceeding alleging that Mark is the father and seeking orders of filiation and support. Initially, Mark did not contest paternity. On the contrary, in September 2000, when the child was 4½ years old, Mark commenced a Family Court Act article 6 proceeding, seeking visitation. In his petition, he stated that he was the child's father, and that he loved her and wished to "spend quality time with her on a regularly scheduled basis."

In October 2000, however, when appearing before a Family Court hearing examiner to answer Shondel's petition, Mark ***325** requested DNA testing. The hearing examiner ordered genetic marker tests, which revealed that Mark is not the child's biological father. The hearing examiner then dismissed Shondel's paternity petition, and Mark abandoned his petition for visitation, having severed his relationship with the child. Shondel objected to the hearing examiner's order, expressing doubts about the laboratory tests and stating that she would be able to show that Mark had always recognized the child as his. Realizing that the hearing examiner had exceeded her authority in dismissing Shondel's petition, Family Court sustained her objection and appointed a law guardian for the child.

In October 2001, the Law Guardian reported that Mark had acted as the father of the child, who in turn considered him her father. Family Court set the matter down for a trial on equitable estoppel and ordered another set of tests. A blood genetic marker test confirmed that Mark is not the child's biological father. ****3**

At the estoppel trial, Family Court heard widely diverging testimony from Shondel and Mark. According to Shondel's testimony, Mark spent time with her and the child when they traveled to the United States in 1996 and 1997, seeing them "every day" for about six weeks in the summer of 1997 in New York; continued to visit the child and take her out after his relationship with Shondel soured in 1998; bought the child toys, clothes and other gifts; took the child to meet his parents; told his family that she was his daughter; regularly spoke with the child by telephone; referred to himself as "daddy" when talking with the child; and visited the child "almost every other day" in August 1999 and "almost every other day" between the time Shondel and the child moved to New York in January 2000 and the commencement of this litigation.

Mark denied all of this, asserting that he had seen the child only four times since her birth; that he had not acknowledged the child as his; that he had not introduced the child to his family or friends as his child; that he had not sent the child birthday or Christmas gifts; and that he had never visited her. Mark testified that he twice asked Shondel to submit to a blood test to determine whether he was the father of her child. Shondel insisted that he did not.

Family Court believed Shondel "entirely" and found Mark's testimony incredible. It ruled that Mark "held himself out as [the] child's father, and behaved in every way as if he was the ***326** father, albeit a father who didn't reside for a good part of the child's life, in the same country." These affirmed findings of Family Court have support in the record and are binding on this Court.

Family Court entered an order of filiation and awarded child support retroactive to the date Shondel commenced the Family Court proceeding. The Appellate Division affirmed, concluding that "Family Court properly determined that it was in the best interests of the subject child to equitably estop [Mark] from denying paternity" (6 AD3d 437 [2004]). [1] We agree, based on our precedents, the affirmed findings of fact and the legislative recognition of paternity by estoppel.

II.

The purpose of equitable estoppel is to preclude a person from asserting a right after having led another to form the reasonable belief that the right would not be asserted, and loss or prejudice to the other would result if the right were asserted. The law imposes the doctrine as a matter of fairness. Its purpose is to prevent someone from enforcing rights that would work injustice on the person against whom enforcement is sought and who, while justifiably relying on the opposing party's actions, has been

misled into a detrimental change of ****4** position (*see generally Nassau Trust Co. v Montrose Concrete Prods. Corp.*, 56 NY2d 175, 184 [1982]).

New York courts have long applied the doctrine of estoppel in paternity and support proceedings. Our reason has been and continues to be the best interests of the child (*Jean Maby H. v Joseph H.*, 246 AD2d 282, 285 [2d Dept 1998]; *see generally Matter of L. Pamela P. v Frank S.*, 59 NY2d 1, 5 [1983]).

Although it originated in case law, paternity by estoppel is now secured by statute in New York (*see* Family Ct Act § 418 [a]; § 532 [a]). For that reason, and contrary to Mark's assertions, it is not for us to decide whether the doctrine has a rightful place in New York law. Clearly it does, in the absence of legislative repeal or a determination of unconstitutionality. Mark argues for the first time in this appeal that sections 418 (a) and 532 (a) are unconstitutional and deprive him of due process. As this claim was not raised in the courts below, we do not entertain it.

***327** Equitable estoppel is gender neutral. In *Matter of Sharon GG. v Duane HH.* (63 NY2d 859 [1984], *affg* 95 AD2d 466 [3d Dept 1983]), we affirmed an order of the Appellate Division dismissing a paternity petition in which a mother sought to compel her husband to submit to a blood test as a means of challenging his paternity. We agreed with the Appellate Division that the mother should be estopped. As that Court pointed out, the mother expressed no question about her child's paternity until some 2½ years after the child's birth. She had held the child out as her husband's, accepted his support for the child while she and her husband lived together and after they separated, and permitted her husband and child to form strong ties together.

Estoppel may also preclude a man who claims to be a child's biological father from asserting his paternity when he acquiesced in the establishment of a strong parent-child bond between the child and another man. The rationale is that the child would be harmed by a determination that someone else is the biological father. For example, in *Purificati v Paricos* (154 AD2d 360 [2d Dept 1989]), a boy's biological father who did not seek to establish his paternity until more than three years after the child's birth, and who acquiesced as a relationship flourished between the boy and his mother's former husband, was estopped from claiming paternity. The courts “impose equitable estoppel to protect the status interests of a child in an already recognized and operative parent-child relationship” (*Matter of Baby Boy C.*, 84 NY2d 91, 102 n [1994]).

Finally, the Appellate Division has repeatedly concluded that a man who has held himself out to be the father of a child, so that a parent-child relationship developed between the ****5** two, may be estopped from denying paternity. [2] Where a child justifiably relies on the representations of a man that he is her father with the result that she will be harmed by the man's denial of paternity, the man may be estopped from asserting that denial. [3]

***328 III.**

Mark represented that he was the father of the child, and she justifiably relied on this representation, changing her position by forming a bond with him, to her ultimate detriment. He is therefore estopped from denying paternity.

Mark expressly represented that he was the father of Shondel's child in the notarized sworn statement and in the Guyana registry in which he gave the child his name, as well as in the visitation petition filed with Family Court. Further, Mark held himself out as the child's father, and behaved in every way as if he was the father. Mark and the child had a close relationship, in which he referred to himself as her “daddy,” and which involved regular telephone conversations, frequent visits when she and Mark were in the same city, and contact with his parents. Moreover, Mark named the child as the primary beneficiary on his life insurance policy and sent money monthly for the child's support until June 1999 and then less regularly through the summer of 2000.

The record also establishes that the child justifiably relied on Mark's representations, accepting and treating him as her father. The Law Guardian's October 2001 oral report to Family Court on her interview with the child (conducted when she was 5½ years old) concluded that she

> "considers Mark [D.] to be her father. She enjoys spending time with him, she knew his name, she described what he looks like, different things about his appearance, she talked about some of the things they did together, she enjoyed the visits a lot, he brought her presents in the past, he took her out without the mother sometimes, ****6** there's a picture album with pictures of [Mark] in it and she wanted me to express that she misses him and she wants to know when he's going to come back to see her."

In the best interests of the child, Family Court properly applied estoppel, to impose support obligations on Mark, after he left the child with the detrimental effects of a relationship in which she was misled into believing that he was her father. A mother who had perfect foresight and knew that her child's relationship with a father figure would be severed when the child was 4½ might well choose never to inform him of her child's birth.

***329 IV.**

Mark attacks the statutory basis for the application of paternity by estoppel. In 1990, the Legislature amended Family Court Act § 418 (a), which governs the procedures related to scientific testing of biological paternity in support proceedings, so as to read, in pertinent part:

> "The court, on its own motion or motion of any party, when paternity is contested, shall order the mother, the child and the alleged father to submit to one or more genetic marker or DNA marker tests . . . to aid in the determination of whether the alleged father is or is not the father of the child. No such test shall be ordered, however, upon a written finding by the court that it is not in the best interests of the child on the basis of res judicata, *equitable estoppel* or the presumption of legitimacy of a child born to a married woman." (Family Ct Act § 418 [a] [emphasis supplied]; *see* L 1990, ch 818, § 12.)

Arguing that the statute is self-contradictory, Mark asserts that the law mandates scientific testing of biological paternity in support proceedings and then in the next sentence makes such tests discretionary. We view the statute differently.

By providing a limited "best interests of the child" exception to mandatory biological tests of disputed paternity, the statute requires Family Court to justify its refusal to order biological tests when paternity is in issue. Before the amendment, Family Court was authorized, but not required, to order biological tests, and the court did not have to justify its refusal to do so. Now, in a support proceeding in which paternity is disputed, Family Court must explain why it denies a motion for biological paternity testing. The court may deny testing based on "res judicata, equitable estoppel or the presumption of legitimacy of a child born to a married woman," if denial is in the best interests of the child.

It is true that a child in a support proceeding has an interest in finding out the identity of her biological father. But in many instances a child also has an interest--no less powerful--in maintaining her relationship with the man who led her to believe that he is her ****7** father. The 1990 amendment to Family Court Act § 418 (a) appropriately balances these interests in accordance with the primary purpose of the Family Court Act--to protect and promote the best interests of children.

***330** The procedure contemplated by section 418 (a) is that Family Court should consider paternity by estoppel before it decides whether to test for biological paternity. Here, the process was inverted early in the proceeding. Instead of referring the matter to a Family Court judge, the hearing examiner ordered genetic marker tests of paternity when the parties appeared in October 2000. As a result, the child's biological paternity had been addressed before Family Court conducted its trial on the issue of estoppel. Nevertheless, even though the tests had been conducted, Family Court was authorized to decide the estoppel issue.

V.

In allowing a court to declare paternity irrespective of biological fatherhood, the Legislature made a deliberate policy choice that speaks directly to the case before us. The potential damage to a child's psyche caused by suddenly ending established parental support need only be stated to be appreciated. Cutting off that support, whether emotional or financial, may leave the child in a

worse position than if that support had never been given. Situations vary, and the question whether extinguishing the relationship and its attendant obligations will disserve the child is one for Family Court based on the facts in each case. Here, Family Court found it to be in the best interests of the child that Mark be declared her father and the Appellate Division properly affirmed.

Asserting that the equities are with Mark, our dissenting colleagues argue that we do not acknowledge the fraud or misrepresentation exception to the doctrine of equitable estoppel. This argument is misplaced for three reasons. To begin with, the child is the party in whose favor estoppel is being applied and there can be no claim here that she was guilty of fraud or misrepresentation. Secondly, to the extent that it matters, we note that there is no evidence of fraud or willful misrepresentation even on Shondel's part. It is not likely that she would have initiated paternity proceedings, with the predictable prospect of biological testing, if she expected tests to rule him out as the father. There is every reason to believe that she thought Mark was the biological father and that the tests would confirm her belief. Finally, the issue does not involve the equities between the two adults; the case turns exclusively on the best interests of the child.

We appreciate the dissenters' concern over applying estoppel to a case in which, as between Mark and Shondel, it was she ***331** who misrepresented Mark to be the father (even though she may have earnestly believed he was). The dissenters' position, however, appears not to recognize that fatherhood by estoppel does not contemplate a contest between two adults to ****8** see who is the more innocent. The child is entirely innocent and by statute the party whose interests are paramount.

To the child, Mark represented himself as her father. The Legislature did not create an exception for men who take on the role of fatherhood based on the mother's misrepresentation. That would eviscerate the statute and, with it, the child's best interests. Under the enactment, the mother's motivation and honesty are irrelevant; the only issue for the court is how the interests of the child are best served.

Here, Family Court found, and the Appellate Division affirmed, that Mark represented himself to be the father and that the child's best interests would be served by a declaration of fatherhood. Under our decisional law, and contrary to the dissenters' suggestion, equitable estoppel does not require that Mark, to be estopped, necessarily knew that his representation was false. A party who, like Mark, does not realize that his representation was factually inaccurate may yet be estopped from denying that representation when someone else--here the child--justifiably relied on it to her detriment (*see Romano v Metropolitan Life Ins. Co.*, 271 NY 288, 293-294 [1936]; *Triple Cities Constr. Co. v Maryland Cas. Co.*, 4 NY2d 443, 448 [1958]).

The dissenters cite *Simcuski v Saeli* (44 NY2d 442 [1978]), which holds that a defendant may be estopped to plead the statute of limitations after having wrongfully induced the plaintiff to refrain from filing a timely suit. *Simcuski* prevents defendants from profiting from their misconduct. It does not bear on estoppel as between a man and the child with whom he has formed a father-daughter relationship.

Our dissenting colleagues point out that Mark has renounced fatherhood and now has no relationship with the child. This state of affairs, however, does not preclude the application of estoppel. If it did, a man could defeat the statute simply by severing all ties with the child.

Given the statute recognizing paternity by estoppel, a man who harbors doubts about his biological paternity of a child has a choice to make. He may either put the doubts aside and initiate a parental relationship with the child, or insist on a scientific test of paternity *before* initiating a parental relationship. A ***332** possible result of the first option is paternity by estoppel; the other course creates the risk of damage to the relationship with the woman. It is not an easy choice, but at times, the law intersects with the province of personal relationships and some strain is inevitable. This should not be allowed to distract the Family Court from its principal purpose in paternity and support proceedings--to serve the best interests of the child.

Accordingly, the order of the Appellate Division should be affirmed, without costs.

G.B. Smith, J. (dissenting). The issue in this case is whether an individual nonspouse who was falsely told he was the biological father of a child and who DNA tests show could not be the biological father can be equitably estopped from denying paternity. A man or woman is and should be responsible for the financial support of his or her own offspring. In some instances, this responsibility may be placed upon a nonbiological parent. The facts in this case do not justify such a result. Because the "best interests of the child" require more than financial support, and equitable estoppel should be applicable only to someone who engages in false conduct, I dissent.

In 1995, while on a trip to Georgetown, Guyana, respondent Mark D. met and engaged in sexual intercourse with the petitioner, Shondel J. Following his return to the United States, Shondel J. told respondent she was pregnant and he began financially supporting petitioner. In 1996, respondent signed documents submitted to the Guyanese Consul that declared him to be the father of the child. He claims that he did this in order for petitioner to travel to the United States and submit to a paternity test. Between 1996 and 2000, when petitioner moved to New York, Mark D. saw the child multiple times during two visits to Guyana and a visit to Chicago. In 1997, he named the child as a beneficiary on his life insurance policy.

In 2000, Shondel J. commenced a Family Court proceeding in New York to declare Mark D. the child's father and to obtain an order of support. Family Court ordered DNA tests at Mark D.'s request and the DNA saliva swab test excluded paternity. In 2001, Family Court dismissed Shondel J.'s petition and she filed objections to the order of dismissal, alleging that the DNA test was erroneous. In November 2001, the results of a new blood test showed respondent was not the biological father. On August 8, 2002, in Family Court, Kings County, respondent was declared the child's father on the verified petition originally filed by petitioner. The court stated:

> ***333** "The essence of the paternity trial was really one of equitable estoppel, should [Mark D.] be estopped from denying paternity. . . . I do find the Petitioner to have been entirely credible, and with all due respect, except in one regard, [Mark D.] entirely incredible.
>
> "I do believe that he had doubts, however, he didn't act on them in the appropriate fashion, and as a result he held himself out as this child's father, and behaved in every way as if he was the father, albeit a father who didn't reside for a good part of the child's life, in the same country.
>
> "However, it's clear to me that these families were involved with each other, involved with this child, that his parents and probably other friends and relatives and church members were ****9** aware of this relationship, were aware of this child . . . .
>
> "I would assume that for the best--and hope that for the best interests of the child, that he could pick up where he left off, and accept this child wholeheartedly into his life, because the child certainly wants that, and really, what's paramount here is what the child needs."

On April 5, 2004, the Appellate Division, Second Department affirmed the Family Court's order of filiation. On May 9, 2005, the Second Department dismissed respondent's appeal from a Family Court order of retroactive child support, and affirmed an order of support against him.

The question here is not, as the majority suggests, whether equitable estoppel "has a rightful place in New York law" (majority op at 326) or in paternity proceedings. The statute makes clear that it does. The question is whether the elements of estoppel are present in this case. Equitable estoppel is a "defensive doctrine preventing one party from taking unfair advantage of another when, through false language or conduct, the person to be estopped had induced another person to act in a certain way, with the result that the other person has been injured in some way" (Black's Law Dictionary 571 [7th ed 1999]; *see also Simcuski v Saeli*, 44 NY2d 442, 449 [1978] [stating defendant may be equitably estopped "where plaintiff was induced by fraud, misrepresentations or deception to refrain from filing a timely action" and plaintiff demonstrates reasonable reliance on ***334** defendant's misrepresentations]). Once a party makes a prima facie showing of facts sufficient to support equitable estoppel in the paternity context, the opponent of equitable estoppel must demonstrate why estoppel should not be applied in the best interests of the child (*see Matter of Sharon GG. v Duane HH.*, 95 AD2d 466 [3d Dept 1983], *affd* 63 NY2d 859 [1984]).

According to Family Court Act § 532 (a), which is substantially similar in language to Family Court Act § 418 (a):

> "The court shall advise the parties of their right to one or more genetic marker tests or DNA tests and, on the court's own motion or the motion of any party, shall order the mother, her child and the alleged father to submit to one or more genetic marker or DNA tests of a type generally acknowledged as reliable by an accreditation body designated by the secretary of the federal department of health and human services and performed by a laboratory approved by such an accreditation body and by the commissioner of health or by a duly qualified physician to aid in the determination of whether the alleged father is or is not the father of the child. *No such test shall be ordered, however, upon a written finding by the court that it is not in the best interests of the child on the basis of res* ****10** *judicata, equitable estoppel, or the presumption of legitimacy of a child born to a married woman*. The record or report of the results of any such genetic marker or DNA test ordered pursuant to this section or pursuant to section one hundred eleven-k of the social services law shall be received in evidence by the court pursuant to subdivision (e) of rule forty-five hundred eighteen of the civil practice law and rules where no timely objection in writing has been made thereto and that if such timely objections are not made, they shall be deemed waived and shall not be heard by the court. If the record or report of the results of any such genetic marker or DNA test or tests indicate at least a ninety-five percent probability of paternity, the admission of such record or report shall create a rebuttable presumption of paternity, and shall establish, if unrebutted, the paternity of and liability for ***335** the support of a child pursuant to this article and article four of this act" (emphasis added). [1]

The majority posits that once Shondel J. claimed Mark D. was the father and made a showing (visits, support, sworn statements), it was respondent's burden to show equitable estoppel should not be applied since it would not be in the best interests of the child. The facts are not sufficient to support equitable estoppel. While Mark D. financially supported the child and made time to visit her, he has not (in the language of Black's Law Dictionary) "tak[e]n unfair advantage" or been guilty of "false language or conduct"; he has not (in the language of our decision in *Simcuski*) committed any "fraud, misrepresentations or deception." Thus an essential element of equitable estoppel does not exist.

The record is clear that Shondel J. misrepresented the paternity of the child for years and Mark D. relied on this information in good faith. There is no evidence that Mark D. gained any advantage from holding himself out as the child's father. Thus the majority's decision applies estoppel against a completely innocent litigant who gained no benefit from the conduct on which the estoppel is based--a holding without precedent, in the research undertaken here, in this Court's decisions. Mark D. is being required to support this child through payments of $12,858 in arrearage (as of October 2003) and $78 per week, in lieu of providing that support to his own children and his wife.

Moreover, this is a poor case for abandoning the traditional elements of estoppel. The balance of equities is in Mark D.'s favor. Contrary to the majority's view (majority op at 330), ****11** there is strong evidence of "fraud or willful misrepresentation" by Shondel J. She not only told Mark D. that the child was his, she swore in Family Court that she had sexual relations with no other man during the relevant time period--testimony proven by DNA tests to be false. Perhaps more important, this is not a case where a child lived for years with, and was brought up by, a man she had always thought was her father (*cf. Matter of Diana E. v Angel M.*, 20 AD3d 370 [2005]). At the time of the paternity proceeding, the child had lived most of her life in a different country from Mark D., and their relationship was primarily on the telephone. This is a case in which this Court ***336** should remember "the rightful reluctance of courts in a society valuing freedom of association to impose a personal relationship upon an unwilling party," a consideration that applies with special force to "the power of the State to force a parent-child relationship" (*Matter of Baby Boy C.*, 84 NY2d 91, 101, 102 [1994]).

The majority's ruling allows disestablishment of paternity if a presumed father acts promptly but does not allow for an exception for those who have acted in reliance on a misrepresentation or a fraud. The balance of equities should rarely favor continuing such misrepresentation or fraud. To hold as the majority does would reward a presumed father who takes no role in a child's life until a DNA test makes it official or a mother who obtains paternal obligations through fraud. As the Massachusetts Supreme Judicial Court wrote in *A.R. v C.R.*:

> "We would proceed with caution, as other courts have, in imposing a duty of support on a person who has not adopted a child, is not the child's natural parent, but has undertaken voluntarily to support the child and to act as a parent. *In most instances, such conduct should be encouraged as a matter of public policy. The obligation to support a child primarily rests with the natural parents, and one who undertakes that task without any duty to do so generally should not be punished if he or she should abandon it*. On the other hand, a husband who for years acts as a father to a child born to the wife, supports that child, and holds himself out as the father to the child and to the world, may be obliged to continue to support the child when he, for the first time, renounces his apparent paternity in an attempt to avoid court-imposed support obligations. It may be relevant, in deciding whether reliance was detrimental, to know whether there once was an opportunity to pursue the natural father that is now lost" (411 Mass 570, 575, 583 NE2d 840, 843-844 [1992] [citations omitted and emphasis added]).

With this decision, this Court supports a public policy that says a man should ****12** never take on a parental role unless he wants to be unconditionally responsible for the child's financial support.

Finally, it is not in the best interests of the child in this matter that the order of filiation and order of support be affirmed. ***337** The Law Guardian concedes that Mark D.'s contributions to this child's life will only be financial. He has had no contact with the child since March 2000. Unlike *Matter of Sharon GG.*, where an estranged husband fought to keep his parental rights, in this matter we have a man fighting to divorce his financial interests from petitioner and her child. While it was in the best interests of the child in *Sharon GG.* to maintain a relationship with an estranged husband who had filled the role of father in every way, it should not be said here that it is in the best interests of a child to have an order of filiation declare respondent to be her father, a man, who in addition to having no biological tie, has no interest in continuing a relationship with her or her mother. [2]

Accordingly, I dissent.

Chief Judge Kaye and Judges Ciparick, Graffeo and Read concur with Judge Rosenblatt; Judge G.B. Smith dissents in a separate opinion in which Judge R.S. Smith concurs.

Order affirmed, without costs.

FOOTNOTES

Footnotes

1 This Appellate Division order is brought up for review here by Mark's appeal of a later Appellate Division order dismissing his objections to the child support order (18 AD3d 551 [2005]).

2 *Mancinelli v Mancinelli*, 203 AD2d 634 (3d Dept 1994); *Matter of Commissioner of Social Servs. of Tompkins County v Gregory B.*, 211 AD2d 956 (3d Dept 1995); *Brian B. v Dionne B.*, 267 AD2d 188 (2d Dept 1999); *Matter of Jennifer W. v Steven X.*, 268 AD2d 800 (3d Dept 2000); *Ocasio v Ocasio*, 276 AD2d 680 (2d Dept 2000); *Matter of Sarah S. v James T.*, 299 AD2d 785 (3d Dept 2002); *Matter of Diana E. v Angel M.*, 20 AD3d 370 (1st Dept 2005).

3 As one court put it, "[t]he law is not so insensitive as to countenance the breach of an obligation in so vital and deep a relation, undertaken, partially fulfilled, and suddenly sundered." (*Clevenger v Clevenger*, 189 Cal App 2d 658, 674, 11 Cal Rptr 707, 716 [Ct App 1961]; *accord Pietros v Pietros*, 638 A2d 545, 548 [RI 1994].)

1 It is arguable that because DNA and other tests were ordered prior to any decision on equitable estoppel, the said doctrine should not apply here at all.

2 Respondent argues that his constitutional rights are being violated since he is being deprived of his property in violation of the due process clauses of the federal and state constitutions. We do not address this argument because of the view taken with respect to equitable estoppel.

15 N.Y.3d 1, 930 N.E.2d 214, 904 N.Y.S.2d 293, 2010 N.Y. Slip Op. 03758

In the Matter of Juanita A., Respondent
v
Kenneth Mark N., Appellant.

Court of Appeals of New York
Argued March 25, 2010
Decided May 4, 2010

CITE TITLE AS: Matter of Juanita A. v Kenneth Mark N.

SUMMARY

Appeal, by permission of the Court of Appeals, from an order of the Appellate Division of the Supreme Court in the Fourth Judicial Department, entered June 5, 2009. The Appellate Division affirmed an order of the Family Court, Ontario County (Craig J. Doran, J.), entered May 21, 2008, which had denied respondent's objections to an order of that court (John M. Costello, S.M.), entered March 17, 2008. The March 17, 2008 order had directed respondent to pay child support. The appeal brings up for review two prior orders of that court (Frederick G. Reed, J.), entered October 10, 2007 and December 12, 2007. The October 10, 2007 order had granted petitioner summary judgment on the issue of paternity. The December 12, 2007 order of filiation had adjudged and declared that respondent was the father of petitioner's child.

Matter of Juanita A. v Kenneth Mark N., 63 AD3d 1662, reversed.

HEADNOTE

Children Born out of Wedlock
Paternity Proceeding
Equitable Estoppel

Respondent biological father was entitled to assert an equitable estoppel defense in paternity and child support proceedings brought by petitioner ***2** mother, when the mother had acquiesced in the development of a close relationship between the child and another father figure, and it would have been detrimental to the child's interests to disrupt that relationship. At the time the petition was brought, the child was 12 years old and had lived in an intact family with petitioner and petitioner's boyfriend, whom she had referred to for most of her life as her father. The boyfriend's name appeared on the child's birth certificate and he was the biological father of the child's older and younger siblings. Moreover, petitioner had led respondent to form the reasonable belief that he was not the child's father. Here, respondent properly raised the issue as to whether it was in the child's best interests to have someone besides her mother's boyfriend declared her father late in her childhood. Provided it is used to protect the best interests of the child, equitable estoppel may be used in the offensive posture to enforce parental rights or in the defensive posture to prevent rights from being enforced.

RESEARCH REFERENCES

Am Jur 2d, Illegitimate Children §§ 22, 43–45, 59.

Carmody-Wait 2d, Support Proceedings §§ 119:284, 119:293.

5 Law and the Family New York (2d ed) § 4:24.

NY Jur 2d, Domestic Relations §§ 724, 773, 781.

ANNOTATION REFERENCE

See ALR Index under Equitable Estoppel; Legitimacy of Children.

FIND SIMILAR CASES ON WESTLAW

Database: NY-ORCS

Query: equitable /2 estoppel /5 paternity /5 support & best /2 interest

POINTS OF COUNSEL

Davison Law Office PLLC, Canandaigua (*Mary P. Davison* of counsel), for appellant.
I. The intermediate appellate court erred in affirming the judgment of the Family Court which adjudicated appellant to be the father and imposed on him a duty of support. (*Matter of Shondel J. v Mark D.,* 7 NY3d 320; *Matter of John Robert P. v Vito C.*, 23 AD3d 659; *Matter of Juan A. v Rosemarie N.*, 55 AD3d 827; *Matter of Antonio H. v Angelic W.*, 51 AD3d 1022; *Matter of Bruce W.L. v Carol A.P.*, 46 AD3d 1471, 10 NY3d 707; *Matter of Isaiah A. C. v Faith T.*, 43 AD3d 1048; *Matter of Darlene L.-B. v Claudio B.*, 27 AD3d 564; *Matter of Sharon GG. v Duane HH.*, 95 AD2d 466, 63 NY2d 859; *Matter of Boyles v Boyles*, 95 AD2d 95; *Matter of Charles v Charles*, 296 AD2d 547.) II. Appellant was denied his right to due process ***3** and his right to counsel because the Family Court ordered genetic marker testing without advising him that he had a right to assignment of counsel and a right to an adjournment to confer with counsel. Appellant was further denied his right to effective assistance of counsel, once appointed. The intermediate appellate court erred in finding that trial counsel was not ineffective and that appellant waived review of the magistrate's failure to properly advise him of his rights. (*Matter of Jung [State Commn. on Jud. Conduct]*, 11 NY3d 365; *Matter of Ella B.*, 30 NY2d 352; *Matter of Wilson v Bennett*, 282 AD2d 933; *Matter of Brown v Wood*, 38 AD3d 769; *Matter of Machado v Del Villar*, 299 AD2d 361; *Matter of Gaudette v Gaudette*, 263 AD2d 620; *Matter of Hassig v Hassig*, 34 AD3d 1089; *Matter of Delafrange v Delafrange*, 24 AD3d 1044; *Matter of Darryl B.W. v Sharon M.W.*, 49 AD3d 1246; *Matter of Fralix v Thornock*, 9 AD3d 890.)
Susan Gray Jones, Canandaigua, *Law Guardian*.
I. The intermediate appellate court correctly affirmed that lower court's adjudication of paternity and declined to apply the doctrine of equitable estoppel. (*Matter of Shondel J. v Mark D.*, 7 NY3d 320; *Matter of Ruby M.M. v Moses K.*, 18 AD3d 471; *Matter of Dowed v Munna*, 306 AD2d 278; *Ocasio v Ocasio*, 276 AD2d 680; *Brian B. v Dionne B.*, 267 AD2d 188; *Matter of Saragh Ann K. v Armando Charles C.*, 67 AD3d 537; *Matter of John Robert P. v Vito C.*, 23 AD3d 659; *Purificati v Paricos*, 154 AD2d 360; *Howard S. v Lillian S.*, 62 AD3d 187.) II. Appellant was provided effective assistance of counsel. (*Matter of Laura LL. v Robert LL.*, 186 Misc 2d 642; *Strickland v Washington*, 466 US 668; *Matter of Shangraw v Shangraw*, 61 AD3d 1302; *Matter of Chaquill R.*, 55 AD3d 975; *Matter of St. Lawrence County Support Collection Unit v Cook*, 57 AD3d 1258; *Matter of Yette v Yette*, 39 AD3d 952, 9 NY3d 802; *Matter of Kilmartin v Kilmartin*, 44 AD3d 1099; *Matter of Bryan W.*, 299 AD2d 929; *Matter of Nagi T. v Magdia T.*, 48 AD3d 1061; *Marivel G. v Marcus D.*, 6 Misc 3d 1030[A], 2005 NY Slip Op 50230[U].)

OPINION OF THE COURT

Pigott, J.

The issue before this Court is whether a biological father may assert an equitable estoppel defense in paternity and child support proceedings. Under the circumstances of this case, where another father figure is present in the child's life, we hold that he may assert such a claim.

***4** On June 25, 1994, the child, A., was born. At the time, mother was unmarried, but living with Raymond S., who was listed as A.'s father on her birth certificate. Mother and ****2** Raymond had a previous child together and, after the birth of A., had another child. When A. was seven years old, during a family dispute, she became aware that Raymond may not be her biological father. At that time, mother called Kenneth at his home in Florida and had him speak with A. The conversation lasted less than 10 minutes, during which time A. asked questions concerning his physical characteristics. Kenneth's attempt to speak with A. a second time was rebuffed by Raymond, who warned Kenneth not to speak to A. again. Kenneth has had no further contact with A.

In 2006, when A. was approximately 12 years old, mother filed the instant petition against Kenneth, seeking an order of filiation and child support. Kenneth appeared before Family Court for the first time by way of telephone. The Support Magistrate advised Kenneth, among other things, that he had the right to admit or deny that he was the father of A. However, he did not advise Kenneth that he had the right to assignment of counsel, or inquire whether he wished to consult with counsel prior to proceeding. Kenneth agreed to the ordered genetic marker testing, which indicated a 99.99% probability that Kenneth is indeed A.'s biological father.

At a hearing in January 2007, Kenneth, having now been assigned counsel, appeared once again via telephone, but protested that he had yet to speak with the lawyer assigned to him. Counsel admitted that he had not spoken to his client, and that the "file fell through the cracks for me." Despite Kenneth's protest, the Support Magistrate proceeded with the hearing. When the issue of equitable estoppel was raised by Kenneth, the Magistrate, lacking the authority to hear that issue, transferred the case to a judge of the Family Court. That court, determining the issue on motion papers and oral argument, held that Kenneth was the father of A. and entered an order of filiation.

The Appellate Division affirmed, holding that the doctrine of equitable estoppel is applicable in paternity proceedings only where it is invoked to further the best interests of the child, and "generally is not available to a party seeking to disavow the allegation of parenthood for the purpose of avoiding child support" (63 AD3d 1662, 1663 [4th Dept 2009]). The court also rejected Kenneth's contention that he was denied effective assistance ***5** of counsel (*id.*). We granted leave to appeal (13 NY3d 830 [2009]) and now reverse.

In *Matter of Shondel J. v Mark D.* (7 NY3d 320 [2006]), we set forth the law applicable to equitable estoppel in paternity and child support proceedings. We noted that the

> "purpose of equitable estoppel is to preclude a person from asserting a right after having led another to form the reasonable belief that the right would not be asserted, and loss or prejudice to the other would result if the right were asserted. The law imposes the doctrine as a matter of fairness. Its purpose is to prevent ****3** someone from enforcing rights that would work injustice on the person against whom enforcement is sought and who, while justifiably relying on the opposing party's actions, has been misled into a detrimental change of position" (*id.* at 326).

We concluded that the "paramount" concern in such cases "has been and continues to be the best interests of the child" (*id.*).

Equitable estoppel has been used, as it was in *Shondel J.*, to prevent a man from avoiding child support by claiming that he is not the child's biological father (*id.* at 328). In such a case, the man has represented himself to be the child's father and the child's best interests are served by a declaration of fatherhood. The doctrine in this way protects "the status interests of a child in an already recognized and operative parent-child relationship" (*Matter of Baby Boy C.*, 84 NY2d 91, 102 n [1994]). Here, Kenneth seeks to invoke the doctrine against mother, who led Kenneth to form the reasonable belief that he was not a father and that Raymond is A.'s father. He argues that it is not in A.'s best interest to have her current, child-father relationship with Raymond interrupted.

At the time the instant petition was brought, A. was 12 years old and had lived in an intact family with Raymond and her mother. His name appears on her birth certificate and he is the biological father of her older and younger siblings. For most of A.'s life, she referred to Raymond as father. Thus, Kenneth appropriately raises an issue as to whether it is in A.'s best interest to have

someone besides Raymond declared her father this late in her childhood. As a result, we conclude it is proper for him to assert a claim of estoppel to, among other things, protect the status of that parent-child relationship.

***6** We disagree with the Law Guardian's position that a person who has already been determined to be a child's biological father cannot raise an equitable estoppel argument.[*] Indeed, the doctrine has been used to prevent a biological father from asserting paternity rights when it would be detrimental to the child's interests to disrupt the child's close relationship with another father figure (*see e.g. Matter of Fidel A. v Sharon N.*, 71 AD3d 437 [1st Dept 2010]; *Matter of Richard W. v Roberta Y.*, 240 AD2d 812 [3d Dept 1997]; *Purificati v Paricos*, 154 AD2d 360 [2d Dept 1989]). The same best-interests considerations that justify estopping a biological father from asserting his paternity may justify preventing a mother from asserting it. Indeed, whether it is being used in ****4** the offensive posture to enforce rights or the defensive posture to prevent rights from being enforced, equitable estoppel is only to be used to protect the best interests of the child. Therefore, we hold that the doctrine of equitable estoppel may be used by a purported biological father to prevent a child's mother from asserting biological paternity—when the mother has acquiesced in the development of a close relationship between the child and another father figure, and it would be detrimental to the child's interests to disrupt that relationship.

We conclude that a hearing is needed in this case to decide the merits of Kenneth's claim. At that hearing, Raymond must be joined as a necessary party, so that Family Court may consider the nature of his relationship with the child and make a proper determination of A.'s best interests. Consequently, we remit the matter to Family Court for such a hearing and determination.

In view of the foregoing, we need not address Kenneth's remaining issues. However, both the Support Magistrate's failure to advise Kenneth of his right to counsel before genetic testing was done and counsel's failure to consult with Kenneth before the January 2007 hearing are troubling events, which should not have occurred.

Accordingly, the order of the Appellate Division should be reversed, with costs, and the matter remitted to Family Court for further proceedings in accordance with this opinion.

***7** Chief Judge Lippman and Judges Ciparick, Graffeo, Read, Smith and Jones concur.

Order reversed, etc.

FOOTNOTES

Footnotes

* We note that Family Court should have addressed the equitable estoppel issue prior to directing that Kenneth undergo genetic marker tests (*see Shondel J.*, 7 NY3d at 330). The fact that testing was conducted, however, does not bar the court from thereafter deciding the estoppel issue, as *Shondel J.* itself held.

20 N.Y.3d 995, 985 N.E.2d 127, 961 N.Y.S.2d 363, 2013 N.Y. Slip Op. 00115

In the Matter of Commissioner of Social Services, on Behalf of Elizabeth S., Appellant, v Julio J., Respondent.

Court of Appeals of New York
Decided January 10, 2013

CITE TITLE AS: Matter of Commissioner of Social Servs. v Julio J.

SUMMARY

Appeal, by permission of the Appellate Division of the Supreme Court in the First Judicial Department, entered April 24, 2012. The Appellate Division (1) reversed, on the law, an order of the Family Court, New York County (Mary E. Bednar, J.), which had declared respondent to be the father of the subject child, and (2) remanded the matter for further proceedings to include the performance of a biological paternity test. The following question was certified by the Appellate Division: "Was the order of this Court, which reversed the order of the Family Court, properly made?"

In a paternity proceeding under article 5 of the Family Court Act, the Appellate Division concluded that petitioner agency had failed to establish by evidence that was clear, convincing and entirely satisfactory, that respondent had acted as the child's father to such an extent as to give rise to equitable estoppel barring him from denying paternity and rendering a biological paternity test inappropriate.

Matter of Commissioner of Social Servs. v Julio J., 94 AD3d 606, reversed.

HEADNOTE

Children Born out of Wedlock
Paternity Proceeding
Equitable Estoppel—Parent-Child Relationship

In a paternity proceeding, the Court of Appeals reversed an Appellate Division order which had reversed a Family Court order declaring respondent to be the father of the subject child based upon findings that the child, who was eight years old at the time of the hearing, knew respondent, with his encouragement, as her father; that a relationship had existed insofar as the child was concerned; and that the child had relied on respondent to be her father sufficiently such that it would be to her detriment for the court to direct DNA testing. Before a party can be estopped from denying paternity or from obtaining a DNA test that may establish that he is not the child's biological parent, the court must be convinced that applying equitable estoppel is in the child's best interest, and the party seeking to prove paternity, whether by estoppel or otherwise, must do so by clear and convincing evidence. Here, the Appellate Division, considering the same evidence as Family Court, made different factual findings to support its conclusion that the Commissioner of Social Services had not proven by clear and convincing evidence that respondent should be estopped from denying paternity. The Court of Appeals, reviewing the record to determine which set of findings more nearly comported with the weight of the evidence, concluded that the evidence more nearly comported with Family Court's findings. Upon those findings, Family Court properly decided that respondent should be equitably estopped from asserting nonpaternity.

APPEARANCES OF COUNSEL

985 N.E.2d 127, 961 N.Y.S.2d 363, 2013 N.Y. Slip Op. 00115

Michael A. Cardozo, Corporation Counsel, New York City (*Deborah A. Brenner* of counsel), for appellant.
George E. Reed, Jr., White Plains, for respondent.
Lawyers For Children, Inc., New York City (*Brenda S. Soloff* of counsel), for Elizabeth S. ***997**

OPINION OF THE COURT

Memorandum. ****2**

The order of the Appellate Division should be reversed, without costs, the order of Family Court reinstated, and the certified question answered in the negative.

Before a party can be estopped from denying paternity or from obtaining a DNA test that may establish that he is not the child's biological parent, the court must be convinced that applying equitable estoppel is in the child's best interest (*Matter of Shondel J. v Mark D.*, 7 NY3d 320 [2006]). The party seeking to prove paternity, whether by estoppel or otherwise, must do so by clear and convincing evidence. Here, although the Appellate Division stated that its reversal was on the law, that Court, considering the same evidence as Family Court, made different factual findings to support its conclusion that the Commissioner of Social Services had not proven by clear and convincing evidence that respondent Julio J. should be estopped from denying paternity. Accordingly, we review the record to determine which set of findings more nearly comports with the weight of the evidence (*see Matter of Jamie M.*, 63 NY2d 388, 393 [1984]).

We conclude that the evidence more nearly comports with Family Court's findings that the child, who was eight years old at the time of the hearing, knows respondent, with his encouragement, as her father; that a relationship existed insofar as the child was concerned; and that the child relied on respondent to be her father sufficiently such that it would be to her detriment for the court to direct DNA testing. Upon those findings, Family Court properly decided that respondent should be equitably estopped from asserting nonpaternity.

Chief Judge Lippman and Judges Graffeo, Read and Pigott concur; Judge Smith dissents and votes to affirm, concluding that the findings of the Appellate Division more nearly comport with the weight of the evidence.

On review of submissions pursuant to section 500.11 of the Rules of the Court of Appeals (22 NYCRR 500.11), order reversed, without costs, order of Family Court, New York County, reinstated, and certified question answered in the negative, in a memorandum.

2018 WL 541768
Supreme Court,
Appellate Division, Third Department, New York.

In the Matter of CHRISTOPHER YY., Respondent,
v.
JESSICA ZZ., Appellant,
and
Nichole ZZ., Respondent.

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Calendar Date: October 19, 2017
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Decided and Entered: January 25, 2018

Synopsis

Background: Sperm donor filed paternity petition and sought custody of child. After mother and her wife cross-petitioned for custody, mother moved to dismiss donor's petition. The Family Court, Chemung County, Tarantelli, J., denied the motion. Mother appealed.

Holdings: The Supreme Court, Appellate Division, Mulvey, J., held that:

[1] presumption of legitimacy afforded to child born to a marriage applied to child born to lesbian married couple;

[2] donor was precluded under equitable estoppel doctrine from asserting paternity; and

[3] best interests of the child would not be served in ordering genetic tests.

Reversed.

West Headnotes (14)

[1] **Parent and Child** In general;hearing

Where paternity is in issue, Family Court is required to order biological tests unless it relies upon the best interests of the child exception and, if so, it must justify its refusal to order such tests. N.Y. Family Court Act § 532(a).

Cases that cite this headnote

[2] **Parent and Child** In general;hearing

Even if the presumption of legitimacy applies in a paternity petition, a court must proceed to the best interests of the child analysis before deciding whether to order a biological test. N.Y. Family Court Act § 532(a).

Cases that cite this headnote

[3] **Parent and Child** Paternity in general

The paramount concern in a proceeding to establish paternity is the best interests of the child. N.Y. Family Court Act § 532(a).

Cases that cite this headnote

[4] **Parent and Child** Paternity in general

Importantly, biology is not dispositive in a court's paternity determination. N.Y. Family Court Act § 532(a).

Cases that cite this headnote

[5] **Parent and Child** Presumptions and Burden of Proof

Presumption of legitimacy afforded to child born to a marriage applied to child born to lesbian married couple. N.Y. Dom. Rel. Law § 24.

Cases that cite this headnote

[6] **Parent and Child** Presumptions and Burden of Proof

The presumption of legitimacy afforded to child born to a marriage is unaffected by the gender composition of the marital couple or the use of informal artificial insemination by donor. N.Y. Dom. Rel. Law § 24.

Cases that cite this headnote

[7] **Parent and Child** Presumptions and Burden of Proof

The presumption of legitimacy afforded to child born to a marriage is rebuttable upon clear and convincing evidence excluding the spouse as the child's parent or otherwise tending to prove that the child was not the product of the marriage. N.Y. Dom. Rel. Law § 24.

Cases that cite this headnote

[8] **Parent and Child** Presumptions and Burden of Proof

There was no evidence that child was not product of marriage between mother and her wife, and therefore presumption of legitimacy afforded to child born to a marriage was not rebutted in paternity action by sperm donor. N.Y. Dom. Rel. Law § 24.

Cases that cite this headnote

[9] **Estoppel** Nature and Application of Estoppel in Pais

The essential purpose of equitable estoppel is to preclude a person from asserting a right after having led another to form the reasonable belief that the right would not be asserted, and loss or prejudice to the other would result if the right were asserted; its purpose is to prevent someone from enforcing rights that would work injustice on the person against whom enforcement is sought and who, while justifiably relying on the opposing party's actions, has been misled into a detrimental change of position.

Cases that cite this headnote

[10] **Parent and Child** To assert or establish paternity

The doctrine of equitable estoppel is a defense in a paternity proceeding which, among other applications, precludes a man from asserting his paternity when he acquiesced in the establishment of a strong parent-child bond between the child and another person.

Cases that cite this headnote

[11] **Parent and Child** Estoppel and Waiver

While the equitable estoppel doctrine is invoked in a variety of situations in paternity proceedings, whether it is being used in the offensive posture to enforce rights or the defensive posture to prevent rights from being enforced, it is only to be used to protect the best interests of the child; for that reason, the dispute does not involve the equities between, or among, the adults, but the case turns exclusively on the best interests of the child.

Cases that cite this headnote

[12] **Parent and Child** To assert or establish paternity

Sperm donor was precluded under equitable estoppel doctrine from asserting paternity as to child of mother and her wife, where donor voluntarily donated sperm to mother and wife, he engaged in several discussions with them and his own partner about donation, he understood donation was so that they could be sole parents of any child conceived, he had no expectation of parentage and expressly disavowed parental intention, rights, or responsibilities, he later took steps to preclude mother and wife from pursuing him for paternity or child support, donor never attended any appointments for child and did not see her until at least one or two months after birth, he never paid child support, mother's wife was present at birth and had assumed all burdens that came with parenting a newborn, she was recorded on birth certificate, and she was listed as parent for purposes of government benefits. N.Y. Family Court Act § 532(a).

Cases that cite this headnote

[13] **Parent and Child** As to Paternity;Presumed Fatherhood

The parties asserting equitable estoppel in paternity proceedings have the initial burden of establishing a prima facie case sufficient to support that claim and, assuming that burden is met, the burden then shifts to the nonmoving party to establish that it would be in the best interests of the child to order the genetic marker test.

Cases that cite this headnote

[14] **Parent and Child** In general;hearing

Best interests of the child would not be served in ordering genetic tests in sperm donor's paternity action as to child born during marriage of mother and her wife; child had bonded with mother and wife, granting request would, at a minimum, disrupt the family unit, and testing would undermine policy of protecting children conceived via artificial insemination by donor. N.Y. Family Court Act § 532(a).

Cases that cite this headnote

Attorneys and Law Firms

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Pamela B. Bleiwas, Ithaca, for Christopher YY., respondent.

Lisa A. Natoli, Norwich, for Nichole ZZ., respondent.

Michelle E. Stone, Vestal, attorney for the child.

Before: Egan Jr., J.P., Devine, Clark, Mulvey and Rumsey, JJ.

Opinion

OPINION AND ORDER

Mulvey, J.

***1** Appeal, by permission, from an amended order of the Family Court of Chemung County (Tarantelli, J.), entered November 23, 2015, which, in a proceeding pursuant to Family Ct Act article 5, among other things, denied respondents' motion to dismiss the petition.

Respondent Jessica ZZ. (hereinafter the mother) and respondent Nichole ZZ. (hereinafter the wife) were married prior to the mother giving birth to the subject child in August 2014. It is undisputed that the child was conceived, on the second attempt, through an informal artificial insemination process performed in respondents' home using sperm donated by petitioner. The parties, who had known one another for a short time through family, had discussed respondents' desire to have a child together, and petitioner volunteered to donate his sperm for this purpose. The parties agree that petitioner, with his partner present, knowingly provided his sperm to assist respondents in having a child, and that the wife performed the insemination. Prior to the insemination, the parties had entered into a written agreement drafted by petitioner that was signed by respondents and petitioner in the presence of his partner. Pursuant to that written agreement, which was entered into without formalities or the benefit of legal advice, petitioner volunteered to donate his sperm so that respondents could have a child together, expressly waived any claims to paternity with regard to any child conceived from his donated sperm and further waived any right to custody or visitation, and respondents, in turn, waived any claim for child support from petitioner. [1] At some point after the birth of the child, the parties disagreed on petitioner's access to the child, and his partner subsequently admitted in sworn testimony that she had destroyed the only copy of that agreement. The legality of that agreement is not before this Court, although it is relevant to the parties' understanding, intent and expectations at the time that petitioner donated his sperm and the wife impregnated the mother (*compare Laura WW. v. Peter WW.*, 51 A.D.3d 211, 213–214, 856 N.Y.S.2d 258 [2008]). Upon her birth, the child was given the wife's surname, and respondents lived together as a family with the child and the mother's other two children. Petitioner did not see the child until she was one or two months old.

***2** In April 2015, petitioner filed this paternity petition (*see* Family Ct Act § 522) and, later, a petition seeking custody of the child. The mother opposed the request for a paternity test, requested a stay of any testing and a hearing, and apparently filed a cross petition for custody. At Family Court's direction, the wife was added as a party respondent in the paternity proceeding and an attorney for the child was assigned to represent the child, who was over seven months old when the paternity petition was filed. The mother moved to, among other things, dismiss the paternity petition based upon both the presumption of legitimacy accorded to a child born of a marriage (*see* Domestic Relations Law § 24[1]) and the doctrine of equitable estoppel, and the wife also asserted those grounds in opposition to the paternity petition. [2] An evidentiary hearing was held on the paternity petition at which all parties, who were represented by counsel, testified,

and respondents and the attorney for the child opposed the request for a paternity test. Family Court denied the motion to dismiss and ordered genetic testing. With permission of this Court, the mother appeals. [3]

[1] [2] [3] [4] Pursuant to Family Ct Act § 532(a), when a paternity petition is filed, Family Court, "on the court's own motion or the motion of any party, shall order the mother, her child and the alleged father to submit to one or more genetic marker or DNA tests." However, this directive is qualified by an exception providing that "[n]o such test shall be ordered ... upon a written finding by the court that it is not in the best interests of the child on the basis of res judicata, equitable estoppel, or the presumption of legitimacy of a child born to a married woman" (Family Ct Act § 532[a]; *see* Family Ct Act § 418[a]). Thus, where, as here, paternity is in issue, Family Court is required to order biological tests unless it relies upon the best interests of the child exception and, if so, it must "justify its refusal to order [such] tests" (*Matter of Shondel J. v. Mark D.*, 7 N.Y.3d 320, 329, 820 N.Y.S.2d 199, 853 N.E.2d 610 [2006]; *see Matter of Suffolk County Dept. of Social Servs. v. James D.*, 147 A.D.3d 1067, 1069, 48 N.Y.S.3d 248 [2017]; *Matter of Tralisa R. v. Max S.*, 145 A.D.3d 727, 727–728, 43 N.Y.S.3d 427 [2016]). Even if the presumption of legitimacy applies, the court must proceed to the best interests analysis before deciding whether to order a test (*see Matter of Mario WW. v. Kristin XX.*, 149 A.D.3d 1227, 1228, 51 N.Y.S.3d 678 [2017]). To that end, the "paramount concern" in a proceeding to establish paternity is the "best interests of the child," and Family Court proceeded properly by holding a hearing addressed to that determination (*Matter of Juanita A. v. Kenneth Mark N.*, 15 N.Y.3d 1, 5, 904 N.Y.S.2d 293, 930 N.E.2d 214 [2010] [internal quotation marks and citation omitted]). Importantly, biology is not dispositive in a court's paternity determination (*see id.* at 3, 904 N.Y.S.2d 293, 930 N.E.2d 214 ["biological father may assert an equitable estoppel defense in paternity and child support proceedings"]; *Matter of Shondel J. v. Mark D.*, 7 N.Y.3d at 326, 330, 820 N.Y.S.2d 199, 853 N.E.2d 610 [paternity by estoppel]; *Matter of Carlos O. v. Maria G.*, 149 A.D.3d 945, 946–947, 52 N.Y.S.3d 392 [2017] [test denied although parties agreed the petitioner is the biological father]; *Matter of Melissa S. v. Frederick T.*, 8 A.D.3d 738, 738–739, 777 N.Y.S.2d 774 [2004], *lv dismissed* 3 N.Y.3d 688, 785 N.Y.S.2d 9, 818 N.E.2d 650 [2004]; *Matter of Richard W. v. Roberta Y.*, 240 A.D.2d 812, 814, 658 N.Y.S.2d 506 [1997] ["resolution of the estoppel issue in (the married couple's) favor would have rendered the results of (the putative father's) blood test irrelevant"], *lv denied* 90 N.Y.2d 809, 664 N.Y.S.2d 271, 686 N.E.2d 1366 [1997]; *see also* Family Ct Act §§ 532[a] [best interests test]; 418[a] [same]; Domestic Relations Law § 73 [irrebuttable presumption of paternity]; *Matter of Joshua AA. v. Jessica BB.*, 132 A.D.3d 1107, 1108, 19 N.Y.S.3d 116 [2015]).

[5] [6] Respondents argue that since the child was born to the mother while they were married, they are entitled to the presumption of legitimacy afforded to a child born to a marriage. [4] We agree. Domestic Relations Law § 24, entitled "Effect of marriage on legitimacy of children," expressly provides, as relevant here, that "[a] child ... born of parents who prior or subsequent to the birth of such child shall have entered into a civil or religious marriage ... is the legitimate child of both birth parents" (***3** Domestic Relations Law § 24 [1]; *see* Family Ct Act § 417 [entitled "Child of ceremonial marriage"]). [5] Domestic Relations Law § 24 and Family Ct Act § 417 codify the common-law presumption of legitimacy (*see Matter of Findlay*, 253 N.Y. 1, 170 N.E. 471 [1930] [adopting an evidentiary presumption]; *see also Michael H. v. Gerald D.*, 491 US 110, 124–128, 109 S.Ct. 2333, 105 L.Ed.2d 91 [1989]). [6] As the child was born to respondents, a married couple, they have established that the presumption of legitimacy applies, a conclusion unaffected by the gender composition of the marital couple or the use of informal artificial insemination by donor (hereinafter AID) (*see Matter of Maria–Irene D.* [*Carlos A.–Han Ming T.*], 153 A.D.3d 1203, 1205, 61 N.Y.S.3d 221 [2017]; *Matter of Beth R. v. Ronald S.*, 149 A.D.3d 1216, 1217, 51 N.Y.S.3d 244 [2017]; *Matter of Kelly S. v. Farah M.*, 139 A.D.3d 90, 100–101, 28 N.Y.S.3d 714 [2016]; *Laura WW. v. Peter WW.*, 51 A.D.3d at 215–216, 856 N.Y.S.2d 258; *Wendy G–M. v. Erin G–M.*, 45 Misc.3d 574, 593, 985 N.Y.S.2d 845 [Sup Ct., Monroe County 2014]). [7]

[7] The presumption of legitimacy is rebuttable, however, "upon clear and convincing evidence excluding the [spouse] as the child's [parent] or otherwise tending to prove that the child was not the product of the marriage" (*Matter of Beth R. v. Ronald S.*, 149 A.D.3d at 1217, 52 N.Y.S.3d 515). [8] In cases involving spouses of different genders, the presumption has been rebutted with proof that a husband did not have "access to" his wife at the time that she conceived a child and

he acknowledged that he was not the biological father, combined with testimony that the child was conceived during a trip with the putative father with whom his wife was in a monogamous relationship (*see id.; see also Matter of Jason E. v. Tania G.*, 69 A.D.3d 518, 519, 893 N.Y.S.2d 542 [2010]).

***4** Application of existing case law involving different-gender spouses, addressing whether the presumption has been rebutted, to a child born to a same-gender married couple is inherently problematic, as it is not currently scientifically possible for same-gender couples to produce a child that is biologically "the product of the marriage" (*Matter of Beth R. v. Ronald S.*, 149 A.D.3d at 1217, 52 N.Y.S.3d 515). We have recognized that this "is an evolving area of law" (*Matter of Mario WW. v. Kristin XX.*, 149 A.D.3d at 1228 n. 1, 51 N.Y.S.3d 678). This changing legal and social landscape requires reexamination of the traditional analysis governing the presumption of legitimacy (*see e.g. Matter of Brooke S.B. v. Elizabeth A.C.C.*, 28 N.Y.3d at 13, 25–28, 61 N.E.3d 488). [9] If the presumption of legitimacy turns primarily upon biology, as some earlier cases indicate, rather than legal status (*see Matter of Paczkowski v. Paczkowski*, 128 A.D.3d 968, 969, 10 N.Y.S.3d 270 [2015]), [10] it may be automatically rebutted in cases involving same-gender married parents (*see e.g. id.*; *Matter of Q.M. v. B.C.*, 46 Misc.3d 594, 598–599, 995 N.Y.S.2d 470 [2014]). This result would seem to conflict with this state's "strong policy in favor of legitimacy," which has been described as "one of the strongest and most persuasive known to the law" (*Laura WW. v. Peter WW.*, 51 A.D.3d at 216, 856 N.Y.S.2d 258 [internal quotation marks and citations omitted]). Summarily extinguishing the presumption of legitimacy for children born to same-gender married parents would seem to violate the dictates of the Marriage Equality Act (*see* L 2011, ch 95), which guarantees to such couples the same "legal status, effect, right, benefit, privilege, protection or responsibility relating to marriage" as exist for different-gender couples (Domestic Relations Law § 10–a [2]; *see Matter of Kelly S. v. Farah M.*, 139 A.D.3d at 97–98, 28 N.Y.S.3d 714; *but see Matter of Q.M. v. B.C.*, 46 Misc.3d at 599, 995 N.Y.S.2d 470 ["the Marriage Equality Act does not require the court to ignore the obvious biological differences between husbands and wives" and, "while the language of Domestic Relations Law § 10–a requires same-(gender) married couples to be treated the same as all other married couples, it does not preclude differentiation based on essential biology," decided before *Matter of Brooke S.B. v. Elizabeth A.C.C.,* 28 N.Y.3d at 27–28, 61 N.E.3d 488)]). [11] As the common-law and statutory presumptions of legitimacy predate the Marriage Equality Act, they will need to be reconsidered.

[8] While a workable rubric has not yet been developed to afford children the same protection regardless of the gender composition of their parents' marriage, and the Legislature has not addressed this dilemma, we believe that it must be true that a child born to a same-gender married couple is presumed to be their child and, further, that the presumption of parentage is not defeated solely with proof of the biological fact that, at present, a child cannot be the product of same-gender parents (*see Matter of Maria–Irene D.* [*Carlos A.–Han Ming T.*], 153 A.D.3d at 1205, 61 N.Y.S.3d 221; *Matter of Kelly S. v. Farah M.*, 139 A.D.3d at 100–101, 104–105, 28 N.Y.S.3d 131; *see generally Matter of Brooke S.B. v. Elizabeth A.C.C.*, 28 N.Y.3d at 25, 61 N.E.3d 488). [12] If we were to conclude otherwise, children born to same-gender couples would be denied the benefit of this presumption without a compelling justification. The difficulty is in fashioning the presumption so as to afford the same, and no greater, protections. With that said, we discern no facts in this record on which to conclude that petitioner established, by clear and convincing evidence, that the child is not entitled to the legal status as "the product of the marriage" (*Matter of Beth R. v. Ronald S.*, 149 A.D.3d at 1217, 52 N.Y.S.3d 515). Thus, we find that the presumption was not rebutted. Further, even if the presumption was rebutted by the undisputed fact that petitioner was the sole sperm donor, we find, for reasons to be explained, that the doctrine of equitable estoppel applies to the circumstances here and that it is not in the child's best interests to grant petitioner's request for a paternity test.

***5** Before addressing the issue of equitable estoppel, we note that petitioner's reliance on the parties' noncompliance with Domestic Relations Law § 73 is unavailing. That statutory provision creates an irrebuttable presumption of parentage for a married couple who utilizes *formal* AID performed by medical personnel and meets certain conditions. Domestic Relations Law § 73 states:

> "Any child born to a married woman by means of artificial insemination performed by persons duly authorized to practice medicine and with the consent in writing of the woman and her [spouse], shall be deemed the legitimate,

> birth child of the [spouse] and his [or her] wife for all purposes. The aforesaid written consent shall be executed and acknowledged by both the [spouse] and wife and the physician who performs the technique shall certify that he [or she] had rendered the service" (Domestic Relations Law § 73[1], [2]).

We have noted that this statute only "covers one specific situation" by "provid[ing] a mechanism for married couples who utilize AID to have a child with assurances that the child will be, for all purposes, considered the legitimate child of both the [impregnated] woman and her [spouse]" (*Laura WW. v. Peter WW.*, 51 A.D.3d at 214–215, 856 N.Y.S.2d 258). We expressly recognized that this is not the "exclusive means" for a nonbiological parent/spouse to establish parentage of a child born through AID procedures to a married woman (*id.; see Matter of Kelly S. v. Farah M.*, 139 A.D.3d at 102, 28 N.Y.S.3d 131). While respondents admittedly cannot benefit from this statutory protection, which they attributed to the prohibitive costs associated with such services and the lack of health insurance coverage for a medical AID procedure, this only leads to the conclusion that this statute does not establish the wife's rights; it does not mean that the wife's rights as a spouse to the mother cannot otherwise be established (*see Laura WW. v. Peter WW.*, 51 A.D.3d at 214, 856 N.Y.S.2d 258). Indeed, we have recognized that, prior to the enactment of Domestic Relations Law § 73, the common-law rule was that "a child born of consensual AID during a valid marriage is a legitimate child entitled to the rights and privileges of a naturally conceived child of the same marriage" (*id.* at 216, 856 N.Y.S.2d 258 [internal quotation marks and citation omitted]). The child here is entitled to that status regardless of the gender of her parents.

[9] [10] [11] We further agree with respondents that it is appropriate to apply the doctrine of equitable estoppel to preclude petitioner from asserting paternity. Generally stated, the essential

> "purpose of equitable estoppel is to *preclude a person from asserting a right after having led another to form the reasonable belief that the right would not be asserted*, and loss or prejudice to the other would result if the right were asserted. The law imposes the doctrine as a matter of fairness. Its purpose is to prevent someone from enforcing rights that would work injustice on the person against whom enforcement is sought and who, while justifiably relying on the opposing party's actions, has been misled into a detrimental change of position" (*Matter of Shondel J. v. Mark K.*, 7 N.Y.3d at 326 [820 N.Y.S.2d 199, 853 N.E.2d 610] [emphasis added]; *see Matter of Carlos O. v. Maria G.*, 149 A.D.3d at 946 [52 N.Y.S.3d 392]; *Matter of Stephen N. v. Amanda O.*, 140 A.D.3d 1223, 1224 [33 N.Y.S.3d 496] [2016]; *Matter of Richard W. v. Roberta Y.*, 240 A.D.2d at 814 [658 N.Y.S.2d 506]).

***6** As relevant here, the doctrine "is a defense in a paternity proceeding which, among other applications, precludes a man from asserting his paternity when he acquiesced in the establishment of a strong parent-child bond between the child and another [person]" (*Matter of John J. v. Kayla I.*, 137 A.D.3d 1500, 1501, 28 N.Y.S.3d 485 [2016] [internal quotation marks, ellipsis and citations omitted]; *see Matter of Stephen N. v. Amanda O.*, 140 A.D.3d at 1224, 33 N.Y.S.3d 496; *see also* Family Ct Act § 522). It is significant that "courts impose equitable estoppel to protect the status interests of a child in an already recognized and operative parent-child relationship" (*Matter of Shondel J. v. Mark D.*, 7 N.Y.3d at 327, 820 N.Y.S.2d 199, 853 N.E.2d 610 [internal quotation marks and citation omitted]; *see Matter of Suffolk County Dept. of Social Servs. v. James D.*, 147 A.D.3d at 1069, 48 N.Y.S.3d 248; *see also Matter of Baby Boy C.*, 84 N.Y.2d 91, 102 n., 615 N.Y.S.2d 318, 638 N.E.2d 963 [1994]). While this doctrine is invoked in a variety of situations, "whether it is being used in the offensive posture to enforce rights or the defensive posture to prevent rights from being enforced, [it] is only to be used to protect the best interests of the child" (*Matter of Juanita A. v. Kenneth Mark N.*, 15 N.Y.3d at 6, 904 N.Y.S.2d 293, 930 N.E.2d 214; *see Matter of Suffolk County Dept. of Social Servs. v. James D.*, 147 A.D.3d at 1069, 48 N.Y.S.3d 248; *Matter of Tralisa R. v. Max S.*, 145 A.D.3d at 728, 43 N.Y.S.3d 427). For that reason, this dispute "does not involve the equities between [or among] the ... adults; the case turns exclusively on the best interests of the child" (*Matter of Shondel J. v. Mark D.*, 7 N.Y.3d at 330, 820 N.Y.S.2d 199, 853 N.E.2d 610; *accord Matter of Carlos O. v. Maria G.*, 149 AD3d at 946).

[12] [13] The parties asserting equitable estoppel—the mother and the wife—have "the initial burden of establishing a prima facie case sufficient to support that claim" and, "[a]ssuming that burden is met, the burden then shifts to the nonmoving party—here, petitioner—to establish that it would be in the best interests of the child[ ] to order the genetic

marker test" (*Matter of Patrick A. v. Rochelle B.*, 135 A.D.3d 1025, 1026, 23 N.Y.S.3d 660 [2016] [internal quotation marks and citation omitted], *lv dismissed* 27 N.Y.3d 957, 49 N.E.3d 1213 [2016]; *see Matter of Starla D. v. Jeremy E.*, 95 A.D.3d 1605, 1606, 945 N.Y.S.2d 779 [2012], *lv dismissed* 19 N.Y.3d 1015, 951 N.Y.S.2d 711, 976 N.E.2d 239 [2012]). We find that respondents satisfied their initial burden to support invoking this doctrine, and that petitioner failed to satisfy his corresponding burden of establishing that it would be in the child's best interests to order the test. The credible testimony established that, at the time that petitioner voluntarily donated his sperm to respondents, he had engaged in several discussions with them and his partner about donating sperm to enable respondents to have a child together. He unequivocally understood that he was doing so to permit the mother and the wife to be the sole parents of any child conceived, aware that they wanted to raise the child together and planned to marry, as they did prior to the birth of the child. Most significantly, petitioner had no expectation of parentage in any form; indeed, he had expressly disavowed any such parental intention, rights or responsibilities and took steps to preclude respondents from later pursuing him for paternity or child support.

Petitioner's conduct was likewise consistent with that agreement. He was not involved in the child's prenatal care or present at her birth, did not know her birth date, never attended doctor appointments and did not see her for at least one or two months after her birth. He was employed, but never paid child support, and provided no financial support aside from a single cash Christmas gift intended for all of the children in respondents' home and one or two outfits of clothing for the child. By his own admission, he donated sperm as a "humanitarian[ ]" gesture, to give respondents "the gift of life" and expected only "contact" with the child as a "godparent" by providing her mothers with "a break" or "help." He never signed an acknowledgment of paternity or asked to do so (*see* Family Ct Act § 516–a), and no aspect of his testimony or conduct supports the conclusion that he donated sperm with the expectation that he would have a parental role of any kind in the child's life, and he never had or attempted to assert such a role (*compare Matter of Leon L. v. Carole H.*, 210 A.D.2d 484, 485, 621 N.Y.S.2d 93 [1994]).

***7** By contrast, it was uncontroverted that, like the mother, the wife was in a "recognized and operative parent-child relationship" with the child and had "assum[ed] actual physical and psychological burdens attendant to parenting a newborn" (*Matter of John J. v. Kayla I.*, 137 A.D.3d at 1501–1502, 28 N.Y.S.3d 485 [internal quotation marks and citation omitted]; *see Matter of Carlos O. v. Maria G.*, 149 A.D.3d at 946–947, 52 N.Y.S.3d 392; *Matter of Felix O. v. Janette M.*, 89 A.D.3d 1089, 1090, 934 N.Y.S.2d 424 [2011]; *compare Matter of Beth R. v. Ronald S.*, 149 A.D.3d at 1218, 51 N.Y.S.3d 244; *Matter of John J. v. Kayla J.*, 137 A.D.3d at 1501–1502, 28 N.Y.S.3d 485). The wife was present at the child's birth, gave the child her surname, is recorded as a mother on the child's birth certificate and was listed as a parent for purposes of government benefits. There was no dispute that the wife "played a significant role in raising, nurturing [and] caring for the child" and, to that end, "provided food, clothing and shelter for the child for most of her life" and "otherwise carried out all the traditional responsibilities of a [parent]" (*Matter of Starla D. v. Jeremy E.*, 95 A.D.3d at 1607, 945 N.Y.S.2d 779 [internal quotation marks, brackets and citations omitted]; *see Matter of Carlos O. v. Maria G.*, 149 A.D.3d at 946, 52 N.Y.S.3d 392; *Matter of Richard W. v. Roberta Y.*, 240 A.D.2d at 814, 658 N.Y.S.2d 506; *compare Matter of Gutierrez v. Gutierrez–Delgado*, 33 A.D.3d 1133, 1135, 823 N.Y.S.2d 248 [2006]). [13] As Family Court expressly found and the record unequivocally establishes, it was respondents who "provided all of the parenting, emotional and financial support for the child" (*compare Matter of Patrick A. v. Rochelle B.*, 135 A.D.3d at 1026, 23 N.Y.S.3d 660; *Matter of Starla D. v. Jeremy E.*, 95 A.D.3d at 1606–1607, 945 N.Y.S.2d 779; *Matter of Richard W. v. Roberta Y.*, 240 A.D.2d at 814, 658 N.Y.S.2d 506).

Consequently, the only conclusion that may be reached from the testimony is that petitioner—aware during the mother's entire pregnancy and for over seven months thereafter that he was the probable biological father—"acquiesced in the establishment of a strong parent-child bond between the child and [the wife]" for a protracted period of time (*Matter of John J. v. Kayla I.*, 137 A.D.3d at 1501, 28 N.Y.S.3d 485 [internal quotation marks and citation omitted]; *see Matter of Richard W. v. Roberta Y.*, 240 A.D.2d at 814, 658 N.Y.S.2d 506). At the time that he filed this paternity petition, the child, then over seven months old, was "in an already recognized and operative parent-child relationship" (*Matter of Shondel J. v. Mark D.*, 7 N.Y.3d at 327, 820 N.Y.S.2d 199, 853 N.E.2d 610 [internal quotation marks and citation

omitted]; *see Matter of Carlos O. v. Maria G.*, 149 A.D.3d at 946–947, 52 N.Y.S.3d 392; *compare Matter of Beth R. v. Ronald S.*, 149 A.D.3d at 1218–1219, 52 N.Y.S.3d 515; *Matter of Patrick A. v. Rochelle B.*, 135 A.D.3d at 1026, 23 N.Y.S.3d 660; *Matter of Starla D. v. Jeremy E.*, 95 A.D.3d at 1606–1607, 945 N.Y.S.2d 779; *Matter of Isaiah A.C. v. Faith T.*, 43 A.D.3d 1048, 1049, 842 N.Y.S.2d 69 [2007]). Having led respondents to reasonably believe that he would not assert—and had no interest in acquiring—any parental rights and was knowingly and voluntarily donating sperm to enable them to parent the child together and exclusively, representations on which respondents justifiably relied in impregnating the mother, it would represent an injustice to the child and her family to permit him to much later change his mind and assert parental rights (*see Matter of Shondel J. v. Mark K.*, 7 N.Y.3d at 326, 820 N.Y.S.2d 199, 853 N.E.2d 610; *Matter of Richard W. v. Roberta Y.*, 240 A.D.2d at 814, 658 N.Y.S.2d 506; *compare Matter of Beth R. v. Ronald D.*, 149 A.D.3d at 1218–1219, 52 N.Y.S.3d 515). [14]

***8** Significantly, invocation of the doctrine of equitable estoppel is warranted here "to protect the status interests of [the] child," who was born to married parents and thereafter lived with them in a family unit (*Matter of John J. v. Kayla I.*, 137 A.D.3d at 1501, 28 N.Y.S.3d 485 [internal quotation marks and citation omitted]; *see Obergefell v. Hodges*, 135 S.Ct. at 2600–2601; *Matter of Carlos O. v. Maria G.*, 149 A.D.3d at 946–947, 52 N.Y.S.3d 392). While the child, now over three years old, was an infant when the paternity proceeding was commenced, we nonetheless find that petitioner's representations in donating sperm combined with his delay in asserting parental rights compel against ordering a test. While young, the child's "image of her family"—consisting of two mothers—would be devastated by an outsider, who merely donated sperm, belatedly asserting parental rights (*Matter of Edward WW. v. Diana XX.*, 79 A.D.3d 1181, 1183, 913 N.Y.S.2d 785 [2010] [internal quotation marks and citation omitted]; *compare Matter of John J. v. Kayla I.*, 137 A.D.3d at 1502, 28 N.Y.S.3d 485; *Matter of Starla D. v. Jeremy E.*, 95 A.D.3d at 1607, 945 N.Y.S.2d 779).

To overcome respondents' prima facie showing, petitioner was required to establish that it would be in the child's best interests to order the tests. [15] This he failed to do. The analysis traditionally requires consideration of numerous factors, including "the child's interest in knowing the identity of his or her biological father, whether testing may have a traumatic effect on the child, and whether continued uncertainty may have a negative impact on a parent-child relationship in the absence of testing" (*Matter of Mario WW. v. Kristin XX.*, 149 A.D.3d at 1228, 51 N.Y.S.3d 678; *see Matter of Beth R. v. Ronald S.*, 149 A.D.3d at 1218–1219, 51 N.Y.S.3d 244; *Matter of Gutierrez v. Gutierrez–Delgado*, 33 A.D.3d at 1134, 823 N.Y.S.2d 248; *Matter of Anthony M.*, 271 A.D.2d 709, 711, 705 N.Y.S.2d 715 [2000]). Consideration is given to whether the child "would suffer irreparable loss of status, destruction of [her] family image, or other harm to [her] physical or emotional well-being if this proceeding were permitted to go forward" (*Matter of Starla D. v. Jeremy E.*, 95 A.D.3d at 1607, 945 N.Y.S.2d 779 [internal quotation marks and citation omitted]). Also relevant are the wife's relationship with the child, trauma to the child attributable to identifying a third person as a parent and the very real disruption to the "stability of the child's existing family" that would result (*Matter of Mario WW. v. Kristin XX.*, 149 A.D.3d at 1229, 51 N.Y.S.3d 678; *see Obergefell v. Hodges*, 135 S.Ct. at 2600–2601; *Matter of Ettore I. v. Angela D.*, 127 A.D.2d at 14–15, 513 N.Y.S.2d 733).

[14] Application of the best interest factors fails to support Family Court's decision to order genetic testing. The testimony at the hearing established that the child had a bonded relationship with both parents, and the fact that they are both mothers does not warrant a finding that the child has an interest in knowing the identity of, or having a legal or familial relationship with, the man who donated sperm that enabled the mother's conception. "To permit petitioner to take over the parental role at this juncture would be unjust and inequitable" (*Matter of Richard W. v. Roberta Y.*, 240 A.D.2d at 814, 658 N.Y.S.2d 506 [citation omitted]). Contrary to Family Court's apparent conclusion, granting the request of a sperm donor for a paternity test would effectively disrupt, if not destroy, this family unit and nullify the child's established relationship with the wife, her other mother. Testing in these circumstances exposes children born into same-gender marriages to instability for no justifiable reason other than to provide a father-figure for children who already have two parents. This would be indefensible, and not warranted by the facts adduced at the hearing. Further, it would undermine the "compelling public policy of protecting children conceived via AID" (*Laura WW. v. Peter WW.*, 51 A.D.3d at 217, 856 N.Y.S.2d 258). While Family Court recognized that testing would be harmful to respondents'

marital relationship and to the wife's maternal relationship with the child, and then disregarded that finding, the record does not support doing so. Moreover, we find that the harm to the child's mothers and to the child's relationships with her family cannot be separated from the analysis of the child's best interests. That is, the relational damage within the child's family is relevant to, and supports, our finding that testing is not in the child's best interests (*see Obergefell v. Hodges*, 135 S.Ct. at 2600–2601).

***9** Finally, a new attorney for the child was appointed to represent the child on appeal who, contrary to the position taken by the attorney for the child in Family Court, advocated in favor of petitioner's request for genetic testing, based on events that occurred subsequent to the 2015 hearing and Family Court's determination. At oral argument, this Court was advised that the child has been in foster care for a lengthy period of time since the hearing and that there are reportedly neglect petitions pending against respondents, the details of which were not known to any of the parties' counsel (*compare Matter of John J. v. Kayla J.*, 137 A.D.3d at 1502, 28 N.Y.S.3d 485). These developments are certainly relevant, concerning and appropriately considered. However, we find that the subsequent events, on which we take no position, do not alter our conclusion that respondents established at the hearing that petitioner should be equitably estopped from asserting paternity under the circumstances known to Family Court at the time of the hearing (*compare Matter of Anthony M.*, 271 A.D.2d at 709–711, 705 N.Y.S.2d 715). Allowing ongoing, successive consideration of subsequent developments and problems within the child's family *after* respondents had already established, at the hearing, that petitioner should be estopped from asserting paternity, should not be permitted. Doing so would continue to invite challenges to the then-established family unit into which the child was born, creating instability and uncertainty.

ORDERED that the amended order is reversed, on the law and the facts, without costs, and motion to dismiss the paternity petition granted.

Egan Jr., J.P., Devine, Clark and Rumsey, JJ., concur.

All Citations

--- N.Y.S.3d ----, 2018 WL 541768, 2018 N.Y. Slip Op. 00495

Footnotes

1 While petitioner denied that there was such a written agreement, and partially disputed respondents' account of the parties' understanding as to the extent of his expected involvement in the life of any child conceived, Family Court credited the contrary testimony of respondents and petitioner's partner. We defer to those credibility determinations, which are fully supported by a sound and substantial basis in the record (*see Matter ofCatherine A. v. Susan A.,* 155 A.D.3d 1360, 1361, 65 N.Y.S.3d 339 [2017]).

2 While the wife did not formally move to dismiss the paternity petition, or expressly join the mother's motion to dismiss prior to the hearing, respondents and the attorney for the child all moved to dismiss the petition at the close of petitioner's case. Family Court denied that motion.

3 This Court granted a stay pending appeal.

4 Family Court's jurisdiction to address the contested paternity of a child born to a married woman has been recognized (*see Matter of Nathan O. v. Jennifer P.*, 88 A.D.3d 1125, 1126, 931 N.Y.S.2d 198 [2011], *appeal dismissed and lv. denied* 18 N.Y.3d 904, 940 N.Y.S.2d 212, 963 N.E.2d 790 [2012]).

5 As a noted commentator observed, "The [Family Ct Act §] 417 presumption of legitimacy applies to married 'parents.' Hence it should apply to same[-]sex as well as heterosexual married couples; a child born to a same[-]sex couple who married at any time prior or subsequent to the child's birth is presumptively deemed to be legitimate. The problem ... is that the presumption is evidentiary and is hence rebuttable. When appropriate, equitable estoppel may be applied to defeat an attempted rebuttal, but estoppel is always an uncertain doctrine" (Merril Sobie, 2014 Supp Practice Commentaries, McKinney's Cons Laws of NY, Book 29A, Family Ct Act § 417, 2017 Cum Pocket Part at 100).

6 A noted commentator questioned the relevance of the presumption of legitimacy, given the modern availability of genetic and DNA testing that can conclusively establish paternity, and suggested that it has been effectively replaced by principles of equitable estoppel (*see* Merril Sobie, Practice Commentaries, McKinney's Cons Laws of NY, Book 29A, Family Ct Act § 417 at 285–286; *see also* Family Ct Act §§ 532[a]; 418[a]; Merril Sobie, Practice Commentaries, McKinney's Cons Laws of NY, Book 29A, Family Ct Act § 418 at 292).

7 Indeed, it has been recognized that "a child born to a married person by means of artificial insemination with the consent of the other spouse is deemed to be the child of both spouses, regardless of the couple's sexual orientation" (*Matter of Brooke S.B. v. Elizabeth A.C.C.*, 28 N.Y.3d 1, 32, 39 N.Y.S.3d 89 [2016], Pigott, J., concurring; *see Laura WW. v. Peter WW.*, 51 A.D.3d at 213–214, 856 N.Y.S.2d 258).

8 Respondents did not raise an equal protection or other constitutional challenge to the presumption of legitimacy or the manner in which it may be rebutted in the context of a child born to a married, same-gender couple. We recognize that the concept of "legitimacy"—which concerns the effect of a marriage on a child's legal and social status, particularly inheritance rights and child support obligations—has historically focused on fatherhood/paternity, and the stigma and burdens of illegitimacy, and is somewhat archaic (*see Matter of Fay*, 44 N.Y.2d 137, 141–142, 404 N.Y.S.2d 554, 375 N.E.2d 735 [1978], *appeal dismissed* 439 U.S. 1059, 99 S.Ct. 820, 59 L.Ed.2d 25 [1979]; *Matter of Findlay*, 253 N.Y. at 7–8, 170 N.E. 471). However, in recognition of the fundamental right of all persons to marry (*see Obergefell v. Hodges*, —— U.S. ——, 135 S.Ct. 2584, 2604–2605, 192 L.Ed.2d 609 [2015]; Domestic Relations Law § 10–a [2]; L 2011, ch 95, § 2) and the need to afford comparable protections and rights to same-gender spouses, the presumption may, more accurately, be viewed in modern times as a presumption of *parentage* as to both the biological parent and his or her spouse, whether male or female (*see e.g. Matter of Maria–Irene D.* [*Carlos A.–Han Ming T.*], 153 A.D.3d at 1205, 61 N.Y.S.3d 221). The applicability of the presumption of parentage to same-gender married couples is arguably compelled by the Marriage Equality Act (*see* L 2011, ch 95), which provides, in part, that "[n]o government treatment or *legal status*, effect, right, benefit, privilege, *protection or responsibility relating to marriage*, whether deriving from statute, administrative or court rule, public policy, common law or any other source of law, shall differ based on the parties to the marriage being or having been of the same sex rather than a different sex" (Domestic Relations Law § 10–a [2] [emphases added]). In adopting this Act, the Legislature declared its unambiguous intent that "[s]ame-sex couples should have the same access as others to the protections, responsibilities, rights, obligations and benefits of civil marriage" and that "marriages of same-sex and different-sex couples *be treated equally in all respects under the law* " (L 2011, ch 95, § 2 [emphasis added]). The Legislature has not clarified how the presumption of legitimacy is to be employed or rebutted in the context of either same-gender marriages or informal AID.

9 A noted commentator has opined that "since the presumption of legitimacy is evidentiary and hence rebuttable, it may be of no value to a same[-]sex couple (at least unless the child was conceived via [AID] in accordance with Domestic Relations Law [§] 73)" (Merril Sobie, 2015 Supp Practice Commentaries, McKinney's Cons Laws of NY, Book 29A, Family Ct Act § 417, 2017 Cum Pocket Part at 100).

10 Notably, *Matter of Paczkowski v. Paczkowski* (*supra*) relied upon *Debra H. v. Janice R.,* 14 N.Y.3d 576, 904 N.Y.S.2d 263, 930 N.E.2d 184 [2010]), which was later abrogated by *Matter of Brooke S.B. v. Elizabeth A.C.C.*, 28 N.Y.3d at 27–28, 61 N.E.3d 488), which held that the nonadoptive partner of a child's birth mother had standing to seek visitation and custody of a child where the couple had agreed to conceive and raise the child together.

11 One trial court concluded, to the contrary, that because the statutory presumptions of legitimacy predate both the Marriage Equality Act and the increasing availability of artificial insemination, they "only have applicability in opposite-sex marriages as evidenced by the fact that the usual technique to confirm parentage is a genetic test of the putative father which establishes an irrefutable genetic link between the child and the father" (*Wendy G–M. v. Erin G–M.*, 45 Misc.3d at 578, 985 N.Y.S.2d 845).

12 It is unclear whether Family Court concluded that the presumption was rebutted here. To the extent that the court may have concluded that it was rebutted based solely on the fact that the child's parents are of the same gender, we cannot agree.

13 As this Court explained in a case involving a putative father seeking a paternity test with respect to a child born to a married woman and her husband in which we determined that equitable estoppel precluded the test, "we have considered all of the actions [the husband] took, both before and after the birth ... in reliance upon his belief that he was the child's father. Thus, in addition to [his] assumption of the actual physical and psychological burdens attendant to parenting a newborn, and the extent of the parent-child relationship that he forged with the baby after she was born, it is necessary to take into account the time, energy and money he expended to prepare for her arrival, his participation in decision making with regard to her upbringing and, not insignificantly, the fact that he married [his wife, the child's mother,] earlier than he had otherwise planned so as to legitimize the child" (*Matter of Richard W. v. Roberta Y.*, 240 A.D.2d at 814, 658 N.Y.S.2d 506). This analysis applies equally to the facts sub judice.

14 By parity of reasoning, if the posture of the paternity proceeding were altered, and the mother were seeking a test to establish petitioner's paternity in order to obtain child support from him or to preclude the wife's exercise of parental rights, the presumption would apply and the same conclusion regarding equitable estoppel should obtain (*see Matter of Juanita A. v. Kenneth Mark N.*, 15 N.Y.3d at 6, 904 N.Y.S.2d 293, 930 N.E.2d 214; *Matter of Sharon GG. v. Duane HH.*, 95 A.D.2d 466, 467–468, 467 N.Y.S.2d 941 [1983], *affd* 63 N.Y.2d 859, 482 N.Y.S.2d 270, 472 N.E.2d 46 [1984]; *see also Matter of Brooke S.B.v Elizabeth A.C.C.*, 28 N.Y.3d at 28, 61 N.E.3d 488; *Matter of Kelly S. v. Farah M.*, 139 A.D.3d at 104–105, 28 N.Y.S.3d 714; *Matter of Ettore I. v. Angela D.*, 127 A.D.2d 6, 14, 513 N.Y.S.2d 733 [1987] ["It would be incongruous, illogical and unrealistic to conclude that a child would be any less devastated by being forced to accept a stranger as her father merely because the stranger initiated the legal proceeding"]). Likewise, if the wife, having consented to AID, were seeking a test to relieve her of parental rights and obligations, the doctrine of equitable estoppel may well be invoked to protect the child and her operative parental relationship with the wife (*see e.g. Hammack v. Hammack*, 291 A.D.2d 718, 720, 737 N.Y.S.2d 702 [2002]; *see also Laura WW. v. Peter WW.*, 51 A.D.3d at 216–218, 856 N.Y.S.2d 258).

15 Although Family Court's decision did not clearly make a best interests determination, the record is sufficient to permit this Court doing so (*compare Matter of Mario WW. v. Kristin XX.*, 149 A.D.3d at 1228, 51 N.Y.S.3d 678).

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59 A.D.3d 1090, 875 N.Y.S.2d 656, 2009 N.Y. Slip Op. 00932

In the Matter of James M. Saunders, Jr., Respondent
v
Donna M. Aiello, Respondent. William L. Koslosky, Law Guardian, Appellant.

Supreme Court, Appellate Division, Fourth Department, New York
February 6, 2009

CITE TITLE AS: Matter of Saunders v Aiello

HEADNOTE

Parent, Child and Family
Support

Father was not entitled to suspension of his ***1091** child support obligation on ground that children, ages 14 and 17, abandoned him—only one of two children was of employable age, and thus court erred as matter of law in determining that actions of younger child constituted abandonment of her father—evidence failed to support determination that older child abandoned her father; children, who resided in Florida, last visited their father in summer of 2005; failure of older child to contact her father merely indicated that there was reluctance on her part to contact him; child's reluctance to see parent is not abandonment, relieving parent of any support obligation; father's telephone calls and text messages could not be construed as serious attempt to maintain relationship with child—further, court erred in determining that failure of mother to encourage visitation warranted suspension of father's child support obligation.

William L. Koslosky, Law Guardian, Utica, appellant pro se.
Linda M.H. Dillon, County Attorney, Utica (Raymond F. Bara of counsel), for respondent-respondent.
Appeal from an order of the Family Court, Oneida County (James R. Griffith, J.), entered August 15, 2007 in a proceeding pursuant to Family Court Act article 4. The order granted the petition and suspended the child support obligation of petitioner.

It is hereby ordered that the order so appealed from is unanimously reversed on the law without costs and the petition is dismissed.

Memorandum: The Law Guardian appeals from an order suspending the child support obligation of petitioner father, who alleged in his petition that his two children, ages 14 and 17, have abandoned him. In granting the petition seeking that relief, Family Court determined that the children have refused to visit their father or to have any substantial contact with him, and the court further determined that respondent mother was indifferent with respect to the visitation of the children with their father. It is well established that a " 'child of employable age, who actively abandons the noncustodial parent by refusing all contact and visitation, without cause, may be deemed to have forfeited his or her right to support' " (*Matter of Chestara v Chestara*, 47 AD3d 1046, 1047 [2008]). Here, only one of the two children is of employable age (*see Matter of Gottesman v Schiff*, 239 AD2d 500 [1997]; *Matter of Ryan v Schmidt*, 221 AD2d 449, 450 [1995]), and thus the court erred as a matter of law in determining that the actions of the younger child constituted abandonment of her father (*see Gottesman*, 239 AD2d 500 [1997]).

We conclude with respect to the older child that the evidence fails to support the court's determination that she abandoned her father. The children, who reside in Florida, last visited their father in the summer of 2005. The father and the children had an argument on the final night of the visit, and the children stayed with a family friend who transported them to the airport

the next day. The father testified at the hearing on the petition that he left one or two messages for the children on the ****2** answering machine at their home and that he called or sent text messages to them on their individual cellular telephones. The father ***1092** further testified that the children failed to return his calls or to respond to his text messages. We conclude that the failure of the older child to contact her father "merely indicates that there was a reluctance on [her] part to contact him . . . A child's reluctance to see a parent is not abandonment, relieving the parent of any support obligation . . . , and a few telephone calls cannot be construed as a serious attempt to maintain a relationship with a child" (*Radin v Radin*, 209 AD2d 396 [1994]; *cf. Matter of Chamberlin v Chamberlin*, 240 AD2d 908, 909-910 [1997]; *see generally Matter of Kinney v Simonds*, 276 AD2d 882, 883-884 [2000]).

We further conclude that the court erred in determining that the failure of the mother to encourage visitation warranted the suspension of the father's child support obligation. "Where the custodial parent's actions do not rise to the level of 'deliberate frustration' of the noncustodial parent's visitation rights, suspension or termination of support payments is not warranted" (*Hiross v Hiross*, 224 AD2d 662, 663 [1996]). Present—Scudder, P.J., Hurlbutt, Fahey, Peradotto and Pine, JJ.

59 A.D.3d 1090, 875 N.Y.S.2d 655, 2009 N.Y. Slip Op. 00931

In the Matter of Edwin Garcia, Appellant
v
Nora Barie, Respondent.

Supreme Court, Appellate Division, Fourth Department, New York
February 6, 2009

CITE TITLE AS: Matter of Garcia v Barie

HEADNOTE

Parent, Child and Family
Support
Modification—Hearing

Edwin Garcia, petitioner-appellant pro se.
Appeal from an order of the Family Court, Cattaraugus County (Michael L. Nenno, J.), entered December 4, 2006 in a proceeding pursuant to Family Court Act article 4. The order, insofar as appealed from, dismissed that part of the petition seeking to modify a child support order.

It is hereby ordered that the order insofar as appealed from is unanimously reversed on the law without costs, that part of the petition seeking to modify an order of child support is reinstated, and the matter is remitted to Family Court, Cattaraugus County, for a hearing on that part of the petition in accordance with the following memorandum: Petitioner appeals pro se from an order dismissing his petition seeking, inter alia, to modify his child support order for failure to state a cause of action. Pursuant to Family Court Act § 451, Family Court must conduct a hearing on a petition to modify a support order where the petition is "supported by affidavit and other evidentiary material sufficient to establish a prima facie case for the relief requested." Here, petitioner established a prima facie case for the relief requested with respect to child support by submitting evidentiary material establishing that his daughter had abandoned him. His submissions in support of the petition established that his repeated attempts at communication with his daughter had been refused and that she had expressed a clear wish to "have nothing to do with [him]" (*see Matter of Chamberlin v Chamberlin*, 240 AD2d 908, 909 [1997]). At the "hearing" conducted by the court in this proceeding, the court did not permit petitioner to testify or otherwise to present any other sworn testimony, and thus the hearing to which petitioner was entitled was " 'inherently flawed' " (*Matter of Ademovic v Reid*, 1 AD3d 899, 899 [2003]). The court's "cursory handling of this matter . . . [did] not provide a substitute for the 'meaningful hearing' to which petitioner [was] entitled" (*id.* at 900). We therefore reverse the order insofar as appealed from, reinstate that part of the petition seeking to modify a support order, and remit the matter to Family Court for a hearing on that part of the petition in compliance with Family Court Act § 451. Present—Scudder, P.J., Hurlbutt, Fahey, Peradotto and Pine, JJ.

92 N.Y.S.3d 773, 2019 N.Y. Slip Op. 00750

***1** JENNIFER HAGGERTY, PLAINTIFF-APPELLANT,

v.

RYAN HAGGERTY, DEFENDANT-RESPONDENT. (APPEAL NO. 1.)

OPINION

Supreme Court, Appellate Division, Fourth Department, New York
1112 CA 17-01559
Decided on February 1, 2019

PRESENT: CENTRA, J.P., LINDLEY, DEJOSEPH, NEMOYER, AND WINSLOW, JJ.

Appeal from a judgment of the Supreme Court, Erie County (Terrence M. Parker, A.J.), entered June 22, 2017 in a divorce action. The judgment, among other things, granted the parties a divorce and ordered plaintiff to pay $14,000 for defendant's attorneys' fees.

APPEARANCES OF COUNSEL

WILLIAM R. HITES, BUFFALO, FOR PLAINTIFF-APPELLANT.
RYAN D. HAGGERTY, DEFENDANT-RESPONDENT PRO SE.
MARY ANNE CONNELL, BUFFALO, ATTORNEY FOR THE CHILDREN.

It is hereby ORDERED that the judgment so appealed from is unanimously modified in the exercise of discretion and on the law by vacating the award of $14,000 in attorneys' fees to defendant and as modified the judgment is affirmed without costs.

Memorandum: In appeal No. 1, plaintiff appeals from a judgment of divorce that, among other things, calculated retroactive and prospective child support, distributed the parties' assets and debts, and made an award of attorneys' fees to defendant. In appeal No. 2, plaintiff appeals from an intermediate order addressing issues from a trial on financial matters as well as issues raised in a posttrial motion. Due to the fact that the order in appeal No. 2 is subsumed in the final judgment in appeal No. 1, we conclude that appeal No. 2 must be dismissed (*see Maniscalco v Maniscalco* [appeal No. 2], 109 AD3d 1129, 1129-1130 [4th Dept 2013]; *see generally Hughes v Nussbaumer, Clarke & Velzy*, 140 AD2d 988, 988 [4th Dept 1988]).

As a preliminary matter, plaintiff contends that Supreme Court erred in permitting the attorney for the child (AFC) to participate in the financial trial. We reject that contention inasmuch as issues of child support were to be determined at that trial (*see generally Macaluso v Macaluso*, 145 AD3d 1295, 1296 [3d Dept 2016]). We further conclude that there is no merit to plaintiff's contention that the court erred in denying her motion to remove the AFC. Plaintiff's " unsubstantiated allegations of bias' " were insufficient to support her application to remove the AFC (*Matter of Brooks v Greene*, 153 AD3d 1621, 1622 [4th Dept 2017]).

Plaintiff further contends that she is entitled to a credit for excess child support payments. We reject that contention. "It has long been held that there is a strong public policy against restitution or recoupment of support overpayments' . . . and nothing in this record shows it was error to deny that relief" (*Johnson v Chapin*, 12 NY3d 461, 466 [2009], *rearg denied* 13 NY3d 888 [2009]). Contrary to plaintiff's contention, we conclude that the court did not abuse or improvidently exercise its discretion in using the parties' tax returns for the actual years under review as opposed to the tax returns from the year before each year under review inasmuch as the court was being asked to review retroactively the pendente lite award of child support (*see generally* Domestic Relations Law § 240 [1-b] [b] [5] [i]).

We reject plaintiff's challenges to the court's determination concerning prospective child support. Contrary to plaintiff's contentions, the court properly used the parties' most recent tax returns to calculate the amount of future child support (*see generally* ***2** Domestic Relations Law § 240 [1-b] [b] [5] [i]), and the presumptively correct amount of child support did not result in an award that was "unjust or inappropriate" (§ 240 [1-b] [f], [g]; *see Matter of Gillette v Gillette*, 8 AD3d 1102, 1103 [4th Dept 2004]; *Veitch v Veitch*, 6 AD3d 1094, 1094 [4th Dept 2004]).

Addressing next issues of equitable distribution, we reject plaintiff's contention that the court's determinations were erroneous. "It is well settled that [e]quitable distribution presents issues of fact to be resolved by the trial court, and its judgment should be upheld absent an abuse of discretion . . . It is also well settled that trial courts are granted substantial discretion in determining what distribution of marital property [--including debt--]will be equitable under all the circumstances" (*Wagner v Wagner*, 136 AD3d 1335, 1336 [4th Dept 2016] [internal quotation marks omitted]). Preliminarily, plaintiff contends that she should have been given a credit for certain marital assets that she contends were dissipated by defendant. Defendant, however, established that he used those particular assets to pay for marital expenses (*see Pudlewski v Pudlewski*, 309 AD2d 1296, 1297 [4th Dept 2003]; *Gonzalez v Gonzalez*, 291 AD2d 373, 374 [2d Dept 2002]). Plaintiff further contends that the court erred in conditioning her ability to claim one of the parties' two children as a dependency exemption for tax purposes on her ability to "remain[] current with her child support obligation for a full calendar year." Given plaintiff's prior failure to pay child support, we conclude that the imposition of such a condition was not an abuse of the court's discretion (*see Rooney v Rooney* [appeal No. 3], 92 AD3d 1294, 1296 [4th Dept 2012], *lv denied* 19 NY3d 810 [2012]; *see generally Agnello v Payne*, 26 AD3d 837, 837 [4th Dept 2006], *lv denied* 7 NY3d 707 [2006]).

The court directed that the "parties' retirements" be divided pursuant to the *Majauskas* formula, but plaintiff contends that we should modify the judgment inasmuch as it was undisputed that she did not have a retirement plan. We reject that contention. At the hearing, it was established that defendant had two retirement plans, one from his prior military service and one from his then-current employment. The court thus did not err in ordering the division of multiple retirement plans. To the extent that plaintiff did not have a retirement plan, there is nothing to be divided by *Majauskas*, and no need to modify the judgment.

Contrary to plaintiff's further contention, we perceive no basis to modify the court's equitable distribution of the parties' debts. We address specifically the parties' student loans, which totaled over $250,000. The court concluded that each party "utilized education loans to pay for the tuition of his/her graduate program and to cover family expenses during that time." Although "[t]here may be circumstances where equity requires a credit to one spouse for marital property used to pay off the separate debt of one spouse" (*Mahoney-Buntzman v Buntzman*, 12 NY3d 415, 421 [2009]), we conclude that the court did not abuse or improvidently exercise its discretion in directing that each party be responsible for his or her student loan debt (*see Gelb v Brown*, 163 AD2d 189, 194 [1st Dept 1990]; *see also Heydt-Benjamin v Heydt-Benjamin*, 127 AD3d 814, 815 [2d Dept 2015]; *Dashnaw v Dashnaw*, 11 AD3d 732, 734-735 [3d Dept 2004]).

Both plaintiff and defendant sought an award of attorneys' fees, and the court ultimately directed plaintiff to pay $14,000 to defendant's attorney. We agree with plaintiff that the award should be vacated. "The decision to award . . . attorney[s'] fees lies, in the first instance, in the discretion of the trial court and then in the Appellate Division whose discretionary authority is as broad as [that of] the trial court[]" (*O'Brien v O'Brien*, 66 NY2d 576, 590 [1985]). Under the circumstances of this case, where neither party is a "less monied spouse" (Domestic Relations Law § 237 [a]), and plaintiff has significantly more student loan debt than defendant, we conclude in the exercise of our discretion that the award should be vacated and that each party should be responsible for his or her own attorneys' fees. We therefore modify the judgment accordingly.

We have reviewed plaintiff's remaining contention, i.e., that she was denied her right to a fair trial, and we conclude that it lacks merit.

14 N.Y.3d 521, 930 N.E.2d 206, 904 N.Y.S.2d 285, 2010 N.Y. Slip Op. 03756

In the Matter of H.M., Appellant
v
E.T., Respondent.

Court of Appeals of New York
Argued February 17, 2010
Decided May 4, 2010

CITE TITLE AS: Matter of H.M. v E.T.

SUMMARY

Appeal from an order of the Appellate Division of the Supreme Court in the Second Judicial Department, entered May 26, 2009. The Appellate Division, with two Justices dissenting, (1) reversed, on the law, an order of the Family Court, Rockland County (William P. Warren, J.; op 16 Misc 3d 1136[A], 2007 NY Slip Op 51711[U]), entered September 11, 2007, which had (a) granted petitioner's objections to an order of that court (Rachelle C. Kaufman, S.M.), dated March 7, 2007, dismissing the paternity and child support petition brought pursuant to the Uniform Interstate Family Support Act (Family Ct Act art 5-B); (b) reversed the order dated March 7, 2007; and (c) directed a hearing to determine whether respondent should be equitably estopped from denying her responsibility to provide support for the child; (2) denied petitioner's objections; (3) reinstated the order dated March 7, 2007; and (4) vacated (a) an order of that court (William P. Warren, J.), entered March 25, 2008, which had determined that respondent was estopped from denying her responsibility for supporting the child and, for that purpose, declared respondent a parent of the child, and (b) an order of that court (Rachelle C. Kaufman, S.M.), entered March 18, 2009, which had fixed, upon the parties' consent, the amount of the monthly child support and the child support arrears.

Matter of H.M. v E.T., 65 AD3d 119, reversed.

HEADNOTE

Courts
Family Court
Subject Matter Jurisdiction—Proceeding Seeking Child Support from Former Same-Sex Partner

Family Court had subject matter jurisdiction to adjudicate the support petition brought pursuant to the Uniform Interstate Family Support Act (Family Ct Act art 5-B) by petitioner, the child's biological mother, seeking child support from respondent, petitioner's former same-sex partner. Family Court has jurisdiction to determine whether an individual parent—regardless of gender—is responsible for the support of a child (*see* Family Ct Act § 413 [1] [a]). Because Family Court has the subject matter jurisdiction to ascertain the support obligations of a female parent, it also has the inherent authority to ascertain in certain cases whether a female respondent is, in fact, a child's parent. As petitioner here asserted that respondent was the child's parent, and was therefore chargeable with the child's support, the case was within Family Court's article 4 jurisdiction.

***522 RESEARCH REFERENCES**

Am Jur 2d, Divorce and Separation §§ 916, 919.

Carmody-Wait 2d, Spousal Support, Counsel Fees, Child Support, and Property Distribution in Matrimonial Actions §§ 119:2, 119:25, 119:26, 119:32.

4A Law and the Family New York (2d ed) § 2:9; 5 Law and the Family New York (2d ed) § 1:2.

McKinney's, Family Ct Act § 413 (1) (a); art 5, art 5–B.

NY Jur 2d, Domestic Relations §§ 897, 1019, 1071.

ANNOTATION REFERENCE

Child support obligations of former same–sex partners. 5 ALR6th 303.

FIND SIMILAR CASES ON WESTLAW

Database: NY-ORCS

Query: family /2 court /s jurisdiction /s child /5 support & same-sex

POINTS OF COUNSEL

Proskauer Rose LLP, New York City (*Peter J.W. Sherwin, Kenneth E. Aldous, Justin F. Heinrich* and *Nicole Haff* of counsel), for appellant.
I. The Family Court has subject matter jurisdiction to determine whether a woman owes a duty of child support. (*Matter of Fry v Village of Tarrytown*, 89 NY2d 714; *Matter of Johna M.S. v Russell E.S.*, 10 NY3d 364; *Matter of Roy v Roy*, 109 AD2d 150; *Matter of Strom v Lomtevas*, 28 AD3d 779; *Matter of Tall Trees Constr. Corp. v Zoning Bd. of Appeals of Town of Huntington*, 97 NY2d 86; *People v Finnegan*, 85 NY2d 53; *Reddington v Staten Is. Univ. Hosp.*, 11 NY3d 80; *Matter of Karin T. v Michael T.*, 127 Misc 2d 14; *Matter of Carol Y. v David M.*, 150 AD2d 783; *Matter of Lentz*, 247 App Div 31.) II. An emotional bond between child and putative parent is not required to satisfy the reliance element of equitable estoppel in the child support context. (*Matter of Shondel J. v Mark D.*, 7 NY3d 320; *Matter of Charles v Charles*, 296 AD2d 547; *Holtslander v Whalen & Sons*, 69 NY2d 1016; *Matter of Duchnowski*, 31 NY2d 991; *Matter of Napolitano [Motor Veh. Acc. Indem. Corp.]*, 21 NY2d 281; *Matter of Hunter*, 4 NY3d 260; *M.S. v K.T.*, 177 Misc 2d 772; *Laura G. v Peter G.*, 15 Misc 3d 164, *affd sub nom. Laura WW. v Peter WW.*, 51 AD3d 211; ***523** *Wener v Wener*, 35 AD2d 50; *Gursky v Gursky*, 39 Misc 2d 1083; *Maas v Cornell Univ.*, 94 NY2d 87.)
Nixon Peabody LLP, Rochester (*David H. Tennant* and *Erik A. Goergen* of counsel), for respondent.
I. Family Court lacks subject matter jurisdiction to hear H.M.'s claim. II. H.M. has not raised, much less established, an equal protection violation. III. H.M.'s petition fails to allege an essential element in any claim that seeks to impose child support obligations based on equitable principles: detrimental reliance by the child. (*Feyler v Mortimer*, 299 NY 309; *Commissioner of Pub. Welfare v Koehler*, 284 NY 260; *Matter of Spencer v Spencer*, 10 NY3d 60; *Matter of Shondel J. v Mark D.*, 7 NY3d 320.)
Orrick, Herrington & Sutcliffe LLP, New York City (*Matthew L. Craner, Lisa M. Cirando* and *Scott Roehm* of counsel), for New York County Lawyers' Association, amicus curiae.
I. Not allowing this case to proceed in Family Court would frustrate the Uniform Interstate Family Support Act's very purpose. (*Vazquez v Vazquez*, 26 AD2d 701; *Matter of Child Support Enforcement Unit v John M.*, 183 Misc 2d 468, 283 AD2d 40.) II. The majority's decision below deprives H.M., Baby R., and anyone else seeking child support against a woman, of Family Court's unique resources and expertise. (*Matter of Fusco v Roth*, 100 Misc 2d 288; *Matter of Reid v White*, 112 Misc 2d 294; *Matter of Child Support Enforcement Unit v John M.*, 283 AD2d 40; *Matter of Powers v Powers*, 86 NY2d 63.) III. The Appellate Division majority's interpretation of Family Court Act article 5 as applying only to men renders the statute unconstitutional. (*Orr v Orr*, 440 US 268; *Craig v Boren*, 429 US 190; *People v Felix*, 58 NY2d 156; *Kolmer-Marcus, Inc. v Winer*, 32 AD2d 763, 26 NY2d 795; *People v Liberta*, 64 NY2d 152; *Matter of Shondel J. v Mark D.*, 7 NY3d 320; *Anonymous v Anonymous*, 151 AD2d 330; *Anonymous v Anonymous*, 41 Misc 2d 886; *Gursky v Gursky*, 39 Misc 2d 1083.)

Carmelyn P. Malalis, New York City, for New York City Bar Association, amicus curiae.
I. Children conceived with assisted reproductive technology should be ensured a legal forum and remedy to secure support from their intended second parents. (*Matter of L. Pamela P. v Frank S.*, 59 NY2d 1; *Matter of Sebastian*, 25 Misc 3d 567; *Matter of Michael*, 166 Misc 2d 973; *Perry-Rogers v Fasano*, 276 AD2d 67; *Troxel v Granville*, 530 US 57; *Kansas v United States*, 214 F3d 1196; *Matter of Spencer v Spencer*, 10 NY3d 60; *Anonymous v Anonymous*, 41 Misc 2d 886; ***524** *Gursky v Gursky*, 39 Misc 2d 1083; *Laura WW. v Peter WW.*, 51 AD3d 211.) II. The doctrine of equitable estoppel applies to preclude a person who caused a child to be born with promises of support from disclaiming financial obligations to the child. (*Matter of Shondel J. v Mark D.*, 7 NY3d 320; *Nassau Trust Co. v Montrose Concrete Prods. Corp.*, 56 NY2d 175; *Matter of Baby Boy C.*, 84 NY2d 91; *Matter of Ettore I. v Angela D.*, 127 AD2d 6; *Matter of Westchester County Dept. of Social Servs. v Robert W.R.*, 25 AD3d 62; *Matter of Sharon GG. v Duane HH.*, 95 AD2d 466, 63 NY2d 859; *Matter of Montelone v Antia*, 60 AD2d 603; *Laura WW. v Peter WW.*, 51 AD3d 211; *Matter of Vernon J. v Sandra M.*, 36 AD3d 912; *Matter of Griffin v Marshall*, 294 AD2d 438.) III. The Family Court has subject matter jurisdiction to adjudicate a woman liable for support of a child she intentionally caused to be brought into the world. (*Schaschlo v Taishoff*, 2 NY2d 408; *Matter of Dutchess County Dept. of Social Servs. v Day*, 96 NY2d 149; *Matter of Spencer v Spencer*, 10 NY3d 60; *Matter of Aaron J.*, 80 NY2d 402; *Matter of Commissioner of Social Servs. of Franklin County v Bernard B.*, 87 NY2d 61; *Matter of Westchester County Dept. of Social Servs. v Robert W.R.*, 25 AD3d 62; *Matter of Rachelle L. v Bruce M.*, 89 AD2d 765; *Matter of Lisa M. UU. v Mario D. VV.*, 78 AD2d 711; *Matter of Carter v Carter*, 58 AD2d 438; *Califano v Westcott*, 443 US 76.) IV. As held by the Second Department and conceded by E.T., the Supreme Court has concurrent jurisdiction to hear claims for support brought against a woman. (*Sohn v Calderon*, 78 NY2d 755; *Thrasher v United States Liab. Ins. Co.*, 19 NY2d 159; *Vazquez v Vazquez*, 26 AD2d 701; *Kagen v Kagen*, 21 NY2d 532; *Doe v New York City Bd. of Health*, 5 Misc 3d 424; *Matter of Strom v Lomtevas*, 28 AD3d 779; *Matter of Child Support Enforcement Unit v John M.*, 183 Misc 2d 468, 283 AD2d 40.)

OPINION OF THE COURT

Ciparick, J.

This appeal presents the issue whether Family Court has subject matter jurisdiction to adjudicate a support petition brought pursuant to the Uniform Interstate Family Support Act (UIFSA) (Family Ct Act art 5-B) by a biological parent seeking child support from ****2** her former same-sex partner. We hold that Family Court possesses subject matter jurisdiction to hear such a petition.

H.M. seeks child support from E.T. According to H.M.'s allegations, which we must take as true for present purposes, the parties were involved in a romantic relationship in New York ***525** from 1989 through 1995, and cohabited during much, if not all, of that period. During the first year of their relationship, they planned to conceive and raise a child together, discussing, among other things, available methods of conception, child-rearing practices, and whether the child would be raised as a sibling of E.T.'s children from a prior relationship. In 1993, after many failed attempts, H.M. became pregnant by artificial insemination. E.T. performed the procedure by which H.M. was inseminated.

H.M. gave birth to a son in September 1994. E.T. was present at the delivery and cut the umbilical cord, and the parties shared the expenses associated with the conception and birth of the child. After the child's birth, both parties participated in his care. However, four months after the child was born, E.T. ended the relationship. H.M., a Canadian citizen, moved into her parents' residence in Montreal with the child. An attempted reconciliation in 1997 failed, although E.T. continued to provide H.M. with gifts for the child and monetary contributions for the child's care at unspecified times after the parties' separation.

In 2006, H.M. filed an application in Ontario, Canada, seeking a declaration of parentage and an order of child support establishing monthly payments retroactive to the child's birth. Pursuant to the Uniform Interstate Family Support Act, H.M.'s application was transferred to Family Court, Rockland County.

At an appearance before a Family Court Support Magistrate, E.T. moved to dismiss the petition on jurisdictional grounds. The Support Magistrate dismissed the petition, agreeing with E.T. that no legal basis for jurisdiction existed. H.M. filed written

objections to the Support Magistrate's order, and Family Court subsequently reversed the order of dismissal and ordered a hearing to determine whether E.T. should be equitably estopped from denying parentage and support obligations (16 Misc 3d 1136[A], 2007 NY Slip Op 51711[U]).

E.T. appealed. The Appellate Division, with two Justices dissenting, reversed and reinstated the Support Magistrate's order dismissing the petition for lack of subject matter jurisdiction (*see Matter of H.M. v E.T.*, 65 AD3d 119 [2d Dept 2009]).

H.M. appeals as of right pursuant to CPLR 5601 (a) from the Appellate Division order reinstating the Support Magistrate's order of dismissal, and we now reverse.

In 1996, the United States Congress required each state to enact the Uniform Interstate Family Support Act, to ensure ***526** uniformity in interstate actions for the establishment, enforcement, and modification of spousal and child support orders (*see* ****3** 42 USC § 666 [f]; *Matter of Spencer v Spencer*, 10 NY3d 60, 65 [2008]). New York adopted UIFSA in 1997, designating Family Court as our UIFSA "tribunal" (*see* Family Ct Act § 580-102 ["The family court is the tribunal of this state"]). With respect to the law to be applied by Family Court, UIFSA states that

> "[e]xcept as otherwise provided by this article, a responding tribunal of this state:
>
> "(1) shall apply the procedural and substantive law, including the rules on choice of law, *generally applicable to similar proceedings originating in this state and may exercise all powers and provide all remedies available in those proceedings*; and
>
> "(2) shall determine the duty of support and the amount payable in accordance with the law and support guidelines of this state" (Family Ct Act § 580-303 [emphasis added]).

Article VI of the State Constitution establishes "[t]he family court of the state of New York" (NY Const, art VI, § 13 [a]). We have previously explained that Family Court is a court of limited jurisdiction, constrained to exercise only those powers granted to it by the State Constitution or by statute (*see Matter of Johna M.S. v Russell E.S.*, 10 NY3d 364, 366 [2008]). Thus, in addition to establishing Family Court, the Constitution enumerates the powers thereof. Among the "classes of actions and proceedings" over which the Constitution grants Family Court jurisdiction are proceedings to determine "the support of dependents except for support incidental to actions and proceedings in this state for marital separation, divorce, annulment of marriage or dissolution of marriage" (NY Const, art VI, § 13 [b] [4]). Article 4 of the Family Court Act more specifically defines Family Court's role with respect to support.

Specifically, of particular relevance here, article 4 of the Family Court Act, entitled "Support Proceedings," provides, among other things, that

> "the *parents* of a child under the age of twenty-one years are chargeable with the support of such child and, if possessed of sufficient means or able to earn such means, shall be required to pay for child support a fair and reasonable sum as the court may ***527** determine" (Family Ct Act § 413 [1] [a] [emphasis added]).

Family Court indisputably has jurisdiction to determine whether an individual parent—regardless of gender—is responsible for the support of a child (*see* Family Ct Act § 413 [1] [a]). Moreover, statutory jurisdiction—as Family Court has—carries with it such ancillary jurisdiction as is necessary to fulfill the court's core function (*see Higgins v Sharp*, 164 NY 4, 8 [1900]; *see also Loomis v Loomis*, 288 NY 222, 224 [1942]). Thus, because Family Court unquestionably has the subject matter jurisdiction to ascertain the support obligations of a female parent, Family Court also has the inherent authority to ascertain in certain cases whether a female respondent is, in fact, a child's parent. ****4**

Article 4 of the Family Court Act establishes the public policy of the State in favor of obligating individuals, regardless of gender, to provide support for their children. The dissent argues that such relief can be afforded only in Supreme Court, a court of original trial jurisdiction. However, as the two dissenting Justices below found, Family Court and Supreme Court

have coextensive authority—concurrent jurisdiction—in relation to child support matters. The Domestic Relations Law and the Family Court Act are identical in the establishment of statewide child support guidelines applicable to all child support proceedings, whether brought initially in Family Court or brought in Supreme Court as ancillary to a matrimonial action or custody proceeding. Moreover, under the guidelines adopted in New York as the Child Support Standards Act (L 1989, ch 567), both parents have an obligation to contribute to the economic well-being of their children. The relevant coextensive statutes—Family Court Act § 413 and Domestic Relations Law § 240—are capable of being enforced in a fashion that does not disadvantage a litigant in Family Court.

In short, because H.M. asserts that E.T. is the child's parent, and is therefore chargeable with the child's support, this case is within the Family Court's article 4 jurisdiction. We have no occasion to decide whether it is also, as the Family Court and the Appellate Division dissent concluded, within that court's article 5 jurisdiction. Nor do we decide the merits of H.M.'s support claim.

Accordingly, the order of the Appellate Division should be reversed, with costs, and the case remitted to the Appellate ***528** Division for consideration of questions raised but not determined on the appeal to that court.

Smith, J. (concurring in *Debra H. v Janice R.* and *Matter of H.M. v E.T.*). These two cases present (though neither majority decision ultimately turns on) the question of whether a person other than a biological or adoptive mother or father may be a "parent" under New York law. In *Debra H. v Janice R.* (14 NY3d 576 [2010] [decided today]), a visitation case, a majority of the Court reaffirms the holding in *Matter of Alison D. v Virginia M.* (77 NY2d 651 [1991]) that New York parenthood requires a biological or adoptive relationship, though the majority also holds—correctly in my view—that we should recognize Debra H.'s parental status under the law of Vermont. In *H.M. v E.T.*, a child support case, the majority holds—again correctly in my view—that Family Court has jurisdiction of the case, and does not reach the *Alison D.* question, while the dissent suggests that *Alison D.* requires dismissal.

Though I concur with the result in both cases, and join the *H.M. v E.T.* majority opinion in full, I would depart from *Alison D.*, both for visitation and child support purposes. I grant that there is much to be said for reaffirming *Alison D.*, but I conclude that there is even more to be said against it.

I begin by expressing wholehearted agreement with much of what the *Debra H.* majority opinion, and Judge Graffeo's concurring opinion, say. It is indeed highly desirable to have "a bright-line rule that promotes certainty in the wake of domestic breakups," and to avoid litigation "over parentage as a prelude to further potential combat over custody and visitation" (*Debra H.*, 14 NY3d at 593, 594 [majority op]). There are few areas of the law where certainty is more important than in the rules governing who a child's parents are. For that reason, I join the *Debra H.* majority in rejecting the approach taken by the *Alison D.* dissent, which favored a multi-factor test for parenthood "that protects all relevant interests" (77 NY2d at 662), and by the Wisconsin Supreme Court's decision in *In re Custody of H.S.H.-K.* (193 Wis 2d 649, 658-659, 533 NW2d 419, 421 [1995]), which permitted a party to establish a "parent-like relationship" by proving four amorphous elements, including such things as "significant responsibility for the child's care, education and development" and "a bonded, dependent relationship" with the child. The *Debra H.* majority is quite right to see in these vague formulas a ***529** recipe for endless litigation, which would mean endless misery for children and adults alike.

These reasons lead the *Debra H.* majority and the *H.M. v E.T.* dissent to follow *Alison D.* in concluding that women in the position of Debra H. (putting aside her civil union ****5** with Janice R.) and E.T. are not parents of their former lovers' children. But despite the high value I set on certainty and predictability, I find this result unacceptable. I would therefore adopt a different "bright-line rule"—one that includes these women and others similarly situated in the definition of "parent."

The position of Debra H. and E.T. is an increasingly common one. Each lived with her same-sex romantic partner. In each case, while the couple was living together, the partner was artificially inseminated with sperm from an unknown donor (artificial donor insemination, or ADI) and gave birth. Both women in each case expected, and led the other to expect, that both of them

would be the child's parents. Yet the *Debra H.* majority holds that Debra H. would never have become a parent absent the civil union, while the *H.M. v E.T.* dissent implies that E.T. never became a parent at all. This approach not only disappoints the expectations of the adults involved: much worse, it leaves each child with only one parent, rendering the child, in effect, illegitimate.

To put a large and growing number of our state's children in that status seems wrong to me. Each of these couples made a commitment to bring a child into a two-parent family, and it is unfair to the children to let the commitment go unenforced. Nor can it be said that adoption by the nonbiological parent—an option available under *Matter of Jacob* (86 NY2d 651 [1995])—is an adequate recourse, for adoption is possible only by the voluntary act of the adopting parent, with the consent of the biological one. To apply the rule of *Alison D.* to children situated as are the children in these cases is to permit either member of the couple to make the child illegitimate by her whim—as the facts of these two cases illustrate.

I have said that the interest in certainty is extremely strong in this area; but society's interest in assuring, to the extent possible, that each child begins life with two parents is not less so. That policy underlies the common-law presumption of legitimacy, "one of the strongest and most persuasive known to the law" (*Matter of Findlay*, 253 NY 1, 7 [1930, Cardozo, Ch. J.]; *see also Michael H. v Gerald D.*, 491 US 110, 125 [1989] [the ***530** strength of the presumption derives from "an aversion to declaring children illegitimate . . . thereby depriving them of rights of inheritance and succession . . . and likely making them wards of the state"]). The policy has been adopted as a matter of statute in particular circumstances (Domestic Relations Law §§ 24, 73) and, in one persuasively reasoned Appellate Division case, has been adapted as a matter of common law to protect children born by ADI (*Laura WW. v Peter WW.*, 51 AD3d 211 [3d Dept 2008]). I would apply the common-law presumption to the facts of these cases, and would hold that where a child is conceived through ADI by one member of a same-sex couple living together, with the knowledge and consent of the other, the child is as a matter of law—at least in the absence of extraordinary circumstances—the child of both. ****6**

The rule I propose is clearly defined in at least one respect: It would apply only to same-sex couples—indeed, only to lesbian couples, because I would leave for another day the question of what rules govern male couples, for whom ADI is not possible. This limitation may give some pause, for it seems intuitively that all people, male and female, gay and straight, should be treated the same way. Yet it is an inescapable fact that gay and straight couples face different situations, both as a matter of law and as a matter of biology. By the choice of our Legislature, a choice we have held constitutionally permissible (*Hernandez v Robles*, 7 NY3d 338 [2006]), same-sex couples in New York have neither marriage nor domestic civil unions available to them. And, pending even more astounding technological developments than we have yet witnessed, it is not possible for both members of a same-sex couple to become biological parents of the same child. These differences seem to me to warrant different treatment. Indeed, different treatment already exists, for both a statute (Domestic Relations Law § 73) and the common law (*Laura WW.*, 51 AD3d at 217) give a measure of protection to the children of married opposite-sex couples who are conceived by ADI. The rule I propose would give the children of lesbian couples similar, though not identical, protection.

In one respect, the rule I have suggested would come closer to treating gay and straight couples alike than the more flexible rules advocated or adopted in many writings, including the *Alison D.* dissent, the Wisconsin decision in *In re Custody of H.S.H.-K.*, and Judge Ciparick's concurrence today in *Debra H.* (14 NY3d at 606-607). Under these approaches, the same-sex partners of biological parents would ***531** have an opportunity to become quasi-parents—"de facto parents," parents-by-estoppel, or persons "in a parent-like relationship." As to women in the situation of Debra H. and E.T., I would drop all the hyphens and quotation marks, and call them simply parents.

For these reasons, I would hold that Debra H. is M.R.'s parent, and that E.T. is the parent of H.M.'s biological son. Therefore, in *Debra H. v Janice R.*, I would not find it necessary to reach the effect of the Vermont civil union (although, since the majority does reach it, I join in its resolution of that question); and I would hold that Family Court has jurisdiction in *H.M. v E.T.* not only on the narrow ground adopted by the majority, but also on the ground that E.T. is the child's parent and therefore "chargeable with the support of such child" within the meaning of Family Court Act § 413 (1) (a).

Jones, J. (dissenting). In this support petition brought under the Uniform Interstate Family Support Act (UIFSA) (Family Ct Act art 5-B), H.M., the biological parent of a child born in September 1994, seeks to charge E.T., her former same-sex partner, with the financial responsibility for the support of the child who was planned, conceived and born during the couple's relationship, but who never had any continuing relationship with E.T., who ended the relationship with H.M. when the child was three months old. Because Family Court lacks subject matter jurisdiction to hear such a petition, I respectfully dissent and would affirm the order of the Appellate Division.

It is well settled that "Family Court is a court of limited jurisdiction that cannot exercise powers beyond those granted to it by statute" (*Matter of Johna M.S. v Russell E.S.*, 10 NY3d 364, 366 [2008]; *see Matter of Pearson v Pearson*, 69 NY2d 919, 921 [1987]; *Matter of Silver v Silver*, 36 NY2d 324, 326 [1975]; Family Ct Act § 115) or the State Constitution (*see* NY Const, art VI, § 13). In addition, Family Court has no general equity jurisdiction; as such, it cannot grant equitable relief (*see Matter of Brescia v Fitts*, 56 NY2d 132, 139 [1982]).

H.M. brought her petition pursuant to UIFSA and sought a declaration of "parentage," a proceeding authorized by UIFSA. Family Court received the petition and is the "responding tribunal" under UIFSA, which states, "a responding tribunal of this state . . . shall apply the procedural and substantive law . . . generally applicable to similar proceedings originating in this state and may exercise all powers and provide all remedies ***532** available in those proceedings" (Family Ct Act § 580-303 [1]). This rule is applicable to proceedings for the determination of parentage under UIFSA (*see* Family Ct Act § 580-701 [b]). As such, UIFSA does not supplant or otherwise make changes in the procedural and substantive law of New York.

Under the clear and unambiguous language of the Family Court Act—the statute defining the powers of Family Court—the only proceeding "similar" to a proceeding for the determination of "parentage" is the "Paternity Proceeding [ ]" under article 5, which provides a vehicle for determining whether a male is the father of a particular child. The majority argues, though, that Family Court has authority under Family Court Act article 4 to hear H.M.'s support petition. I disagree.

Family Court Act § 413 (1) (a) provides:

> "the *parents* of a child under the age of twenty-one years are chargeable with the support of such child and, if possessed of sufficient means or able to earn such means, shall be required to pay for child support a fair and reasonable sum as the court may ****7** determine. The court shall make its award for child support pursuant to the provisions of this subdivision" (emphasis added).

Although the term "parent" is not defined in the Family Court Act, that term has been defined as follows:

> "The *lawful* father or mother of someone. In ordinary usage, the term denotes more than responsibility for conception and birth. The term commonly includes (1) either the natural father or the natural mother of a child, (2) either the adoptive father or the adoptive mother of a child, (3) a child's putative blood parent who has expressly acknowledged paternity, and (4) an individual or agency whose status as guardian has been established by judicial decree" (Black's Law Dictionary 1222 [9th ed 2009] [emphasis added]).

In addition, one may gain the status of a legal parent through second-parent adoption (*see Matter of Jacob*, 86 NY2d 651 [1995]) or by entering a civil union or same-sex marriage in a state with *laws* providing that participants of such unions have parental rights with respect to children either member or spouse becomes the natural parent of during the course of the union.

To be sure, Family Court may charge both men and women with support obligations based on a biological or adoptive or ***533** "guardianship by judicial decree" or other *legal* "parental" connection to a child. Charging support obligations to one with such a legal relationship to a child is clearly within Family Court's jurisdiction under article 4.

Here, however, H.M. seeks child support from a woman with *no* biological or other legal connection to the child. [1] Accordingly, Family Court has no legal authority to address H.M.'s petition under Family Court Act article 4. In order for Family Court to

find that support obligations are chargeable to E.T. under article 4, it would have to grant H.M. the type of equitable relief that is beyond its jurisdiction.

My analysis is consistent with the holding in *Matter of Shondel J. v Mark D.* (7 NY3d 320, 328 [2006] [respondent was equitably estopped from denying paternity of petitioner mother's child—for support purposes—because respondent "represented that he was the father of the child, and (the child) justifiably relied on this representation, changing her position by forming a bond with him"]). *Shondel J.* makes clear that the doctrine of equitable estoppel is ****8** applicable, in the child support context, only to preclude a party's reliance on genetic marker and DNA testing to prove or disprove *paternity* when such an approach is warranted to prevent disruption of an ongoing parent/child relationship (*see* Family Ct Act § 418 [a]; § 532 [a]; *see e.g. Shondel J., supra*). [2] Put differently, Family Court may apply the doctrine of equitable estoppel only in the stated limited circumstances as a means of granting relief it is statutorily authorized to grant.

Finally, I note that, although Supreme Court would have jurisdiction over H.M.'s equitable claim, that court is also without authority to declare E.T. the child's parent on the basis of equitable estoppel. This is true in the visitation and custody context (*see Debra H. v Janice R.*, 14 NY3d 576 [2010] [decided today]) as well as the child support arena where the standard for determining who constitutes a support parent is no different than the rule applied in Family Court.

***534** In reversing the Appellate Division's order, the majority relies on an overly broad reading of Family Court Act article 4 that is inconsistent with the Family Court's limited subject matter jurisdiction and lack of equity jurisdiction. Further, the position taken by the majority here is inconsistent with this Court's holding today in *Debra H.* (*supra*), which reaffirmed that *Matter of Alison D. v Virginia M.* (77 NY2d 651 [1991] [Held that only a child's biological or adoptive parent has standing to seek visitation against the wishes of a fit custodial parent. Stated differently, a known stranger to a child—i.e., one with no biological, adoptive or other legal relationship—cannot assert that he/she is a parent for visitation purposes]) is still good law.

For the foregoing reasons, I dissent and would affirm the order of the Appellate Division.

Chief Judge Lippman and Judges Smith and Pigott concur with Judge ****9** Ciparick; Judge Smith concurs in a separate concurring opinion; Judge Jones dissents and votes to affirm in another opinion in which Judges Graffeo and Read concur.

Order reversed, etc.

FOOTNOTES

Footnotes

1 Specifically, H.M. asserts that E.T. is, or is estopped from denying that she is, the child's "parent," and is therefore chargeable with the child's support.

2 In this case, there is no allegation that, believing E.T. to be a biological parent (or, for that matter, a parent by virtue of adoption or a civil union), the child established a parent/child bond that would be upset if E.T. were allowed to rely on DNA tests to show that she is not a parent, nor in any event could the preclusion of genetic marker or DNA tests result in a holding that E.T. is a support parent.

McKinney's Consolidated Laws of New York Annotated
Family Court Act (Refs & Annos)
Article 2. Administration, Medical Examinations, Attorneys for Children, Auxiliary Services (Refs & Annos)
Part 4. Attorneys for Children (Refs & Annos)

McKinney's Family Court Act § 241

§ 241. Findings and purpose

Effective: April 14, 2010
Currentness

This act declares that minors who are the subject of family court proceedings or appeals in proceedings originating in the family court should be represented by counsel of their own choosing or by assigned counsel. This declaration is based on a finding that counsel is often indispensable to a practical realization of due process of law and may be helpful in making reasoned determinations of fact and proper orders of disposition. This part establishes a system of attorneys for children who often require the assistance of counsel to help protect their interests and to help them express their wishes to the court. Nothing in this act is intended to preclude any other interested person from appearing by counsel.

Credits
(L.1962, c. 686. Amended L.1970 c. 962 § 4; L.1988, c. 476, § 3; L.2010, c. 41, § 16, eff. April 14, 2010.)

McKinney's Family Court Act § 241, NY FAM CT § 241
Current through L.2019, chapter 144. Some statute sections may be more current, see credits for details.

End of Document

McKinney's Consolidated Laws of New York Annotated
Family Court Act (Refs & Annos)
Article 2. Administration, Medical Examinations, Attorneys for Children, Auxiliary Services (Refs & Annos)
Part 4. Attorneys for Children (Refs & Annos)

McKinney's Family Court Act § 249

§ 249. Appointment of attorney for child

Effective: September 18, 2012
Currentness

(a) [Eff. until Sept. 1, 2020, pursuant to L.2011, c. 29, § 8. See, also, subd. (a) below.] In a proceeding under article three, seven, ten, ten-A or ten-C of this act or where a revocation of an adoption consent is opposed under section one hundred fifteen-b of the domestic relations law or in any proceeding under section three hundred fifty-eight-a, three hundred eighty-three-c, three hundred eighty-four or three hundred eighty-four-b of the social services law or when a minor is sought to be placed in protective custody under section one hundred fifty-eight of this act or in any proceeding where a minor is detained under or governed by the interstate compact for juveniles established pursuant to section five hundred one-e of the executive law, the family court shall appoint an attorney to represent a minor who is the subject of the proceeding or who is sought to be placed in protective custody, if independent legal representation is not available to such minor. In any proceeding to extend or continue the placement of a juvenile delinquent or person in need of supervision pursuant to section seven hundred fifty-six or 353.3 of this act or any proceeding to extend or continue a commitment to the custody of the commissioner of mental health or the commissioner of people with developmental disabilities pursuant to section 322.2 of this act, the court shall not permit the respondent to waive the right to be represented by counsel chosen by the respondent, respondent's parent, or other person legally responsible for the respondent's care, or by assigned counsel. In any proceeding under article ten-B of this act, the family court shall appoint an attorney to represent a youth, under the age of twenty-one, who is the subject of the proceeding, if independent legal representation is not available to such youth. In any other proceeding in which the court has jurisdiction, the court may appoint an attorney to represent the child, when, in the opinion of the family court judge, such representation will serve the purposes of this act, if independent legal counsel is not available to the child. The family court on its own motion may make such appointment.

(a) [Eff. Sept. 1, 2020, pursuant to L.2011, c. 29, § 8. See, also, subd. (a) above.] In a proceeding under article three, seven, ten, ten-A or ten-C of this act or where a revocation of an adoption consent is opposed under section one hundred fifteen-b of the domestic relations law or in any proceeding under section three hundred fifty-eight-a, three hundred eighty-three-c, three hundred eighty-four or three hundred eighty-four-b of the social services law or when a minor is sought to be placed in protective custody under section one hundred fifty-eight of this act, the family court shall appoint an attorney to represent a minor who is the subject of the proceeding or who is sought to be placed in protective custody, if independent legal representation is not available to such minor. In any proceeding to extend or continue the placement of a juvenile delinquent or person in need of supervision pursuant to section seven hundred fifty-six or 353.3 of this act or any proceeding to extend or continue a commitment to the custody of the commissioner of mental health or the commissioner of mental retardation and developmental disabilities pursuant to section 322.2 of this act, the court shall not permit the respondent to waive the right to be represented by counsel chosen by the respondent, respondent's parent, or other person legally responsible for the respondent's care, or by assigned counsel. In any proceeding under article ten-B of this act, the family court shall appoint an attorney to represent a youth, under the age of twenty-one, who is the subject of the proceeding, if independent legal representation is not available to such youth. In any other proceeding in which the court has jurisdiction, the court may appoint an attorney to represent the

child, when, in the opinion of the family court judge, such representation will serve the purposes of this act, if independent legal counsel is not available to the child. The family court on its own motion may make such appointment.

(b) In making an appointment of an attorney for a child pursuant to this section, the court shall, to the extent practicable and appropriate, appoint the same attorney who has previously represented the child. Notwithstanding any other provision of law, in a proceeding under article three of this act following an order of removal made pursuant to article seven hundred twenty-five of the criminal procedure law, the court shall, wherever practicable, appoint the same counsel who represented the juvenile offender in the criminal proceedings.

Credits

(L.1962, c. 686. Amended L.1970, c. 962, § 6; L.1975, c. 682, § 3; L.1975, c. 709, § 1; L.1976, c. 656, § 1; L.1977, c. 859, § 1; L.1978, c. 481, § 46; L.1979, c. 531, § 4; L.1982, c. 920, § 32; L.1986, c. 817, § 3; L.1986, c. 902, § 11; L.1989, c. 321, §§ 1, 2; L.1999, c. 506, § 1, eff. Sept. 28, 1999; L.2002, c. 76, § 1, eff. Aug. 19, 2002; L.2005, c. 3, pt. A, § 2, eff. Dec. 21, 2005; L.2010, c. 41, § 22, eff. April 14, 2010; L.2011, c. 29, § 6, eff. June 23, 2011; L.2011, c. 605, § 2; L.2012, c. 3, § 1.)

McKinney's Family Court Act § 249, NY FAM CT § 249
Current through L.2019, chapter 144. Some statute sections may be more current, see credits for details.

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48 A.D.3d 1202, 850 N.Y.S.2d 765, 2008 N.Y. Slip Op. 00933

In the Matter of Kristi L.T., Respondent
v
Andrew R.V., Appellant.

Supreme Court, Appellate Division, Fourth Department, New York
February 1, 2008

CITE TITLE AS: Matter of Kristi L.T. v Andrew R.V.

***1203 HEADNOTE**

Parent, Child and Family
Custody

Family Court erred in determining that change of primary physical custody to mother was in child's best interests—although mother had completed her jail sentence and mandatory programs, had stopped drinking, was living happily with man and his two children, and was engaged to be married to that man, it was not best interests of child to change her primary physical residence—both homes offered suitable environment and both parents could provide parental guidance; there was nothing in record that supported differentiating between parents with respect to emotional and intellectual development; father's salary was modest, but was more than three times that of mother; mother was financially dependent on her fiancé, whose income was more than double that of father; mother had given no thought to how she would support child if something were to happen to her fiancé or to their relationship; father was more fit parent; child had lived with each parent approximately half of her life, and she had had regular visitation with other parent except during period in which mother was in jail—child had expressed positive feelings about all members of both parents' households, had friends in both communities and was doing well in school at time of hearing.

William M. Borrill, New Hartford, for respondent-appellant.
Richard N. Bach, Utica, for petitioner-respondent.
Susan B. Marris, Law Guardian, Manlius, for Jocelyn R.V.
Appeal from an order of the Family Court, Oneida County (Randal B. Caldwell, J.), entered February 27, 2007 in a proceeding pursuant to Family Court Act article 6. The order, among other things, modified a prior custody order.

It is hereby ordered that the order so appealed from is unanimously reversed in the exercise of discretion without costs and the petition is denied.

Memorandum: Respondent father appeals from an order entered in February 2007 that granted the mother's petition to modify a prior order by awarding the mother primary physical custody of the parties' daughter, who was born in December 2000. At least two other judges had previously entered custody orders in the matter. In our view, Family Court improvidently exercised its discretion in determining that a change of primary physical custody was in the child's best interests.

The parties were never married, and they separated when the child was approximately four months old, at which time the mother and child moved in with the mother's parents. In March 2004 the mother sought modification of a prior custody order and was permitted to move with the child and her parents to Connecticut, with monthly visitation to the father. In August 2004 the mother was convicted of driving while intoxicated in Connecticut and received a four-month jail sentence because of her history of such charges. The parties arranged for the father to take physical custody of the child at the end of October 2004, and

the parties entered into a stipulation in Supreme Court continuing joint custody and giving the father primary physical custody. A Supreme Court order continuing that arrangement and specifying the terms of visitation to the mother was entered at the beginning of September 2005. The father has had primary physical custody of the child since the end of October 2004. ***1204**

At issue in this appeal is the order granting the mother's petition in July 2006 seeking primary physical custody of the child. Family Court issued a decision in January 2007 and an order in February 2007 granting the petition following three days of testimony in November ****2** 2006, and a justice of this Court reinstated the September 2005 order and stayed enforcement of the February 2007 order pending determination of this appeal or until December 31, 2007, whichever occurred first.

In granting the mother's petition, the court concluded that there had been a change of circumstances and that a change in custody was warranted in the best interests of the child, relying on the five factors set forth in our decision in *Matter of Maher v Maher* (1 AD3d 987, 989 [2003]). Although we agree with the court that there was a significant change in circumstances inasmuch as the mother had completed her jail sentence and mandatory programs, had stopped drinking, was living happily with a man and his two children, and was engaged to be married to that man in July 2007, we conclude that the court's determination that it was in the best interests of the child to change her primary physical residence was an improvident exercise of discretion.

As we wrote in *Maher*, among the factors to consider in determining whether a change of primary physical custody is warranted " 'are the quality of the home environment and the parental guidance the custodial parent provides for the child . . . , the ability of each parent to provide for the child's emotional and intellectual development . . . , the financial status and ability of each parent to provide for the child . . . , the relative fitness of the respective parents, and the length of time the present custody arrangement has been in effect' " (*id.* at 989). Here, with respect to the five factors set forth in *Maher*, the evidence presented at the hearing established that the father had been living with his girlfriend, whom he intends to marry, and with their daughter, his girlfriend's daughter, and the subject child. At the time of the hearing, the child was attending kindergarten and school reports showed that after 10 weeks of school her attitude, behavior, participation and work habits were all positive, and her social development, motor skills, knowledge of personal information, and math and language skills were all rated "competently developed." The evidence further established that the child loves both parents, enjoys visitation with her mother, and is comfortable with the other members of both households.

With respect to the first factor set forth in *Maher*, we note that both homes offer a suitable environment and both parents ***1205** can provide parental guidance. With respect to the second factor, there is nothing in the record that supports differentiating between the parents with respect to emotional and intellectual development. There is, however, a marked difference with respect to the third factor, the financial ability of each parent to provide for the child. The father's salary is modest, but it is more than three times that of the mother. The mother is financially dependent on her fiancé, whose net income as owner of a construction business is more than double that of the father. The mother admitted at the hearing, however, that she had given no thought to how she would support the child if something were to happen to her fiancé or to their relationship. She stated, "I never thought about the future. I just think of now."

With respect to the fourth factor, the relative fitness of the respective parents, the mother insists that she is not an alcoholic, although she has been charged with driving while intoxicated several times and was convicted of that crime in Connecticut. She testified that she drinks "like everybody else" but last drank alcohol in October 2004. She attended some Alcoholics Anonymous meetings but did not like them, concluding that "I do much better off on my own dealing, doing things my own way, doing it the way I only know how to do things." The mother's fiancé testified that he has two convictions arising from conduct involving breach of the peace, and that he was convicted of violating an order of protection and of possession of drug paraphernalia. He further testified that the drug charge stemmed from an employee's having left drug paraphernalia in his vehicle. Neither the father nor his girlfriend has a criminal record, and we thus conclude that the record establishes that the father is the more fit parent. ****3**

The fifth factor concerns the length of time the present custody arrangement has been in effect. The father has had primary physical custody since the end of October 2004, while the mother had primary physical custody from approximately March

2001 until the end of October 2004. Thus, the child has lived with each parent approximately half of her life, and she has had regular visitation with the other parent except during the period in which the mother was in jail.

Based on our analysis of the five factors in *Maher*, and given that the child has expressed positive feelings about all the members of both parents' households, has friends in both communities and was doing well in school at the time of the hearing, we cannot agree with the court that the best interests of the child would be served by a change in her primary physical ***1206** residence. Thus, in the exercise of our discretion, we reverse the order and deny the petition.

We note that the record establishes that the parties have had proceedings before at least three different judges. The same Law Guardian was appointed for the child in the first two matters but was not reappointed by Family Court in this matter because the mother objected to his appointment. The court recognized, however, that in appointing a law guardian "the court shall, to the extent practicable and appropriate, appoint the same law guardian who has previously represented the child" (Family Ct Act § 249 [b]). The record establishes that the prior Law Guardian was available, and we conclude that he should have been reappointed.

We do not address the parties' contentions with respect to relocation because in our view relocation is not in issue. Present—Hurlbutt, J.P., Martoche, Smith, Peradotto and Pine, JJ.

McKinney's Consolidated Laws of New York Annotated
Family Court Act (Refs & Annos)
Article 6. Permanent Termination of Parental Rights, Adoption, Guardianship and Custody
Part 4. Guardianship

McKinney's Family Court Act § 664

§ 664. Recording in camera interviews of infants

Currentness

(a) The court shall not conduct an in camera interview of an infant in any action or proceeding to fix temporary or permanent custody or to modify judgments and orders of custody concerning marital separation, divorce, annulment of marriage and dissolution of marriage unless a stenographic record of such interview is made.

(b) If an appeal is taken to the appellate division from a judgment or order of the court on any such action or proceeding, the stenographic record of any such interview shall be made a part of the record and forwarded under seal to the appellate division.

Credits
(Added L.1985, c. 785, § 2.)

McKinney's Family Court Act § 664, NY FAM CT § 664
Current through L.2019, chapter 144. Some statute sections may be more current, see credits for details.

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24 N.Y.2d 270, 247 N.E.2d 659, 299 N.Y.S.2d 842

In the Matter of Richard Lincoln, Respondent,
v.
Sonia Lincoln, Appellant.

Court of Appeals of New York
Argued February 25, 1969;
decided April 9, 1969.

CITE TITLE AS: Matter of Lincoln v Lincoln

HEADNOTES

Parent, Child and Family
custody
in proceeding to obtain custody of children, no deprivation of rights of parties for trial court to have confidential interview with children without parties' consent and in absence of parents and counsel.

([1]) In this proceeding to obtain custody of children, it was not a deprivation of the rights of the parties for the trial court to have a confidential interview with the children without the parties' consent and in the absence of the parents and counsel. In a custody proceeding arising out of a dispute between divorced parents, the first concern of the court must be the welfare and the interests of the children. The trial court concluded that the only method by which it might avoid placing an unjustifiable emotional burden on the three children and, at the same time, enable them to speak freely and candidly concerning their preferences was to assure them that their confidences would be respected. This could only be done in the absence of counsel, and there was no error or abuse of discretion in this procedure.

Matter of Lincoln v. Lincoln, 30 A D 2d 786, affirmed.

SUMMARY

Appeal from an order of the Appellate Division of the Supreme Court in the First Judicial Department, entered July 9, 1968, which affirmed, by a divided court, insofar as appealed from, a judgment of the Supreme Court at Special Term (Francis J. Bloustein, J.), entered in New York County, granting custody of the children of the parties to petitioner and stating visitation rights.

POINTS OF COUNSEL

Mitchell Salem Fisher, *Robert Wang* and *Rona J. Ripkin* for appellant. I. Since the children as a result of the mother's custodial care were in good health, mental, emotional and physical, no change of custody was warranted by the trial record. II. The trial court based his decision on matters in the confidential report or his conversations with the children but improperly failed at the hearing to direct lines of inquiry concerning such matters. (*People ex rel. Fields v. Kaufmann*, 9 A D 2d 375; *Kesseler v. Kesseler*, 10 N Y 2d 445; *Knapp v. Knapp*, 21 A D 2d 761; *People ex rel. Fields v. Kaufmann*, 27 Misc 2d 625.) III. To the plaint that the confidential records so support the transfer of custody as not to require a reversal, it is sufficient to say that the

decision herein far transcends the issue of the mother's unfitness or the disposition of this particular case. ***271** (*People v. Jelke*, 308 N. Y. 56; *Kesseler v. Kesseler*, 10 N Y 2d 445; *Shepherd v. Swatling*, 36 Misc 2d 881; *Herb v. Herb*, 8 A D 2d 419.) *Helen L. Buttenwieser* for respondent. I. Since a custody proceeding is not an adversary proceeding, the consent of parent is not a prerequisite to the court's interviewing the children. (*Finlay v. Finlay*, 240 N. Y. 429; *Matter of Santos*, 304 N. Y. 483; *Kesseler v. Kesseler*, 10 N Y 2d 445; *Herb v. Herb*, 8 A D 2d 419; *Matter of Gault*, 387 U. S. 1.) II. The fact that the admittedly earnest efforts of the mother to find appropriate homes for the children was not disputed did not cancel out the fact that the changes of residences were detrimental to the children. III. The contention in the mother's brief that, since the children were in good health, no change of custody was warranted, ignores all of the other aspects of the children's welfare. IV. It was not improper for the court to close the hearings without directing lines of inquiry based on the confidential reports.

OPINION OF THE COURT

Keating, J.

A father brings this proceeding to obtain custody of three children who, by the terms of a separation agreement subsequently incorporated into a divorce decree, were in their mother's custody. Following a hearing, the trial court transferred custody to the father, with visitation rights to the mother.

Although the Appellate Division determined that two errors had occurred during the trial, it nevertheless affirmed because the overwhelming weight of the evidence favored the father. Since we do not find any error which can be said to be prejudicial as a matter of law, the order of the Appellate Division should be affirmed. We would, however, express our disagreement with the conclusion of the Appellate Division that it was error for the trial court, over objection, to interview the children in the absence of counsel.

Appellant argues that it was a deprivation of the fundamental rights of the parties for the trial court to have a confidential interview with the children without the parties' consent. It is contended such action permits a decision based upon “secret evidence”. We cannot accept the argument, persuasive as it might seem at first, because it ignores the fact that, in a custody ***272** proceeding arising out of a dispute between divorced parents, the first concern of the court is and must be the welfare and the interests of the children (Domestic Relations Law, § 70). Their interests are paramount. The rights of their parents must, in the case of conflict, yield to that superior demand.

It requires no great knowledge of child psychology to recognize that a child, already suffering from the trauma of a broken home, should not be placed in the position of having its relationship with either parent further jeopardized by having to publicly relate its difficulties with them or be required to openly choose between them. The trial court however, if it is to obtain a full understanding of the effect of parental differences on the child, as well as an honest expression of the child's desires and attitudes, will in many cases need to interview the child. There can be no question that an interview in private will limit the psychological danger to the child and will also be far more informative and worthwhile than the traditional procedures of the adversary system -- an examination of the child under oath in open court.

The burden on a Judge when he acts as *parens patriæ* is perhaps the most demanding which he must confront in the course of his judicial duties. Upon his wisdom, insight and fairness rest the future happiness of his wards. The procedures of the custody proceeding must, therefore, be molded to serve its primary purpose, and limited modifications of the traditional requirements of the adversary system must be made, if necessary. (*Kesseler v. Kesseler*, 10 N Y 2d 445; *People ex rel. Fields v. Kaufmann*, 9 A D 2d 375.) The test is whether the deviation will on the whole benefit the child by obtaining for the Judge significant pieces of information he needs to make the soundest possible decision.

The trial court here concluded that the only method by which it might avoid placing an unjustifiable emotional burden on the three children and, at the same time, enable them to speak freely and candidly concerning their preferences was to assure them that their confidences would be respected. This could only be done in the absence of counsel, and we see no error or abuse of discretion in the procedure followed by the trial court. ***273**

There is language in *Kesseler v. Kesseler* (10 N Y 2d 445, 451, supra.;) which, by implication, would support the position that an interview in the absence of counsel is improper. The court in *Kesseler* was dealing with evidence obtained from third parties, principally professional reports. In such a situation the problem presented was how the courts can secure vitally important material, otherwise perhaps not available at all, and, at the same time, be certain of the truthfulness of the information obtained. The conflict was resolved in favor of accuracy. We held that professional reports and independent investigations by the Trial Judge entail too many risks of error to permit their use without the parties' consent. More important, the interest of the children themselves requires that the accuracy of these professional reports be established and that there be an opportunity to explain or rebut material contained in the reports. (See Use of Extra-Record Information in Custody Cases, 24 U. Chi. L. Rev. 349, 356.) However, the added emotional problems raised by the use of adversary procedures with respect to interviewing children as to their preferences was not considered in *Kesseler*, since it was unnecessary to do so to resolve the issues there presented.

In approving the procedure followed by the trial court here, we do not gainsay that there are grave risks involved in these private interviews. A child whose home is or has been torn apart is subjected to emotional stresses that may produce completely distorted images of its parents and its situation. Also its feelings may be transient indeed, and the reasons for its preferences may indicate that no weight should be given the child's choice. Without a full background on the family and the child, these interviews can lead the most conscientious Judge astray.

The dangers, however, can be minimized. We are confident that the Trial Judges recognize the difficulties and will not use any information, which has not been previously mentioned and is adverse to either parent, without in some way checking on its accuracy during the course of the open hearing. (Cf. *Knapp v. Knapp*, 21 A D 2d 761.) The entire issue is a most delicate one, but in weighing the competing considerations, we are convinced that the interests of the child will be best served by ***274** granting to the trial court in a custody proceeding discretion to interview the child in the absence of its parents or their counsel.

The order should be affirmed, without costs.

Chief Judge Fuld and Judges Burke, Scileppi, Bergan, Breitel and Jasen concur.
Order affirmed.

77 A.D.3d 207, 903 N.Y.S.2d 806, 2010 N.Y. Slip Op. 05817

In the Matter of Justin CC. and Others, Children Alleged to be Abused and Neglected. Chemung County Department of Social Services, Respondent; Tina CC. et al., Appellants. (And Another Related Proceeding.)

Supreme Court, Appellate Division, Third Department, New York
July 1, 2010

CITE TITLE AS: Matter of Justin CC. (Tina CC.)

SUMMARY

Appeals from two orders of the Family Court, Chemung County (James T. Hayden, J.), entered January 5, 2009 and April 16, 2009. The orders granted the petitions, in two proceedings pursuant to Family Ct Act article 10, to adjudicate respondents' children to be abused and neglected.

HEADNOTE

Parent, Child and Family
Abused or Neglected Child
Child's Testimony at Fact-Finding Hearing Not Confidential

Where a child provides testimony during the fact-finding stage of a Family Ct Act article 10 proceeding, outside the presence of the respondent but with all counsel present and afforded a full opportunity to cross-examine the child, the child's testimony may not be sealed. If an appeal is taken, the transcript of the child's testimony shall be provided to all counsel, and counsel may refer to the child's testimony in both the brief and at oral argument. The underlying purpose of excluding a respondent during the child victim's testimony in a Family Ct Act article 10 proceeding is to ensure the child's ability to testify accurately and without inhibition, thus fostering open and truthful testimony. Exclusion of a respondent from the child victim's testimony is not based upon a need to keep such testimony confidential, nor is there any basis for maintaining confidentiality of the testimony. Moreover, the position of the allegedly neglected or abused child may be adverse to respondents, and the testimony of a child—sworn or unsworn—taken outside the presence of the respondent in a Family Ct Act article 10 proceeding can, by itself, support a finding of neglect or abuse, as well as provide the requisite corroboration of the child's out-of-court statements. Draping such testimony with the veil of confidentiality, thus precluding appellate counsel from both referring to that testimony by specific reference and making legal arguments based upon it, would raise fundamental due process concerns for the purposes of an appeal.

RESEARCH REFERENCES

Am Jur 2d, Infants § 16; Am Jur 2d, Parent and Child §§ 17, 22.

Carmody-Wait 2d, Proceedings Involving Abused and Neglected Children, Juvenile Delinquents, and Persons in Need of Supervision §§ 119A:80, 119A:82, 119A:85, 119A:86, 119A:91, 119A:107–119A:109.

***208** 6 Law and the Family New York (2d ed) §§ 9:41, 9:65.

NY Jur 2d, Domestic Relations §§ 1322, 1326, 1330.

ANNOTATION REFERENCE

See ALR Index under Child Abuse; Privileged and Confidential Information.

FIND SIMILAR CASES ON WESTLAW

Database: NY-ORCS

Query: child! /s abus! neglect! & testi! /6 child /s confidential

APPEARANCES OF COUNSEL

John J. Raspante, New Hartford, for Tina CC., appellant.
Kelly M. Corbett, Fayetteville, for George CC., appellant.
David Kagle, Chemung County Department of Law, Family Court Division, Elmira, for respondent.
Michelle E. Stone, Vestal, attorney for the child.
Tracey A. Brown, Clifton Park, attorney for the children.

OPINION OF THE COURT

Peters, J.

On this appeal, we are compelled to determine whether testimony taken from a child during the fact-finding stage of a Family Ct Act article 10 proceeding, outside the presence of the respondent but with counsel present and permitted to cross-examine the child, is entitled to the same protections of confidentiality afforded to *Lincoln* testimony in a Family Ct Act article 6 proceeding. We conclude that it is not.

Respondent George CC. (hereinafter the father) and respondent Tina CC. (hereinafter the mother) are the parents of three sons (born in 1996, 1999 and 2001). The mother also has a daughter from a prior relationship (born in 1992). Petitioner commenced these neglect and abuse proceedings alleging, among other things, that respondents subjected the children to corporal punishment and the father had sexual intercourse with the daughter on at least 20 occasions.

Prior to the fact-finding hearing, the attorney for the daughter requested that a "modified *Lincoln* hearing" be held with the daughter in the presence of all counsel, but outside the presence of respondents, citing to this Court's decision in *Matter of Randy A.* (248 AD2d 838, 839-840 [1998]) as authority for such a procedure. There is no indication that any of the parties ***209** objected to the format of this hearing and, although unclear from the record, it appears that respondents in fact consented to their exclusion while the daughter testified.[1] Thereafter, in what was termed a "*Lincoln* hearing," the daughter provided sworn testimony; respondents were excluded but their attorneys were permitted to be present and afforded a full opportunity to cross-examine her. At the conclusion of the fact-finding hearing, Family Court found that the father abused the daughter and derivatively abused the sons, and that both the mother and the father neglected all four children. The transcript of the daughter's testimony was marked confidential by Family Court and was forwarded under seal to this Court for purposes of this appeal.

While these appeals were being perfected, appellate counsel for the father moved for, among other things, an order unsealing the transcript of the daughter's testimony for inclusion in the record on appeal and for purposes of reference in counsel's brief and appendix. In that motion, counsel asserted that, inasmuch as this is not a custody proceeding and all counsel were present during the daughter's testimony and permitted to cross-examine her, the daughter's testimony was not in fact obtained during the course of a true *Lincoln* hearing and, consequently, is not confidential. Counsel also argued that her inability to reference and make fact-specific arguments based upon that testimony hampered her ability to adequately represent the father on ****2** appeal. By motion decision entered November 13, 2009, this Court denied the motion to unseal the daughter's testimony.

On appeal, appellate counsel for the father again asserts that the daughter's testimony should not be maintained confidential since it was not obtained during the course of a true *Lincoln* hearing and that she cannot effectively represent her client without the ability to specifically challenge such testimony. Finding that this type of testimony taken at the fact-finding stage of a Family Ct Act article 10 proceeding is fundamentally different from *Lincoln* testimony and is not entitled to the protections afforded by *Lincoln*, we now, upon reconsideration, vacate our prior decision on the motion and grant the motion to unseal.

In *Matter of Lincoln v Lincoln* (24 NY2d 270 [1969]), the Court of Appeals held that a court deciding the issue of custody has the right to conduct a confidential interview with the child, ***210** outside the presence of the parents and their attorneys, because its first responsibility is and must be the welfare and interests of the child (*id.* at 272). In so concluding, the Court emphasized the importance of protecting the child from having to choose openly between parents or publicly relate his or her difficulties with them (*id.*). Indeed, as this Court noted in upholding a Family Court's refusal—in a custody proceeding—to disclose the contents of a *Lincoln* hearing, "[c]hildren must be protected from having to openly choose between parents or openly divulging intimate details of their respective parent/child relationships[, and *t]his protection is achieved by sealing the transcript of the in camera Lincoln hearing*" (*Matter of Sellen v Wright*, 229 AD2d 680, 681-682 [1996] [emphasis added and citation omitted]).

Although there are sound reasons for maintaining confidentiality of a child's testimony in a custody proceeding, we find no basis for providing such a protection at the fact-finding stage of a neglect/abuse proceeding. While the issue at the fact-finding stage of a custody proceeding is what custodial arrangement is in the best interest of the child, the issue at the fact-finding stage of a Family Ct Act article 10 proceeding is whether the petitioner has proved by a preponderance of the evidence that the child is neglected and/or abused and that the respondent is responsible for the neglect and/or abuse. Most significantly, unlike a custody proceeding, the position of the allegedly neglected or abused child in an article 10 proceeding may be adverse to the respondent.

In that regard, it is firmly established that every litigant has a fundamental right, guaranteed by the Due Process Clauses of both the Federal and State Constitutions, to confront his or her accuser (*see Matter of Cecilia R.*, 36 NY2d 317, 320 [1975]). Nevertheless, a litigant does not have an absolute right to be present at all stages of a civil proceeding, such as a Family Ct Act article 10 proceeding (*see Matter of Lindsey BB. [Ruth BB.]*, 70 AD3d 1205, 1207 [2010]; *Matter of Robert U.*, 283 AD2d 689, 690-691 [2001]; *Matter of Randy A.*, 248 AD2d at 839-840). As such, in the context of a Family Ct Act article 10 proceeding, this Court has concluded that, "[i]n balancing the due process right of the accused with the mental and emotional well-being of the child, a court may . . . exclude the respondent during the child's testimony but allow his [or her] attorney to be present and question the child" (*Matter of Christa H.*, 267 AD2d 586, 587 [1999]; *see* ***211** *Matter of Lindsey BB. [Ruth BB.]*, 70 AD3d at 1207; ****3** *Matter of Robert U.*, 283 AD2d at 690-691). Notably, it is only after such a balancing of these interests—a respondent's right to be present/confront the victim and the psychological danger to the child of testifying in the respondent's presence—that a court may properly exclude a respondent from such testimony (*see Matter of Robert U.*, 283 AD2d at 690; *see also Matter of Lindsey BB. [Ruth BB.]*, 70 AD3d at 1207; *Matter of Annemarie R.*, 37 AD3d 723, 723 [2d Dept 2007]). [2]

In our view, the underlying purpose for excluding a respondent during the testimony of a child victim in a Family Ct Act article 10 proceeding is to ensure the child's ability to testify accurately and without inhibition, thus fostering open and truthful testimony (*see Matter of Q.-L. H.*, 27 AD3d 738, 739 [2d Dept 2006] ["Family Court properly balanced the respective interests of the parties and, based upon the record, reasonably concluded that the child . . . would suffer emotional trauma *if compelled to testify in front of the appellant*" (emphasis added)]; *Matter of Lynelle W.*, 177 AD2d 1008, 1009 [4th Dept 1991] [same]; *Matter of Hadja B.*, 302 AD2d 226 [1st Dept 2003] ["Examination of the child in camera, out of [the] respondent's presence but in the presence of respondent's attorney, who cross-examined the child after being given time to discuss the child's testimony with [the] respondent, was properly based on the social worker's affidavit that [the] respondent's abuse of the child *compromised the child's ability to give clear and accurate testimony in [the] respondent's presence*" (emphasis added)]; *Matter of Robert U.*, 283 AD2d at 690-691 [Family Court abdicated its responsibility to balance the respective interests, instead simply relying on the Law Guardians' assertions that "conversations with the children led them to conclude that *they would be traumatized by having to testify in [the] respondent's presence*" (emphasis added)]; *see also Matter of Arlenys B. [Aneudes B.]*, 70 AD3d 598, 599 [1st Dept 2010] [finding no due process violation where, in balancing the respective interests, Family Court permitted testimony using live two-way video based on representations that the child had been "*intimidated by [the] respondent's gaze*

and that her initial testimony caused her emotional distress" (emphasis added)]). Exclusion of a respondent from the child victim's testimony is not—and should not be—based upon a need to keep such testimony confidential, nor is there any basis for maintaining confidentiality of such testimony.

***212** Unlike a custody proceeding, where the purpose of a *Lincoln* hearing is to corroborate information acquired through testimonial or documentary evidence adduced during the fact-finding hearing, it has been held that the testimony of a child —sworn or unsworn—taken outside the presence of the respondent in a Family Ct Act article 10 proceeding can, by itself, support a finding of neglect or abuse (*see Matter of Danielle M.*, 151 AD2d 240, 243 [1st Dept 1989]; *Matter of Vanessa R.*, 148 AD2d 989, 989 [4th Dept 1989]; *Matter of Elizabeth D.*, 139 AD2d 66, 68 [4th Dept 1988], *appeal dismissed* 73 NY2d 871 [1989]; *Matter of Aryeh-Levi K.*, 134 AD2d 428, 429 [2d Dept 1987]; *see also* ****4** *Matter of Kyanna T.*, 19 Misc 3d 1114[A], 2007 NY Slip Op 52547[U], *5 [2007]; *Matter of Kim K.*, 150 Misc 2d 690, 693-694 [1991]). Although neither this Court nor the Court of Appeals has spoken on that issue—and we do not now pass on it—it is well settled that such testimony can, at a minimum, provide the requisite corroboration of a child's out-of-court statements (*see* Family Ct Act § 1046 [a] [vi]; *Matter of Christina F.*, 74 NY2d 532, 535 [1989]; *Matter of Telsa Z. [Rickey Z.—Denise Z.]*, 71 AD3d 1246, 1250 [2010]; *Matter of Aaliyah B. [Clarence B.]*, 68 AD3d 1483, 1484 [2009]; *Matter of Brandi U.*, 47 AD3d 1103, 1104 [2008]). To then drape such testimony with the veil of confidentiality, thus precluding appellate counsel from both referring to that testimony by specific reference and making legal arguments based upon it, raises fundamental due process concerns for the purposes of an appeal. Furthermore, if such testimony were to remain confidential, appellate counsel's ability to effectively represent his or her client would be even more constrained than that of trial counsel. While trial counsel, in closing arguments, made specific reference to many aspects of the child's testimony in an attempt to argue that her testimony should not be credited and was inconsistent with her prior out-of-court statements, appellate counsel is now unable to make those very same fact-specific arguments based on that same testimony—or other portions of the daughter's testimony. Again, fundamental due process issues are implicated by such a constraint.

For these reasons, we now hold that, where a child provides testimony during the fact-finding stage of a Family Ct Act article 10 proceeding, outside the presence of the respondent but with all counsel present and afforded a full opportunity to cross-examine the child, the child's testimony may not be sealed. If an appeal is taken, the transcript of the child's testimony shall ***213** be provided to all counsel, and counsel may refer to the child's testimony in both the brief and at oral argument.

In light of our determination, we hold these appeals in abeyance and permit the parties to rebrief the issues raised in their initial briefs on appeal in accordance with the conditions set forth in this decision.

Mercure, J.P., Spain, Rose and Kavanagh, JJ., concur.

Ordered that the decision is withheld.

FOOTNOTES

Footnotes

1 During oral argument the father's appellate counsel acknowledged that the father agreed to his exclusion from the daughter's testimony.

2 This balancing procedure, or the reasons obviating the need to engage in it (for example, the parties consent to their exclusion), should be performed on the record so as to permit adequate appellate review.

85 A.D.3d 1244, 925 N.Y.S.2d 227, 2011 N.Y. Slip Op. 04565

In the Matter of Scott T. Spencer, Respondent
v
Susan M. Spencer, Appellant.

Supreme Court, Appellate Division, Third Department, New York
June 2, 2011

CITE TITLE AS: Matter of Spencer v Spencer

HEADNOTES

Parent, Child and Family
Custody
Consent to Entry of Order—What Constitutes

Parent, Child and Family
Custody
Modification—Court Erred by Modifying Custody Order without Holding Fact-Finding Hearing

Emily Karr-Cook, Elmira, for appellant. Francisco P. Berry, Ithaca, for respondent. Robin A. Masson, Ithaca, attorney for the children. Pamela B. Bleiwas, Ithaca, attorney for the child.

McCarthy, J. Appeal from an order of the Family Court of Chemung County (Buckley, J.), entered July 21, 2010, which granted petitioner's application, in a proceeding pursuant to Family Ct Act article 6, to modify a prior order of custody.

The parties are the parents of three children (born in 1997, 1999 and 2001). As reflected in their divorce judgment, the parties agreed to joint legal custody, physical placement with respondent (hereinafter the mother), and visitation with petitioner (hereinafter the father) every other weekend. In 2009, the father commenced this proceeding seeking to modify the custodial arrangement based upon an improper relationship that the mother's male friend had with one of the parties' children while in the mother's care. Family Court temporarily placed the children with the father. After several court appearances and an in camera interview with each of the children, the court issued an order awarding primary physical custody to the father and extensive visitation to the mother. The mother appeals.

If the mother consented to the order, she would be precluded from appealing because she would not be considered an aggrieved party (*see* CPLR 5511; *Matter of* ****2** *Sterling v Dyal*, 52 AD3d 894, 895 [2008]). We find that she did not consent. Her counsel objected more than once to Family Court entering an order without holding a hearing. At the fourth appearance, which occurred nine months after the petition was filed and the temporary order was issued, the court proposed to finish the case that day. After the court explained how it felt that the case should be resolved, it noted that if there were problems in the ***1245** future a party could come back with a new petition. The court then asked the mother if the proposed disposition was acceptable, to which she responded, "[f]or now." Due to the court's discussion of resolving the case, it is unclear if the mother understood that she was not required to consent and that she could still demand a hearing. The court did not assure that the mother understood her rights, that the order was final as opposed to another temporary order, or what she would be required to demonstrate if she was not satisfied with the order and filed a new petition. Under the circumstances, the mother's statement cannot be considered consent to entry of the order (*cf. Matter of Leighton v Bazan*, 36 AD3d 1178, 1179 [2007]; *compare Matter of Verry v Verry*, 63 AD3d 1228, 1229-1230 [2009], *lv denied* 13 NY3d 707 [2009]).

As to the merits, Family Court erred by modifying the custody order without holding a fact-finding hearing. The father's petition adequately alleged a change in circumstances, namely that, among other things, the mother exposed the children to a convicted sex offender and she was aware that this individual had an inappropriate relationship with one of the children (*see Matter of Christopher B. v Patricia B.*, 75 AD3d 871, 872-873 [2010]; *Matter of Gary J. v Colleen L.*, 288 AD2d 720, 722 [2001]). The mother admitted that an inappropriate relationship occurred, but denied knowing about it. The parties disagreed about most of the other allegations. The mother specifically objected to the court's failure to hold a hearing, and the court lacked record information that would permit it to determine whether the alleged change in circumstances required a modification of the prior custody order (*see Matter of Christopher B. v Patricia B.*, 75 AD3d at 872-873). A court may not grant a final order based upon mere allegations and a request by an attorney for a party or the children; evidentiary proof is required (*see Matter of Twiss v Brennan*, 82 AD3d 1533, 1535 [2011]). Thus, we must remit for Family Court to hold a hearing on the petition.

Because we are remitting this matter, we need not address the parties' remaining arguments, save one. Family Court and the parties inaccurately referred to the in camera interviews with the children as a *Lincoln* hearing. The purpose of a *Lincoln* hearing in a custody proceeding "is to corroborate information acquired through testimonial or documentary evidence adduced during the fact-finding hearing" (*Matter of Justin CC. [Tina CC.]*, 77 AD3d 207, 212 [2010]; *see Matter of Lincoln v Lincoln*, 24 NY2d 270, 273 [1969]). Thus, a true *Lincoln* hearing is held after, or during, a fact-finding hearing; there is no authority or ***1246** legitimate purpose for courts to conduct such interviews in place of fact-finding hearings, and Family Court erred in doing so here. Additionally, we caution the court to protect the children's right to confidentiality by avoiding disclosure of what children reveal in camera during a custody proceeding (*see Matter of Verry v Verry*, 63 AD3d at 1229; *Matter of Hrusovsky v Benjamin*, 274 AD2d 674, 676 [2000]; *compare Matter of Justin CC. [Tina CC.]*, 77 AD3d at 212-213).

Peters, J.P., Spain, Garry and Egan Jr., JJ., concur. Ordered that the order is reversed, on the law, without costs, and matter remitted to ****3** the Family Court of Chemung County for further proceedings not inconsistent with this Court's decision and, pending said proceedings, which shall be held as soon as practicable, the July 2010 order shall remain in effect as a temporary order.

104 A.D.3d 1077, 961 N.Y.S.2d 608, 2013 N.Y. Slip Op. 02118

In the Matter of Jessica B., Individually and on Behalf of Joseph B., an Infant, Respondent
v
Robert B., Respondent. Thomas R. Cline, as Attorney for the Child, Appellant.

Supreme Court, Appellate Division, Third Department, New York
March 28, 2013

CITE TITLE AS: Matter of Jessica B. v Robert B.

HEADNOTE

Parent, Child and Family
Visitation
Visitation Rights of Siblings—Lincoln Hearing

Thomas R. Cline, Binghamton, attorney for the child, appellant.
Timothy E. Thayne, Binghamton, for Robert B., respondent.
Carman M. Garufi, Binghamton, attorney for the child.

Garry, J. Appeal from an order of the Family Court of Broome County (Pines, J.), entered August 9, 2011, which granted petitioner's application, in a proceeding pursuant to Family Ct Act article 6, for visitation with her sibling.

Petitioner, who lives in Massachusetts, has two younger siblings, Joseph B. (born in 1994) and Melissa B. (born in 1997). Joseph and Melissa resided together in Broome County, in the custody of respondent, their paternal uncle, until September 2010. Joseph then moved to Massachusetts, where he resides with petitioner and in the custody of the Massachusetts Department of Children and Families. In November 2010, petitioner ***1078** commenced this proceeding on behalf of herself and Joseph, seeking visitation with Melissa. Family Court granted visitation following a hearing, but, citing Joseph's troubled background, limited visitation to occur during daytime hours, on one weekend per month, in Broome County. The attorney for the child representing Joseph appeals. ****2**

The sole issue raised on this appeal is a challenge to Family Court's denial of the request by the attorney for Joseph for a *Lincoln* hearing to ascertain Melissa's wishes (*see Matter of Lincoln v Lincoln*, 24 NY2d 270 [1969]). Such a hearing, though often preferable, is not mandatory, and the determination is addressed to Family Court's discretion (*see Matter of DeRuzzio v Ruggles*, 88 AD3d 1091, 1091 [2011]; *Matter of Walker v Tallman*, 256 AD2d 1021, 1022 [1998], *lv denied* 93 NY2d 804 [1999]). Here, on the final day of the fact-finding hearing, the attorney representing Joseph made a written application requesting that the court conduct a *Lincoln* hearing prior to rendering a determination, but the attorney representing Melissa stated that a *Lincoln* hearing was not necessary, as he would convey her wishes. [*] Notably, the appellate attorney for the child representing Melissa offers strong support for Joseph's appeal, alleging that Melissa's wishes were not in fact accurately or adequately conveyed by her trial counsel. In light of this argument, we find our record lacking. Although not determinative, the wishes of this 14-year-old child should be considered, and the insight she may provide will be helpful; thus, in these unusual circumstances, we remit for a *Lincoln* hearing (*see Matter of Flood v Flood*, 63 AD3d 1197, 1199 [2009]; *see also Matter of Tamara FF. v John FF.*, 75 AD3d 688, 690 [2010]).

Mercure, J.P., Rose and Lahtinen, JJ., concur. Ordered that the order is affirmed, without costs, and matter remitted to the Family Court of Broome County for further proceedings not inconsistent with this Court's decision.

FOOTNOTES

Footnotes

* The timing of the request was appropriate, as *Lincoln* hearings are properly held during or after fact-finding (*see Matter of Spencer v Spencer*, 85 AD3d 1244, 1245 [2011]).

44 Misc.3d 449, 986 N.Y.S.2d 313, 2014 N.Y. Slip Op. 24126

T.E.G., Plaintiff
v
G.T.G., Defendant.

Supreme Court, Monroe County
May 8, 2014

CITE TITLE AS: T.E.G. v G.T.G.

HEADNOTES

Parent, Child and Family
Custody
In Camera Interview with Child Prior to Trial

([1]) In a divorce action in which child custody was contested, Supreme Court properly exercised its discretion in holding an in camera interview with the children to confirm that the Attorney for the Children was accurately conveying their wishes. A court may meet in camera with children in advance of trial but it must hold a fact-finding hearing, with the parties and counsel present, to resolve any factual issues involving the children. Here, the court had not yet held a fact-finding hearing, but barring resolution of the disputes it intended to, and it made no decision based on the interview except that their attorney was accurately advocating for the children's preferences regarding custody and visitation. Such an interview with the children is appropriate where, as here, either party's counsel suggests that the Attorney for the Children may not be doing so.

Parent, Child and Family
Custody
In Camera Interview with Child—Confidentiality

([2]) In a divorce action in which child custody was contested, the court denied plaintiff wife's request to release the transcript of its in camera interview with the children, which it had conducted to confirm that the Attorney for the Children was accurately conveying their wishes. Courts generally should avoid disclosing comments made during in camera interviews with children in custody proceedings and instead protect the children's right to confidentiality.

Judges
Recusal
Knowledge of Disputed Facts—In Camera Interview with Child Prior to Trial

([3]) In a divorce action in which child custody was contested, Supreme Court's recusal was not warranted as a result of it having conducted an in camera interview with the children, before trial, to confirm that their attorney was accurately conveying their wishes. Judges must perform their duties without bias or prejudice, and are required to recuse themselves if they have personal knowledge of disputed evidentiary facts concerning the proceeding and prejudge them (Rules Governing Judicial Conduct [22 NYCRR] § 100.3 [B] [4]; [E] [1] [a] [ii]; *see* US Const 14th Amend). Here, plaintiff established no actual bias or other basis for mandatory disqualification; thus, the determination of whether recusal was appropriate was a matter of the

court's discretion and personal conscience. The court's determination to hold the in camera interview as scheduled, without adjourning to accommodate plaintiff's change of counsel, did not evidence bias; it obtained no fact that would taint its ability to act impartially; and it remained ready to conduct a second interview—or a *Lincoln* hearing after trial testimony—if necessary.

RESEARCH REFERENCES

Am Jur 2d, Divorce and Separation §§ 879, 881, 884; Am Jur 2d, Judges §§ 80, 81, 83, 86, 87, 127, 138, 153.

***450** Carmody-Wait 2d, Officers of Court §§ 3:84, 3:86; Carmody-Wait 2d, Child Custody and Visitation in Matrimonial Actions §§ 118A:77, 118A:82, 118A:83.

22 NYCRR 100.3 (B) (4); (E) (1) (a) (ii).

NY Jur 2d, Courts and Judges §§ 357, 358, 411, 412; NY Jur 2d, Domestic Relations §§ 464, 474, 478, 486.

New York Matrimonial Law and Practice § 20:13.

US Const 14th Amend.

ANNOTATION REFERENCE

See ALR Index under Custody and Support of Children; In Camera; Recusal.

FIND SIMILAR CASES ON WESTLAW

Database: NY-ORCS

Query: custody /s “in camera” /5 child /p lincoln

APPEARANCES OF COUNSEL

Maureen Pineau for plaintiff.
Rhian Jones for defendant.
Thomas Hartzell, Attorney for the Children.

OPINION OF THE COURT

Richard A. Dollinger, J.

In this application, the plaintiff seeks an order to recuse this court from presiding over this matter because the court met in camera with the couple's children before trial. The plaintiff wife also seeks a copy of the transcript of the in camera interview. The husband opposes the application, arguing that there is no evidence of actual bias by the court to justify a recusal order, and that the court was within its discretion to hold the interview and should not release a transcript of it. The Attorney for the Children, who attended the in camera interview, also opposes the recusal application and release of the transcript.

In July 2013, the court met with all counsel in the mandatory pretrial conference in this case. Amid attorney complaints of strife between the parents spilling over to the children, the court cautioned the parties to “get the children out of the middle” and advised both parents to seek the assistance of the ACT Program, a parental education program made available through the Monroe County Bar Association. The court also appointed an Attorney for the Children (AFC). A month later, the AFC reported that his clients concurred with a temporary ***451** residence/visitation schedule that had been discussed at the pretrial conference. When a temporary order surfaced, the husband's counsel objected. In a letter to the court, he argued that a proposed order of protection, included in the draft order, was based on a disputed series of facts involving transfer of personalty when the

husband moved out of the marital residence months before. The court responded that in **2 the absence of motion practice, the court would not continue the order of protection.

When the court later asked for an update from all counsel, the court was informed that there were "problems with kids" and the court asked the AFC to contact his clients. After a telephone conference with counsel, the court, in a sharply worded email, informed counsel to tell their clients: "Stop talking to the children about this case, where they should live or who they spend more time with." The court added: "I strongly urge both parents to stop talking to their children about this case. I also ask the parents to refrain [from] any confrontations or obviously inappropriate behavior in front of the boys. Keep them out of this dispute. Everyone is warned."

On November 20, 2013, the court held a conference and heard allegations from both parents' counsel that the parents were coaching their children on their preferences given to the AFC. The question was raised as to whether the AFC, in his advocacy before the court, was accurately summarizing the children's preferences. To be satisfied that the AFC's advocacy was consonant with the children's view, the court told all parties that the court would hold a "*Lincoln* hearing." (*Matter of Lincoln v Lincoln*, 24 NY2d 270 [1969].) The court asked each attorney to offer questions to be posed to the children. The court scheduled the meeting with the children. At that time, neither attorney objected to the court meeting with the children. In fact, all three attorneys supported the interview.

The day before the meeting, the wife's counsel advised the court that she had signed a consent to change attorneys and asked that the hearing be rescheduled "to give the new attorney time to get familiar with this case and submit their own questions to the court." The same day, the husband's attorney submitted questions, as requested by the court, and claimed the last-minute change of counsel was a "dilatory tactic." The wife's then-current counsel responded, reiterating a request for an adjournment:

> "I cannot let [the wife] be steam rolled while new *452 counsel is getting up to speed with the case. If the court insists upon seeing the boys tomorrow, I would then respectfully request that the court meet with them again once [the wife's] new attorney has had the opportunity to review the questions, he or she may have additional or new questions for the boys."

The court responded:

> "I cannot see how the *Lincoln* hearing is dependent on a party's change of counsel. I am unwilling, given the nature of the accusations in this case, to postpone the *Lincoln* hearing. It will occur as planned and [the wife's] right to request a second hearing, when her counsel's questions can be posed, is preserved."

At that point, the successor counsel weighed in on the morning the in camera interview was scheduled, noting: "I have been substituted in . . . I ask that the *Lincoln* hearing not be held. In fact, case law provides that it is reversible error for a *Lincoln* hearing to occur before a trial has been concluded." The new attorney also suggested that she did not learn about the in camera meeting until the morning it was scheduled. However, at the time of the email exchange, the new attorney had yet to be formally substituted as counsel: the substitution of counsel was not filed in the county clerk's office until two days after the in **3 camera interview with the court.

The court proceeded with the in camera interview and later advised the parties: "However, based on the interview, I am confident that the preference advocated by the AFC accurately reflects the wishes of these two young men. The court advised new counsel that her objection to the in camera was preserved."

Six weeks after the in camera interview, the wife moved for the relief requested in this application.

Initially, this court notes that it repeatedly referred to the confidential closed-door interview with the two sons as a "*Lincoln* hearing." (*Matter of Lincoln v Lincoln*, 24 NY2d 270, 273 [1969].) This description of the in camera meeting with two children, prior to trial, was inartful by the court, although this court is not the only New York trial judge somewhat confused by the widespread use of the phrase "*Lincoln* hearing" to describe confidential in camera interviews with children in contested custody

matters. (*See Matter of Rush v Roscoe*, 99 AD3d 1053 [3d Dept 2012].) In that case, the Court noted that there was confusion over whether an in camera interview with ***453** a child, conducted well before a trial, was a *Lincoln* hearing. The Court held it was not a *Lincoln* hearing, but instead a permissive in camera interview with the child. The "purpose of a *Lincoln* hearing in a custody proceeding is to corroborate information acquired through testimonial or documentary evidence adduced during the fact-finding hearing" (*Matter of Spencer v Spencer*, 85 AD3d 1244, 1245 [3d Dept 2011] [a true *Lincoln* hearing is held after, or during, a fact-finding hearing and adding there is no authority or legitimate purpose for courts to conduct such interviews in place of fact-finding hearings]). In short, the lesson from these cases is simple: the court may meet in camera with a child, in advance of a hearing, but the court, in deciding any question involving the children, must hold a fact-finding hearing and thereafter seek to corroborate any trial testimony by examining the children in a *Lincoln* hearing setting. This court has not held a fact-finding hearing in this case but barring resolution of the ongoing disputes, it will. This court has made no decision based on the interview with the children except that the court was satisfied, based on the children's comments, that their attorney was accurately advocating their interests.

In addition, as further case law suggests, the court should confer with the children if either counsel suggests—as occurred in this case—that the children's court-appointed attorney may not be accurately advocating for the children's preference in both temporary and permanent orders involving residence and visitation. (*Matter of Jessica B. v Robert B.*, 104 AD3d 1077 [3d Dept 2013] [noting that an in camera interview was justified because there was strong support for the claim that the child's wishes were not in fact accurately or adequately conveyed by her trial counsel].) In addition, this court notes that the court preserved the right of the wife's attorney to seek an additional in camera interview with the children and request a *Lincoln* hearing after the proof at the custody hearing.

([1]) Based on these facts and law, this court's in camera meeting with the children did not violate any precepts of the *Lincoln* hearing doctrine or any other rule or statute and simply exercised its discretion to meet with the children to confirm their then-existing ****4** preferences in this contested custody matter.

([2]) In response to the request to release the transcript of the discussion with the children, this court notes that it has not, in writing this opinion, reviewed the transcript. However, appellate courts have cautioned trial judges not to divulge comments ***454** made during in camera interviews with children in custody proceedings and instead urged courts to protect the children's right to confidentiality by avoiding disclosure. (*Matter of Spencer v Spencer*, 85 AD3d 1244 [3d Dept 2011]; *Matter of Verry v Verry*, 63 AD3d 1228, 1229 [3d Dept 2009] [what transpires at a *Lincoln* hearing as a general rule is confidential and "the child's right to confidentiality should remain paramount absent a direction to the contrary"]; *Matter of Carter v Work*, 100 AD3d 1557 [4th Dept 2012] [we agree with the AFC that the court improperly disclosed the child's statement at the *Lincoln* hearing].) Given the weight of these authorities contrary to the wife's position, the court declines to release the transcript to either party.

Finally, in considering the wife's request for recusal by this court, the court notes that the wife argues that she was denied due process when the court declined to adjourn the in camera interview and the court is now potentially tainted by a bias because the court was "certainly effected by the comments and statements of the children." In further support of the release of the transcript, she argues that the court has had access to information from the children not subject to cross-examination. First, this court notes that an in camera hearing is, by its terms, a conversation with the children in which they are questioned by the court and not subject to cross-examination by either counsel. The parents' attorneys do not attend: only the children's attorney attends. Second, there is no authority cited to or found by the court for any proposition that an in camera interview with the children, in advance of a fact-finding hearing and when a second interview—or a *Lincoln* hearing to corroborate trial testimony—is available and may be requested, somehow violates the vague assertion of "due process."

In considering the request for recusal, this court is cognizant that an impartial decision maker is a core guarantee of due process. (*Matter of 1616 Second Ave. Rest. v New York State Liq. Auth.*, 75 NY2d 158, 161 [1990].) This court takes note of its obligation to be faithful to the law and maintain professional competence in it. (Rules Governing Judicial Conduct [22 NYCRR] § 100.3 [B] [4] [a judge shall perform judicial duties without bias or prejudice against or in favor of any person].) This court is well aware that the Rules Governing Judicial Conduct suggest recusal if the judge has personal knowledge of disputed evidentiary

facts concerning the proceeding and prejudges it. (22 NYCRR 100.3 [E] [1] [a] [ii]; *Matter of 1616* ***455** *Second Ave. Rest. v New York State Liq. Auth.*, 75 NY2d at 162 [recusal appropriate on ground of prejudgment if " 'a disinterested observer may conclude that (the judge) has in some measure adjudged the facts as well as the law of a particular case in advance of hearing it' "]; *Rochester Community Individual Practice Assn. v Excellus Health Plan*, 305 AD2d 1007, 1008 [4th Dept 2003].)

([3]) However, there is also no allegation of any actual judicial bias under Judiciary Law § 14. (*Saccone v Elm Hill Plaza*, 5 AD3d 1028 [4th Dept 2004] [plaintiff failed to demonstrate a basis for mandatory disqualification or recusal and made no showing of actual bias on the part of the court].) Hence, the court is the sole arbiter of the need for recusal and its decision is a matter of discretion and personal conscience. (*Chusid v Silvera*, 110 AD3d 662 [2d Dept 2013]; ****5** *Galanti v Kraus*, 98 AD3d 559 [2d Dept 2012].) There is no proof of any bias or prejudice before this court. (*Matter of Moore v Palmatier*, 115 AD3d 1069 [3d Dept 2014] [in absence of statutory disqualification or of personal bias, Family Court did not abuse its discretion in denying the father's recusal motion]; *Guerrera v Tooker*, 43 Misc 3d 1212 [A], 2014 NY Slip Op 50586[U], *3 [Sup Ct, Suffolk County 2014] [where the party seeking recusal fails to demonstrate that any determinations in the case were the result of bias, the court providently exercises its discretion in declining to recuse itself from the case].) In *D.I. v S.I.* (240 NYLJ 59, 2008 NY Misc LEXIS 6033, *3 [Sup Ct, Westchester County, Sept. 23, 2008]), a litigant sought to disqualify a judge after he had ruled against the litigant and the court noted:

> "It is '[o]nly when alleged bias and prejudice arise from an extrajudicial source and result in an opinion on the merits based on the outside source is disqualification warranted . . . . In the absence of a violation of express statutory provisions, bias or prejudice or unworthy motive on the part of a Judge, unconnected with an interest in the controversy, will not be a cause for disqualification, unless shown to affect the result' . . . . Here, not only does the Court not harbor a bias or prejudice or unworthy motive as charged by defendant, defendant has failed to show how any such allegation, even if true, affected the Court's determination."

The court's determination to hold the in camera interview, even over the objection and request for delay by the wife's successor counsel, is not evidence of bias and no fact obtained in the ***456** interview will taint the court's ability to seek the truth in this disputed custody matter. This court will not decide any of the issues related to the children until after a fact-finding hearing and, if requested, a *Lincoln* hearing—to obtain corroboration of trial testimony—with the children. Because there is an abundance of opportunities for proof in this case at this stage—further interviews with the children, a trial and a posttrial *Lincoln* hearing—and no evidence or even an allegation of any actual bias, the court denies the request for recusal.

McKinney's Consolidated Laws of New York Annotated
Family Court Act (Refs & Annos)
Article 10. Child Protective Proceedings (Refs & Annos)
Part 4. Hearings

McKinney's Family Court Act § 1046

§ 1046. Evidence

Effective: October 10, 2009
Currentness

(a) In any hearing under this article and article ten-A of this act:

(i) proof of the abuse or neglect of one child shall be admissible evidence on the issue of the abuse or neglect of any other child of, or the legal responsibility of, the respondent; and

(ii) proof of injuries sustained by a child or of the condition of a child of such a nature as would ordinarily not be sustained or exist except by reason of the acts or omissions of the parent or other person responsible for the care of such child shall be prima facie evidence of child abuse or neglect, as the case may be, of the parent or other person legally responsible; and

(iii) proof that a person repeatedly misuses a drug or drugs or alcoholic beverages, to the extent that it has or would ordinarily have the effect of producing in the user thereof a substantial state of stupor, unconsciousness, intoxication, hallucination, disorientation, or incompetence, or a substantial impairment of judgment, or a substantial manifestation of irrationality, shall be prima facie evidence that a child of or who is the legal responsibility of such person is a neglected child except that such drug or alcoholic beverage misuse shall not be prima facie evidence of neglect when such person is voluntarily and regularly participating in a recognized rehabilitative program; and

(iv) any writing, record or photograph, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any condition, act, transaction, occurrence or event relating to a child in an abuse or neglect proceeding of any hospital or any other public or private agency shall be admissible in evidence in proof of that condition, act, transaction, occurrence or event, if the judge finds that it was made in the regular course of the business of any hospital, or any other public or private agency and that it was in the regular course of such business to make it, at the time of the act, transaction, occurrence or event, or within a reasonable time thereafter. A certification by the head of or by a responsible employee of the hospital or agency that the writing, record or photograph is the full and complete record of said condition, act, transaction, occurrence or event and that it was made in the regular course of the business of the hospital or agency and that it was in the regular course of such business to make it, at the time of the condition, act, transaction, occurrence or event, or within a reasonable time thereafter, shall be prima facie evidence of the facts contained in such certification. A certification by someone other than the head of the hospital or agency shall be accompanied by a photocopy of a delegation of authority signed by both the head of the hospital or agency and by such other employee. All other circumstances of the making of the memorandum, record or photograph, including lack of personal knowledge of the maker, may be proved to affect its weight, but they shall not affect its admissibility; and

(v) any report filed with the statewide central register of child abuse and maltreatment by a person or official required to do so pursuant to section four hundred thirteen of the social services law shall be admissible in evidence; and

(vi) previous statements made by the child relating to any allegations of abuse or neglect shall be admissible in evidence, but if uncorroborated, such statements shall not be sufficient to make a fact-finding of abuse or neglect. Any other evidence tending to support the reliability of the previous statements, including, but not limited to the types of evidence defined in this subdivision shall be sufficient corroboration. The testimony of the child shall not be necessary to make a fact-finding of abuse or neglect; and

(vii) neither the privilege attaching to confidential communications between husband and wife, as set forth in section forty-five hundred two of the civil practice law and rules, nor the physician-patient and related privileges, as set forth in section forty-five hundred four of the civil practice law and rules, nor the psychologist-client privilege, as set forth in section forty-five hundred seven of the civil practice law and rules, nor the social worker-client privilege, as set forth in section forty-five hundred eight of the civil practice law and rules, nor the rape crisis counselor-client privilege, as set forth in section forty-five hundred ten of the civil practice law and rules, shall be a ground for excluding evidence which otherwise would be admissible.

(viii) proof of the "impairment of emotional health" or "impairment of mental or emotional condition" as a result of the unwillingness or inability of the respondent to exercise a minimum degree of care toward a child may include competent opinion or expert testimony and may include proof that such impairment lessened during a period when the child was in the care, custody or supervision of a person or agency other than the respondent.

(b) In a fact-finding hearing: (i) any determination that the child is an abused or neglected child must be based on a preponderance of evidence;

(ii) whenever a determination of severe or repeated abuse is based upon clear and convincing evidence, the fact-finding order shall state that such determination is based on clear and convincing evidence; and

(iii) except as otherwise provided by this article, only competent, material and relevant evidence may be admitted.

(c) In a dispositional hearing and during all other stages of a proceeding under this article, except a fact-finding hearing, and in permanency hearings and all other proceedings under article ten-A of this act, only material and relevant evidence may be admitted.

Credits

(Added L.1970, c, 962, § 9. Amended L.1972, c. 1015, § 4; L.1979, c. 81, § 2; L.1981, c. 64, § 1; L.1981, c. 984, § 2; L.1985, c. 724, § 1; L.1993, c. 432, § 3; L.1999, c. 7, § 45, eff. Feb. 11, 1999; L.2009, c. 334, § 1, eff. Oct. 10, 2009.)

McKinney's Family Court Act § 1046, NY FAM CT § 1046
Current through L.2019, chapter 144. Some statute sections may be more current, see credits for details.

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26 A.D.3d 731, 809 N.Y.S.2d 699, 2006 N.Y. Slip Op. 00709

In the Matter of Jose Mateo, Respondent
v
Susan Tuttle, Appellant.

Supreme Court, Appellate Division, Fourth Department, New York
February 3, 2006

CITE TITLE AS: Matter of Mateo v Tuttle

HEADNOTE

Evidence
Hearsay Evidence

Hearsay statements were admissible at hearing on custody petition in view of allegations of abuse and neglect of child, since they were sufficiently corroborated—in any event, statements of child to petitioner and his wife as well as statements made by nurse to petitioner's wife were not offered for truth of matters asserted therein but, rather, were offered to explain actions taken by petitioner and his wife, and thus those statements and that testimony fell within exception to hearsay rule. ***732**

Appeal from an order of the Family Court, Ontario County (James R. Harvey, J.), entered November 15, 2004 in a proceeding pursuant to Family Court Act article 6. The order, inter alia, granted sole custody of the subject child to petitioner with supervised visitation to respondent.

It is hereby ordered that the order so appealed from be and the same hereby is unanimously affirmed without costs.

Memorandum: Family Court properly granted sole custody of the parties' child to petitioner father, with supervised visitation to respondent mother. Contrary to respondent's contention, the court properly admitted hearsay statements at the hearing on the petition. It is well settled that there is "an exception to the hearsay rule in custody cases involving allegations of abuse and neglect of a child, based on the Legislature's intent to protect children from abuse and neglect as evidenced in Family Ct Act § 1046 (a) (vi)" (*Matter of Rosario WW. v Ellen WW.*, 309 AD2d 984, 987 [2003]), where, as here, the statements are corroborated (*see Matter of Stacey L.B. v Kimberly R.L.*, 12 AD3d 1124, 1125 [2004], *lv denied* 4 NY3d 704 [2005]; *Kantrowitz v LaRoche*, 5 AD3d 101 [2004]; *Matter of Albert G. v Denise B.*, 181 AD2d 732, 733 [1992]). Contrary to respondent's further contention, the child's hearsay statements to others were sufficiently corroborated (*see generally Matter of Nicole V.*, 71 NY2d 112, 121 [1987]). In any event, the statements of the child to petitioner and his wife as well as statements made by a nurse to petitioner's wife were not offered for the truth of the matters asserted therein but, rather, were offered to explain actions taken by petitioner and his wife, and thus those statements and that testimony fall within an exception to the hearsay rule (*see generally People v Tosca*, 98 NY2d 660 [2002]; *People v Felder*, 37 NY2d 779 [1975]).

Respondent's "present [contention] challenging the methodology used by [petitioner's] expert[ ] was waived by the absence of timely objection on that ground" (*Sampson v New York City Hous. Auth.*, 256 AD2d 19, 19 [1998], *lv denied* 93 NY2d 808 [1999]), and we reject the further contention of respondent that she was denied effective assistance of counsel. Based on our review of the record, we conclude that respondent received "meaningful assistance" at the hearing (*Matter of Longo v Wright*, 19 AD3d 1078, 1079 [2005]). Finally, we have reviewed respondent's contentions concerning alleged procedural errors, and we conclude that those contentions are without merit. Present—Pigott, Jr., P.J., Kehoe, Martoche, Smith and Pine, JJ.

2 A.D.3d 476, 768 N.Y.S.2d 498, 2003 N.Y. Slip Op. 19259

Iolanta Campolongo, Plaintiff
v
Sergio Campolongo, Appellant. Irwin Weisberg, Nonparty Respondent.

Supreme Court, Appellate Division, Second Department, New York
December 8, 2003

CITE TITLE AS: Campolongo v Campolongo

HEADNOTE

Attorney and Client
Disqualification

Court properly granted motion to disqualify defendant's attorney and to preclude him from using psychiatrist's report and testimony as evidence in pending custody dispute—defendant's attorney violated Code of Professional Responsibility DR 7-104 (A) (1) (***see*** 22 NYCRR 1200.35 [a] [1]) by allowing psychiatrist, that he caused defendant father to retain, to interview subject child regarding pending custody dispute and to prepare report without Law Guardian's knowledge and consent.

In a matrimonial action in which the parties were divorced by a judgment dated November 16, 2001, the defendant appeals, as limited by his brief, from so much of an order of the Supreme Court, Kings County (Fitzmaurice, J.), dated September 19, 2002, as granted those branches of the Law Guardian's motion which were to disqualify the defendant's attorney and preclude the defendant from using a psychiatrist's report and testimony as evidence in the pending custody dispute.

Ordered that the order is affirmed insofar as appealed from, with costs.

It is well settled that the disqualification of an attorney is a matter which rests within the sound discretion of the court (*see Olmoz v Town of Fishkill*, 258 AD2d 447 [1999]; *Fischer v Deitsch*, 168 AD2d 599 [1990]). A party's entitlement to be represented in ongoing litigation by counsel of his or her own choosing is a valued right which should not be abridged absent a clear showing that disqualification is warranted (*see Olmoz v Town of Fishkill, supra)*, and the movant bears the burden on the motion (*see Tekni-Plex, Inc. v Meyner & Landis*, 89 NY2d 123, 131 [1996]; *Solow v Grace & Co.*, 83 NY2d 303, 308 [1994]; *S & S Hotel Ventures Ltd. Partnership v 777 S. H. Corp.*, 69 NY2d 437, 445 [1987]).

Here, the defendant's attorney violated Code of Professional Responsibility DR 7-104 (A) (1) (*see* 22 NYCRR 1200.35 [a] [1]) by allowing a psychiatrist, that he caused the defendant father to retain, to interview the subject child regarding the pending custody dispute and to prepare a report without the Law Guardian's knowledge and consent. The appointment of a Law Guardian to protect the interests of a child creates an attorney-client relationship, and the absence of the Law Guardian at the subject interview constituted a denial of the child's due process rights (*see Matter of Samuel H.*, 208 AD2d 746, 747 [1994]; *see* ***477** *also* Family Ct Act § 241). Further, while the Supreme Court previously appointed a psychologist to conduct a forensic examination of the child and the parties herein, the defendant's attorney failed to seek court permission for an additional forensic evaluation, and also failed to inform the attorney for the plaintiff of the interview by the defendant's psychiatrist.

Under the circumstances of this case, the Supreme Court providently exercised its discretion in granting those branches of the Law Guardian's motion which were to disqualify the defendant's attorney and to preclude him from using the psychiatrist's report and testimony as evidence in the pending custody dispute. Friedmann, J.P., H. Miller, Townes and Cozier, JJ., concur.

65 A.D.3d 1350, 886 N.Y.S.2d 463, 2009 N.Y. Slip Op. 06847

In the Matter of Brian Krieger, Respondent
v
Traci Krieger, Respondent. Janis Parazzelli, Nonparty Appellant.

Supreme Court, Appellate Division, Second Department, New York
September 29, 2009

CITE TITLE AS: Matter of Krieger v Krieger

HEADNOTE

Parent, Child and Family
Custody

In custody proceeding, Family Court erred in failing to adjourn hearing to provide attorney for child with reasonable opportunity to present additional witnesses and in requiring attorney for child to offer expert testimony on issues of child's capacity to articulate her desires and whether child would be at imminent risk of harm if she moved with father to another state, prior to attorney advocating position that could be viewed as contrary to child's wishes.

Janis A. Parazzelli, Floral Park, N.Y., attorney for the child, appellant, pro se.
Donna M. McCabe, East Atlantic Beach, N.Y., for petitioner-respondent Brian Krieger.
Roberta Nancy Kaufman, Hicksville, N.Y., for respondent-respondent Traci Krieger.

In a child custody proceeding pursuant to Family Court Act article 6, the attorney for the child appeals, as limited by her brief, from so much of an order of the Family Court, Nassau ***1351** County (Phillips, Ct Atty Referee), dated April 14, 2008, as, upon the mother's default in personally appearing on scheduled hearing dates, granted the father's petition to modify an order of the same court dated January 5, 2006, inter alia, awarding the parties joint custody of the subject child, so as to allow the father to relocate with the child to the State of Ohio, and awarded sole custody of the child to the father.

Ordered that the order is reversed, on the law, without costs or disbursements, and the matter is remitted to the Family Court, Nassau County, for further proceedings in accordance herewith.

By order dated January 5, 2006, entered on consent of the parties, inter alia, the parties were awarded joint custody of their adolescent daughter, with residential custody to the father. In May 2007, the father filed a petition to modify the order dated January 5, 2006, so as to allow him to relocate with the child to the State of Ohio. By order dated April 14, 2008, upon the mother's default in personally appearing on scheduled hearing dates, the Family Court granted the father's petition, and awarded sole custody of the child to the father.

The attorney for the child appeals from the order dated April 14, 2008, asserting that a number of errors were committed by the Family Court which require reversal of the award of sole custody to the father and the grant of permission for him to relocate with the child to the State of Ohio.

The appointment of an attorney to represent a child in Family Court proceedings, whether the appointment is required by statute or, as in this case, the appointment is made in the court's discretion, is based on the legislative determination “that counsel is

often indispensable to a practical realization of due process of law and may be helpful in making reasoned determinations of fact and proper orders of disposition" (Family Ct Act § 241). ****2**

The right to counsel has been held to imply "that the court will afford a respondent and his or her attorney a reasonable opportunity to appear and present evidence and arguments" (*Matter of Scott v Scott*, 62 AD3d 714, 715 [2009]). An attorney appointed to represent a child in a Family Court proceeding should be accorded the same reasonable opportunity to appear and present evidence and arguments on behalf of the child as is accorded the child's mother or father, or other interested party.

Under the circumstances of this case, the Family Court improvidently exercised its discretion in failing to adjourn the hearing to provide the attorney for the child with a reasonable opportunity to present additional witnesses (*see Matter of* ***1352** *Czaban v Czaban*, 24 AD3d 547 [2005]; *cf. Matter of Steven B.*, 6 NY3d 888 [2006]; *Diamond v Diamante*, 57 AD3d 826, 827 [2008]).

The rules applicable to the representation of a child in a Family Court proceeding require that the attorney adhere to the same ethical requirements applicable to all attorneys: that the attorney zealously advocate the child's position; that the attorney have a thorough knowledge of the child's circumstances; and that the attorney consult with and advise the child, consistent with the child's capacities, in ascertaining the child's position (*see* 22 NYCRR 7.2 [b], [c], [d] [1]). In addition, the attorney for the child must follow the child's wishes to refrain from taking a position for or against requested relief where the child has the capacity to take such a position and is not at imminent risk of harm, regardless of whether the attorney believes that the grant or denial of the requested relief would be in the child's best interest (*see* 22 NYCRR 7.2 [d] [2]).

The Family Court erred, however, in requiring the attorney for the child to offer expert testimony on the issues of the child's capacity to articulate her desires and whether the child would be at imminent risk of harm if she moved with the father to the State of Ohio, prior to the attorney advocating a position that could be viewed as contrary to the child's wishes. The Rules of the Chief Judge do not impose such a requirement (*see* 22 NYCRR 7.2).

The Family Court also erred in awarding sole custody of the child to the father, as the father did not request such relief in his modification petition.

Accordingly, we remit the matter to the Family Court, Nassau County, for a new hearing on the father's modification petition. Upon remittal, the hearing on the father's petition shall be conducted before a different judicial officer; and given the intemperate remarks made by the attorney for the child, and the attorney's confrontational approach toward the court, the Family Court may consider whether it is appropriate to appoint a new attorney for the child or continue the representation.

The parties' remaining contentions either are not properly before this Court or need not be reached in light of our determination. Spolzino, J.P., Angiolillo, Chambers and Hall, JJ., concur.

100 A.D.3d 1432, 954 N.Y.S.2d 793, 2012 N.Y. Slip Op. 07500

In the Matter of William M. Hilgenberg, Respondent
v
Christopher A. Hertel, Respondent, and Heidi D. Hilgenberg, Appellant.

Supreme Court, Appellate Division, Fourth Department, New York
November 9, 2012

CITE TITLE AS: Matter of Hilgenberg v Hertel

HEADNOTES

Parent, Child and Family
Visitation Rights of Grandparents
Standing—Long-Standing and Loving Relationship

Parent, Child and Family
Visitation Rights of Grandparents
Visitation Award Lacked Sound and Substantial Basis—Evidence of Serious Wrongdoing by Grandparent

Kelly M. Corbett, Fayetteville, for respondent-appellant.
Karin H. Marris, Attorney for the Child, Syracuse, for Kameri M.H.
Appeal from an order of the Family Court, Onondaga County (Salvatore Pavone, R.), entered October 25, 2011. The order, among other things, awarded petitioner visitation with the subject child.

It is hereby ordered that the order so appealed from is unanimously modified on the law by vacating the first and second ordering paragraphs and as modified the order is affirmed without costs, and the matter is remitted to Family Court, Onondaga County, for further proceedings in accordance ***1433** with the following memorandum: Petitioner grandfather, the father of respondent mother, commenced this proceeding seeking visitation with his granddaughter (hereafter, grandchild). The mother appeals from an order that, inter alia, granted the petition and awarded the grandfather one weekend per month of overnight visitation with the grandchild. Initially, we reject the mother's contention that the grandchild was deprived of effective assistance of counsel in Family Court (*see generally Matter of Ferguson v Skelly*, 80 AD3d 903, 906 [2011], *lv denied* 16 NY3d 710 [2011]; *Matter of Sarah A.*, 60 AD3d 1293, 1294-1295 [2009]; *Matter of West v Turner*, 38 AD3d 673, 674 [2007]). The record does not support the mother's allegation that the Attorney for the Child failed to make a recommendation in accordance with the grandchild's wishes, or the mother's implicit contention that the Attorney for the Child was biased against her (*see generally Matter of Nicole VV.*, 296 AD2d 608, 614 [2002], *lv denied* 98 NY2d 616 [2002]).

We reject the mother's conclusory assertion that Family Court erred in concluding that the grandfather had standing to seek visitation. A grandparent has standing to seek visitation with his or her grandchildren pursuant to Domestic Relations Law § 72 (1) where, inter alia, "circumstances show that conditions exist [in] which equity would see fit to intervene." The factors that a court must consider in determining whether the grandparent made such a showing include the "nature and basis of the parents' objection to visitation . . . [and] the nature and extent of the grandparent-grandchild relationship" (*Matter of Emanuel S. v Joseph E.*, 78 NY2d 178, 182 [1991]; *see Matter of Morgan v Grzesik*, 287 AD2d 150, 154 [2001]). Here, the court properly concluded that the grandfather had demonstrated a long-standing and loving relationship with the grandchild sufficient to seek visitation with her. ****2**

Upon demonstrating standing to seek visitation, however, a grandparent must then establish that visitation is in the best interests of the grandchild (*see Emanuel S.*, 78 NY2d at 181). Among the factors to be considered are whether the grandparent and grandchild have a preexisting relationship, whether the grandparent supports or undermines the grandchild's relationship with his or her parents, and whether there is any animosity between the parents and the grandparent (*see Matter of E.S. v P.D.*, 8 NY3d 150, 157-158 [2007]). Animosity alone is insufficient to deny visitation. " 'It is almost too obvious to state that, in cases where grandparents must use legal procedures to obtain visitation rights, some degree of animosity exists between them and the party having custody of the [grandchildren]. ***1434** Were it otherwise, visitation could be achieved by agreement' " (*id.* at 157, quoting *Lo Presti v Lo Presti*, 40 NY2d 522, 526 [1976]). Furthermore, "the decision whether . . . an intergenerational relationship would be beneficial in any specific case is for the parent to make in the first instance. And, if a fit parent's decision . . . becomes subject to judicial review, the court must accord at least some special weight to the parent's own determination" (*Troxel v Granville*, 530 US 57, 70 [2000]; *see Morgan*, 287 AD2d at 151). Thus, "the courts should not lightly intrude on the family relationship against a fit parent's wishes. The presumption that a fit parent's decisions are in the [grand]child's best interests is a strong one" (*E.S.*, 8 NY3d at 157).

Inasmuch as the court made no finding that the mother was not fit, and the grandfather did not take a cross appeal from the order, we must therefore begin by according "some special weight" to the mother's decision that the grandchild's best interests are not served by visitation with the grandfather (*Troxel*, 530 US at 70). Furthermore, the court's determination concerning whether to award visitation " 'depends to a great extent upon its assessment of the credibility of the witnesses and upon the assessments of the character, temperament, and sincerity of the parents' " and grandparents (*Matter of Thomas v Thomas*, 35 AD3d 868, 869 [2006]; *see Matter of Steinhauser v Haas*, 40 AD3d 863, 864 [2007]). The court's determination concerning visitation will not be disturbed unless it lacks a sound and substantial basis in the record (*see Thomas*, 35 AD3d at 869; *Matter of Keylikhes v Kiejliches*, 25 AD3d 801, 801 [2006], *lv denied* 7 NY3d 710 [2006]).

Here, we conclude that the court's determination lacks a sound and substantial basis in the record insofar as it grants visitation to the grandfather. The mother and the grandmother testified to serious wrongdoing by the grandfather, including, inter alia, illegal drug use and sales, and vehicular assault upon the mother's boyfriend. The court failed to make any finding regarding the credibility of those allegations, and thus we have no basis upon which to determine how those allegations, which include serious misconduct, would impact the determination whether visitation with the grandfather is in the grandchild's best interests. Furthermore, there is no evidence in the record establishing that the grandfather previously has cared for the grandchild overnight, or for as extensive a time as the full weekend of visitation awarded by the court. "Given the . . . deficiencies in the record . . . , this Court can neither conclude that a sound and substantial basis exists for Family Court's award of [visitation] to the [grand]father . . . , nor can we ac ***1435** cord appropriate weight to the [court's credibility determinations] in conducting our own independent review" (*Matter of Rivera v LaSalle*, 84 AD3d 1436, 1440 [2011]). We therefore modify the order by vacating the first two ordering paragraphs, and we remit the matter to Family Court for further proceedings on the petition. Present—Scudder, P.J., Smith, Fahey, Carni and Valentino, JJ.

115 A.D.3d 1237, 982 N.Y.S.2d 640, 2014 N.Y. Slip Op. 01914

In the Matter of Wilfredo Lopez et al., Respondents
v
Jennifer Lugo, Appellant. In the Matter of Wilfredo Lopez, Respondent, v Jennifer Lugo, Appellant. In the Matter of Jennifer Lugo, Appellant, v Wilfredo Lopez et al., Respondents.

Supreme Court, Appellate Division, Fourth Department, New York
March 21, 2014

CITE TITLE AS: Matter of Lopez v Lugo

HEADNOTES

Parent, Child and Family
Custody
Attorney for Child Advocating Position Contrary to Child's Wishes—Substantial Risk of Imminent Serious Harm Demonstrated

Parent, Child and Family
Custody
Limited Visitation with Noncustodial Parent

Koslosky & Koslosky, Utica (William L. Koslosky of counsel), for respondent-appellant and petitioner-appellant.
Steven R. Fortnam, Attorney for the Child, Westmoreland.
A.J. Bosman, Attorney for the Child, Rome.
Appeal from an order of the Family Court, Oneida County (James R. Griffith, J.), entered January 14, 2013 in a proceeding pursuant to Family Court Act article 6. The order, among other things, awarded sole custody of the subject children to Sandro Lopez.

It is hereby ordered that the order so appealed from is unanimously affirmed without costs.

Memorandum: Respondent-petitioner (mother) appeals, as limited by her notice of appeal, from an order that, inter alia, granted sole custody of the subject children to petitioner-respondent Sandro Lopez (father). Initially, we note that the mother's contentions with respect to Family Court's denial of a motion by the Attorney for the Child (AFC) to withdraw from representing one of the subject children are not before us on this appeal. The appeal is limited by the mother's notice of appeal to the issues of custody, parenting time, contact with the mother's ****2** husband and a grandparent's visitation, and thus the mother's contentions regarding the court's resolution of the AFC's motion to withdraw are not properly before this Court (*see Gray v Williams*, 108 AD3d 1085, 1087 [2013]). In addition, the record on appeal does not contain the AFC's motion to withdraw from representing the subject child. "It is the obligation of the appellant to assemble a proper record on appeal" (*Gaffney v Gaffney*, 29 AD3d 857, 857 [2006]), which must include all of the relevant papers that were before the motion court (*see Aurora Indus., Inc. v Halwani*, 102 AD3d 900, 901 [2013]). The mother, "as the appellant, submitted this appeal on an incomplete record and must suffer the consequences" (*Matter of Santoshia L.*, 202 AD2d 1027, 1028 [1994]; *see Matter of Rodriguez v Ward*, 43 AD3d 640, 641 [2007]; *LeRoi & Assoc. v Bryant*, 309 AD2d 1144, 1145 [2003]).

The mother failed to preserve for our review her contention ***1238** that the AFC representing the other subject child "failed to advocate for the [child's] position regarding custody and visitation and thus failed to provide [him] with effective representation" (*Matter of Brown v Wolfgram*, 109 AD3d 1144, 1145 [2013]; *see Matter of Mason v Mason*, 103 AD3d 1207,

1207-1208 [2013]). In any event, the mother's contention that both AFCs failed to provide the subject children with effective representation is without merit. Although an AFC "must zealously advocate the child's position" (22 NYCRR 7.2 [d]), an exception exists where, as here, the AFC "is convinced . . . that following the child's wishes is likely to result in a substantial risk of imminent, serious harm to the child" (22 NYCRR 7.2 [d] [3]; *see Mason*, 103 AD3d at 1208; *Matter of Swinson v Dobson*, 101 AD3d 1686, 1687 [2012], *lv denied* 20 NY3d 862 [2013]). Both AFCs noted for the court that they were advocating contrary to their respective clients' wishes, and both amply demonstrated the "substantial risk of imminent, serious harm" (22 NYCRR 7.2 [d] [3]), including the mother's arrest for possession of drugs in the children's presence, the numerous weapons that had been seized from the mother's house, and the credible evidence establishing that the mother's husband assaulted one of the subject children who attempted to intervene when the husband attacked the mother with an electrical cord.

Finally, we reject the mother's further contention that there is insufficient evidence supporting the court's determination awarding custody of the subject children to the father, with limited visitation to the mother, and directing that all contact between the mother's husband and the subject children be supervised. "The court's determination regarding custody and visitation issues, based upon a first-hand assessment of the credibility of the witnesses after an evidentiary hearing, is entitled to great weight and will not be set aside unless it lacks an evidentiary basis in the record" (*Matter of Samuel L.J. v Sherry H.*, 206 AD2d 886, 886 [1994], *lv denied* 84 NY2d 810 [1994]). Here, the record supports the court's conclusion that the mother repeatedly violated the court's orders directing her not to discuss the litigation with the subject children, as well as the orders awarding temporary custody of the subject children to their paternal grandfather. Based on those violations and the dangers to the subject children discussed above, we conclude that the court's determination with respect to custody, limited visitation and supervised contact is in the best interests of the children (*see generally Eschbach v Eschbach*, 56 NY2d 167, 172-173 [1982]). Present—Smith, J.P., Fahey, Lindley, Sconiers and Valentino, JJ. ***1239**

129 A.D.3d 1679, 12 N.Y.S.3d 684, 2015 N.Y. Slip Op. 05372

**1 In the Matter of Angelo M. Viscuso, Respondent
v
Susan M. Viscuso, Appellant. (Appeal No. 1.)

Supreme Court, Appellate Division, Fourth Department, New York
June 19, 2015

CITE TITLE AS: Matter of Viscuso v Viscuso

HEADNOTES

Parent, Child and Family
Custody
Attorney for Child Advocating for Position Contrary to Child's Wishes Justified—Substantial Risk of Imminent, Serious Harm

Parent, Child and Family
Custody
Concerted Effort to Interfere with Other *1680 Parent's Contact

Parent, Child and Family
Custody
Disclosure of Report of Court-Appointed Psychological Expert

Husband and Wife and Other Domestic Relationships
Counsel Fees

Bouvier Partnership, LLP, Buffalo (Emilio Colaiacovo of counsel), for respondent-appellant.
Francine E. Modica, Tonawanda, for petitioner-respondent.
Leigh E. Anderson, Attorney for the Child, Buffalo.
Appeal from an order of the Family Court, Erie County (Paul G. Buchanan, J.), entered December 3, 2013 in a proceeding pursuant to Family Court Act article 6. The order, among other things, awarded petitioner sole custody of the subject child.

It is hereby ordered that the order so appealed from is unanimously affirmed without costs.

Memorandum: These consolidated appeals arise from a custody proceeding pursuant to Family Court Act article 6, in which petitioner father sought sole custody of the parties' daughter. In appeal No. 1, respondent mother appeals from an order that, inter alia, granted the petition and awarded sole custody of the subject child to the father, with specified visitation to the mother. In appeal No. 2, the mother appeals from an order directing her to pay counsel fees to the father's attorney. We affirm the order in each appeal.

In appeal No. 1, the mother contends that the Attorney for the Child (AFC) violated her ethical duty to determine the subject child's position and advocate zealously in support of the child's wishes, because the AFC advocated for a result that was contrary to the child's expressed wishes in the absence of any justification for doing so. We reject that contention. The Rules of the Chief Judge provide that an AFC “must zealously advocate the child's position” and that, “[i]f the child is capable of knowing,

voluntary and considered judgment, the [AFC] should be directed by the wishes of the child, even if the [AFC] for the child believes that what the child wants is not in the child's best interests" (Rules of Chief Judge [22 NYCRR] § 7.2 [d] [2]; *see Matter of Swinson v Dobson*, 101 AD3d 1686, 1687 [2012], *lv denied* 20 NY3d 862 [2013]). A contrary rule arises where, as here, "the [AFC] is convinced either that the child lacks the capacity for knowing, voluntary and considered judgment, or that following the child's wishes is likely to result in a substantial risk of imminent, serious harm to the child[.] [In such circumstances, the AFC] would be justified in advocating a position that is contrary to the child's wishes" (22 NYCRR 7.2 [d] [3]; *see generally Matter of Carballeira v Shumway*, 273 AD2d 753, 755-756 [2000], *lv denied* 95 NY2d 764 [2000]). Here, "the evidence supports the court's conclusion that to follow [the child's] wishes would be tantamount to severing her relationship with her father, and [that] result would not be in [the child's] best interest [s]' " (*Matter of Marino v Marino*, 90 AD3d 1694, 1696 [2011]). We conclude that the mother's persis ***1681** tent and pervasive pattern of alienating the child from the father "is likely to result in a substantial risk of imminent, serious harm to the child" (22 NYCRR 7.2 [d] [3]), and we conclude that the AFC acted in accordance with her ethical duties.

The mother further contends that Family Court erred in denying her motion to replace the AFC. The court denied the motion in a prior order from which the mother did not appeal, and we ****2** therefore do not consider the propriety of the court's denial of the motion (*see generally Hoffman v Hoffman*, 31 AD3d 1125, 1126 [2006]; *Matter of St. Lawrence County Dept. of Social Servs. v Pratt*, 24 AD3d 1050, 1050 [2005], *lv denied* 6 NY3d 713 [2006]). In any event, even assuming, arguendo, that the order on appeal brings up for review the prior order denying the mother's motion to replace the AFC (*see* CPLR 5501 [a] [1]; *cf. Abasciano v Dandrea*, 83 AD3d 1542, 1544-1545 [2011]), we note that the court denied the motion on the ground that the mother's motion did not comply with CPLR 2214 (b), and thus the court's remaining discussion was dicta. On appeal, however, the mother confines her contentions to the court's remaining discussion, concerning the propriety of the actions of the AFC. Inasmuch as "no appeal lies from dicta" (*Companion Life Ins. Co. of N.Y. v All State Abstract Corp.*, 35 AD3d 518, 519 [2006]; *see Matter of Khatib v Liverpool Cent. School Dist.*, 244 AD2d 957, 957 [1997]), the mother's contentions with respect to her motion to replace the AFC are not before us on this appeal for that reason as well.

Contrary to the mother's further contention, the court's determination to award custody of the subject child to the father is supported by a sound and substantial basis in the record. It is well settled that a " concerted effort by one parent to interfere with the other parent's contact with the child is so inimical to the best interests of the child . . . as to, per se, raise a strong probability that [the interfering parent] is unfit to act as custodial parent' " (*Matter of Amanda B. v Anthony B.*, 13 AD3d 1126, 1127 [2004]; *see Matter of Avdic v Avdic*, 125 AD3d 1534, 1536 [2015]; *Marino*, 90 AD3d at 1695). Here, there is a sound and substantial basis in the record for the court's conclusion that the mother interfered with the father's relationship with the child by, inter alia, blatantly and repeatedly violating the court's directive not to discuss the litigation with the child, attempting to instill in the child a fear of the father, and encouraging the child to medicate herself before going to visit the father. We reject the mother's contention that the father's prior domestic violence toward the mother requires ***1682** that she have primary custody of the child. "There is no evidence in the record indicating that the domestic violence was anything other than an isolated incident with no negative repercussions on the child's well-being" (*Matter of Ilona H. [Elton H.]*, 93 AD3d 1165, 1166 [2012]). Indeed, we note that the domestic violence occurred before the child was born, and there is no evidence that the father has engaged in any act of domestic violence in the presence of the child.

We reject the mother's contention that the court erred in denying her pretrial request to release certain materials, i.e., the report of a court-appointed psychological expert and the expert's notes. It is well settled that "the potential for abuse in matrimonial and custody cases is great, and the court has broad discretionary power to limit disclosure and grant protective orders" (*Matter of Worysz v Ratel*, 101 AD3d 893, 894 [2012]; *see generally Wegman v Wegman*, 37 NY2d 940, 941 [1975]). We conclude that the court did not abuse its discretion in denying the mother's request, particularly in light of the mother's repeated violations of the court's orders prohibiting her from disclosing confidential materials. Moreover, the court denied the request without prejudice to renewal, and thus the mother could have reapplied for release of the materials upon submitting evidence demonstrating that she had actually retained an expert who required access to the report prior to trial. In any event, any error in declining to release the materials prior to trial is harmless. The record establishes that the mother introduced the materials in evidence several months before the trial ended, and she therefore had more than ample access to the materials in time to use them at trial. Furthermore,

she had the use of the materials for cross-examination purposes, and thus there was no denial of due process (*see Matter of Patrick H.*, 229 AD2d 682, 683 [1996]).

The mother's final contention in appeal No. 1 is that the court's temporary order of primary physical custody was improperly entered without a full hearing in the midst of the trial. That contention is moot based on the court's issuance of the final order of custody (*see Matter of Dench-Layton v Dench-Layton*, 123 AD3d 1350, 1351 [2014]; *see also Matter of Rodriguez v Feldman*, 126 AD3d 1557, 1558 [2015]).

In appeal No. 2, the mother contends that the court erred in directing her to pay counsel fees to the father's attorney. Contrary to the mother's contention, a party seeking an award of attorney's fees need not demonstrate that he or she is unable to pay those fees (*see Griffin v Griffin*, 104 AD3d 1270, 1272 [2013]; *see generally* ***1683** *DeCabrera v Cabrera-Rosete*, 70 NY2d 879, 881 [1987]). Furthermore, upon our review of the record, including the lengthy delays engendered by, inter alia, the mother's repeated replacement of her attorneys and her lengthy pro se litigation, much of which was unwarranted under the circumstances, we conclude that the court's award of counsel ****3** fees was a proper exercise of discretion that is supported by "the equities of the case and the financial circumstances of the parties" (*Popelaski v Popelaski*, 22 AD3d 735, 738 [2005]). Present—Smith, J.P., Peradotto, Carni, Valentino and Whalen, JJ.

10 A.D.3d 349, 780 N.Y.S.2d 761, 2004 N.Y. Slip Op. 06269

Peter Cruciata, Plaintiff
v
Josephine Cruciata, Defendant. (Action No. 1.)
v
Josephine Cruciata, Appellant, v Peter Cruciata, Respondent. (Action No. 2.)

Supreme Court, Appellate Division, Second Department, New York
August 2, 2004

CITE TITLE AS: Cruciata v Cruciata

HEADNOTE

Husband and Wife and Other Domestic Relationships
Stipulations

In action to rescind stipulation of settlement, allegations were sufficient to create inference of duress and intimidation exercised by respondent and former Law Guardian as to issue of custody; further, reasonable inference exists that respondent may not have fully disclosed his financial assets, and that his pension and other assets were overlooked in arriving at stipulation and, as result, terms of agreement were so inequitable as to be manifestly unfair to appellant—court should have directed further financial disclosure followed by hearing "to test the validity of the [stipulation of settlement]."

In an action for a divorce and ancillary relief (Action No. 1) and a related action to rescind a stipulation of settlement dated September 24, 2002, entered into in Action No. 1 (Action No. 2), Josephine Cruciata appeals, as limited by her brief, from (1) so much of an order of the Supreme Court, Richmond County (Lebowitz, J.), dated May 29, 2003, as denied her motion in Action No. 2, in effect, for summary judgment declaring that the stipulation of settlement was void ab initio, and (2) so much of an order of the same court dated December 15, 2003, as, upon granting Peter Cruciata's oral application for leave to reargue his cross motion to dismiss the complaint in Action No. 2 pursuant to CPLR 3211 (a), which had been denied in the order dated May 29, 2003, granted the cross motion. ****2**

Ordered that on the Court's own motion, the notice of appeal from the order dated December 15, 2003, is treated as an application for leave to appeal, and leave to appeal is granted; and it is further, ***350**

Ordered that the order dated December 15, 2003, is reversed insofar as appealed from, on the law, and, upon reargument, so much of the order dated May 29, 2003, as denied the cross motion is adhered to; and it is further;

Ordered that the order dated May 29, 2003, is affirmed insofar as appealed from; and it is further,

Ordered that one bill of costs is awarded to the appellant.

The Supreme Court erred in, upon reargument, granting the cross motion of the respondent Peter Cruciata to dismiss the complaint in Action No. 2 pursuant to CPLR 3211 (a). Where, as here, the matrimonial action (Action No. 1) had not been terminated, a challenge to a stipulation entered into during the course of the litigation may be made by commencing a plenary action or by motion within the matrimonial action (*see Zeppelin v Zeppelin*, 245 AD2d 504 [1997]; *Arguelles v Arguelles*, 251

AD2d 611 [1998]; *see also Teitelbaum Holdings v Gold,* 48 NY2d 51 [1979]). A stipulation of settlement should be closely scrutinized and may be set aside upon a showing that it is unconscionable or the result of fraud, or where it is shown to be manifestly unjust because of the other spouse's overreaching (*see Christian v Christian,* 42 NY2d 63, 72-73 [1977]; *Santini v Robinson,* 306 AD2d 266 [2003]; *Gilbert v Gilbert,* 291 AD2d 479 [2002]).

Here, the allegations in the complaint in Action No. 2, if proven, were sufficient to create an inference of duress and intimidation exercised by the respondent and the former Law Guardian as to the issue of custody. Furthermore, a reasonable inference exists that the respondent may not have fully disclosed his financial assets, and that his pension and other assets were overlooked in arriving at the stipulation and, as a result, the terms of the agreement were so inequitable as to be manifestly unfair to the appellant. Under these circumstances, the Supreme Court should have denied the cross motion to dismiss the complaint in Action No. 2 and exercised its equitable powers and directed further financial disclosure followed by a hearing "to test the validity of the [stipulation of settlement]" (*Berkman v Berkman,* 287 AD2d 426, 427 [2001]; *see Christian v Christian, supra*).

The parties' remaining contentions are without merit. Prudenti, P.J., Ritter, Cozier and Skelos, JJ., concur.

48 A.D.3d 906, 851 N.Y.S.2d 689, 2008 N.Y. Slip Op. 01461

In the Matter of Luis F. Figueroa, Respondent
v
Lydia M. Lopez, Appellant. Charles E. Andersen, as Law Guardian, Appellant.

Supreme Court, Appellate Division, Third Department, New York
February 21, 2008

CITE TITLE AS: Matter of Figueroa v Lopez

HEADNOTE

Guardian and Ward
Law Guardian

Order which granted petition to modify prior order of custody was reversed—having appointed Law Guardian, Family Court could not thereafter relegate Law Guardian to meaningless role—Law Guardian stated that he did not consent to stipulation, and when he attempted to explain his reason, Family Court responded that it did not care; Family Court also characterized Law Guardian's position as ridiculous, without allowing explanation for his position to be placed on record; Law Guardian reportedly had obtained information (including possible domestic violence by father) which made him concerned about unsupervised visitation by father.

Charles E. Andersen, Law Guardian, Elmira, appellant.

Lahtinen, J. Appeal from an order of the Family Court of ***907** Broome County (Pines, J.), entered February 23, 2006, which granted petitioner's application, in a proceeding pursuant to Family Ct Act article 6, to modify a prior order of custody.

Respondent (hereinafter the mother) was awarded sole custody of the parties' child in September 2004 and, a year later, petitioner (hereinafter the father) filed a modification petition seeking custody. At the commencement of a hearing on the father's petition, the parties stipulated on the record to joint custody, with the mother having primary physical custody and the father receiving visitation. The Law Guardian stated that he did not consent to the terms of the stipulation and, when he attempted to explain his reasons, he was cut off by Family Court and not permitted to give his reasons. Following entry of an order based on the terms of the stipulation, the Law Guardian and the mother [*] appealed. ****2**

Although appointing a Law Guardian is not statutorily required in contested custody proceedings, doing so is the preferred practice (*see Matter of Robinson v Cleveland*, 42 AD3d 708, 710 [2007]) and such an appointment was important in this proceeding to protect the interests of the child (*see Matter of Miller v Miller*, 220 AD2d 133, 135 [1996]). Having made the appointment, Family Court cannot thereafter relegate the Law Guardian to a meaningless role (*see Frizzell v Frizzell*, 177 AD2d 825, 825-826 [1991]). We have previously observed that "a Law Guardian 'must be afforded the same opportunity as any other party to fully participate in a proceeding' " (*Matter of White v White*, 267 AD2d 888, 890 [1999], quoting *Matter of Machukas v Wagner*, 246 AD2d 840, 842 [1998], *lv denied* 91 NY2d 813 [1998] [emphasis omitted]).

Here, the Law Guardian stated that he did not consent to the stipulation. When he attempted to explain his reason, Family Court responded that it did not care. Family Court also characterized the Law Guardian's position as ridiculous, without allowing an explanation for his position to be placed on the record. The Law Guardian reportedly had obtained information (including

possible domestic violence by the father) which made him concerned about unsupervised visitation by the father. Moreover, while not all improper restrictions imposed on a Law Guardian will result in reversal if the record indicates sufficient facts to uphold the determination (*see Matter of White v White*, 267 AD2d at 890; *see also Matter of Vickery v Vickery*, 28 AD3d 833, 834 [2006]; *Matter of Kaczynski v Van Amerongen*, 284 AD2d 600, 603 [2001]), this sparse record is inadequate. While ***908** the Court is troubled by the fact that, despite a hearing transcript of two pages, this appeal took more than a year to perfect and was argued nearly two years from the date of the order appealed from, reversal is nonetheless required.

Cardona, P.J., Peters, Spain and Kane, JJ., concur. Ordered that the order is reversed, on the law, without costs, and matter remitted to the Family Court of Broome County for further proceedings not inconsistent with this Court's decision.

FOOTNOTES

Footnotes

* The mother did not perfect her appeal and it is therefore deemed abandoned (*see Pahl v Grenier*, 279 AD2d 882, 883 n [2001]).

94 A.D.3d 1542, 943 N.Y.S.2d 708, 2012 N.Y. Slip Op. 03327

In the Matter of Amanda J. McDermott, Respondent
v
Andrew John Bale, Respondent. Sanford A. Church, Esq., Attorney for the Children, Appellant.

Supreme Court, Appellate Division, Fourth Department, New York
April 27, 2012

CITE TITLE AS: Matter of McDermott v Bale

***1543 HEADNOTE**

Guardian and Ward
Attorney for Child
Participation in Custody Proceeding

Sanford A. Church, Attorney for the Children, Albion, appellant pro se.
Muscato, Dimillo & Vona, L.L.P., Lockport (P. Andrew Vona of counsel), for petitioner-respondent-respondent.
James D. Bell, Brockport, for respondent-petitioner-respondent.
Appeal from an order of the Family Court, Orleans County (James P. Punch, J.), entered January 21, 2011 in a proceeding pursuant to Family Court Act article 6. The order, inter alia, granted the parents joint custody of their children, with petitioner-respondent having primary physical residence.

It is hereby ordered that the order so appealed from is unanimously affirmed without costs.

Memorandum: In this custody proceeding pursuant to Family Court Act article 6, the Attorney for the Children (AFC) appeals from an order granting the parties joint custody of their two children, with primary physical residence to petitioner-respondent mother and liberal visitation to respondent-petitioner father. The order incorporated the terms of a written stipulation executed by the parties on the eve of trial. The AFC refused to join in the stipulation, but Family Court approved the stipulation over the AFC's objection. We reject the AFC's contention that the court erred in approving the stipulation. Although we agree with the AFC that he " 'must be afforded the *same opportunity as any other party to fully participate in* [*the*] *proceeding*' " (*Matter of White v White*, 267 AD2d 888, 890 [1999]), and that the court may not "relegate the [AFC] to a meaningless role" (*Matter of Figueroa v Lopez*, 48 AD3d 906, 907 [2008]), the children represented by the AFC are not permitted to "veto" a proposed settlement reached by their parents and thereby force a trial. The record reflects that, unlike in *Matter of Figueroa*, upon which the AFC relies, the court here gave the AFC a full and fair opportunity to be heard, and the AFC stated in detail all of the reasons that he opposed the stipulation. Indeed, the court gave credence to many of the comments made by the AFC, as did the attorneys for the parents, ****2** both of whom agreed to modify the stipulation to address several of the AFC's concerns.

We cannot agree with the AFC that children in custody cases should be given full-party status such that their consent is necessary to effectuate a settlement. The purpose of an attorney for the children is "to help protect their interests and to help them express their wishes to the court" (Family Ct Act § 241). There is a significant difference between allowing children to express their wishes to the court and allowing their wishes to scuttle a proposed settlement. We note that the court is not required to appoint an attorney for the children in contested custody proceedings, although that is no doubt the preferred practice (*see Matter of Amato v Amato*, 51 AD3d 1123, 1124 [2008]; *Davis v Davis*, 269 AD2d 82, 85 [2000]). Thus, there is ***1544** no support for the AFC's contention that children in a custody proceeding have the same legal status as their parents, inasmuch as it is well settled that parents have the right to the assistance of counsel in such proceedings (*see* § 262 [a] [v]; *Matter of Kristin R.H. v Robert E.H.*, 48 AD3d 1278, 1279 [2008]).

In sum, we conclude that, where the court in a custody case appoints an attorney for the children, he or she has the right to be heard with respect to a proposed settlement and to object to the settlement but not the right to preclude the court from approving the settlement in the event that the court determines that the terms of the settlement are in the children's best interests. Parents who wish to settle their disputes should not be required to engage in costly and often times embittered litigation merely because their children or the attorney for the children would prefer a different custodial arrangement. Present—Centra, J.P., Peradotto, Lindley, Sconiers and Martoche, JJ.

112 A.D.3d 1323, 978 N.Y.S.2d 501, 2013 N.Y. Slip Op. 08701

In the Matter of Mary L. Kessler, Petitioner
v
Scott M. Fancher, Respondent. Scott A. Otis, Attorney for the Children, Appellant. (Appeal No. 2.)

Supreme Court, Appellate Division, Fourth Department, New York
December 27, 2013

CITE TITLE AS: Matter of Kessler v Fancher

HEADNOTES

Appeal
Parties Aggrieved
Custody Proceeding

Parent, Child and Family
Custody
Abandoned Petition

Scott A. Otis, Watertown, appellant pro se.
Mary L. Kessler, petitioner pro se.
Scott M. Fancher, respondent-respondent pro se.
Appeal from an order of the Family Court, Jefferson County (Peter A. Schwerzmann, A.J.), entered September 10, 2012 in a proceeding pursuant to Family Court Act article 6. The order dismissed the petition for modification of a custody order.

It is hereby ordered that the order so appealed from is unanimously affirmed without costs.

Memorandum: The Attorney for the Children (AFC) appeals from a decision of Family Court dismissing various petitions filed by the parents of two minor children. We note at the outset that no appeal lies from a decision (*see Pecora v Lawrence*, 28 AD3d 1136, 1137 [2006]). We exercise our discretion, however, to treat the notice of appeal as valid and deem the appeals as taken from the seven orders in the respective appeals that were entered upon the single decision (*see* CPLR 5520 [c]).

We conclude that the children are not aggrieved by the orders in appeal Nos. 1 and 3 through 6 inasmuch as those orders dismissed petitions filed by one parent alleging that the other parent had violated an order of custody or seeking a personal order of protection against the other parent (*see Matter of Lagano v Soule*, 86 AD3d 665, 666 n 4 [2011]; *see generally Parochial Bus Sys. v Board of Educ. of City of N.Y.*, 60 NY2d 539, 544-545 [1983]; *Mixon v TBV, Inc.*, 76 AD3d 144, 148-149 [2010]). Moreover, inasmuch as the AFC opposed the relief requested in the petition in appeal No. 7, we conclude that the children are not aggrieved by the order dismissing that petition. We therefore dismiss the AFC's appeals from the orders in appeal Nos. 1 and 3 through 7.

With respect to the order in appeal No. 2, which dismissed ***1324** the petition of Mary L. Kessler (mother) seeking modification of a custody order, the mother has not taken an appeal from that order. The children, while dissatisfied with the order, cannot force the mother to litigate a ****2** petition that she has since abandoned (*see Matter of McDermott v Bale*, 94 AD3d 1542, 1543-1544 [2012]). As we wrote in *McDermott*, "children in custody cases should [not] be given full-party status such that their consent is necessary to effectuate a settlement . . . There is a significant difference between allowing children to express

their wishes to the court and allowing their wishes" to chart the course of litigation (*id.* at 1543). We thus affirm the order in appeal No. 2 and see no need to address the AFC's remaining contentions. Present—Scudder, P.J., Centra, Lindley, Sconiers and Valentino, JJ.

4 A.D.3d 747, 771 N.Y.S.2d 476 (Mem), 2004 N.Y. Slip Op. 00710

In the Matter of James J. Cobb, Respondent
v
Kathy Cobb, Appellant.

Supreme Court, Appellate Division, Fourth Department, New York
February 11, 2004

CITE TITLE AS: Matter of Cobb v Cobb

HEADNOTE

Contempt
Civil Contempt

Respondent, who was aware of order mandating that she and parties' child obtain counseling and willfully violated order, was properly held in contempt—court improperly directed Law Guardian to prepare and file "law guardian report" with court ex parte, and court improperly directed Law Guardian to testify as witness.

Appeal from an order of the Family Court, Oneida County (Frank S. Cook, J.), entered September 27, 2002. The order found respondent in contempt of court for willfully violating an order mandating that respondent and the parties' child obtain counseling.

It is hereby ordered that the order so appealed from be and the same hereby is unanimously affirmed without costs.

Memorandum: We conclude that Family Court properly found respondent in contempt of court. The record establishes that respondent was aware of an order mandating that she and the parties' child obtain counseling and that she willfully violated that order (*see Matter of Hicks v Russi*, 254 AD2d 801 [1998]). We note, however, that the court improperly directed the Law Guardian to prepare and file a "law guardian report" with the court ex parte, inasmuch as a law guardian "is the attorney for the children . . . and not an investigative arm of the court" (*Weiglhofer v Weiglhofer*, 1 AD3d 786, 788 n 1 [2003]; *see Matter of Rueckert v Reilly*, 282 AD2d 608, 609 [2001]). Indeed, a law guardian should not submit any pretrial report to the court or engage in any ex parte communication with the court (*see* NY State Bar Assn Commn. on Children and the Law, Law Guardian Representation Standards, vol 2, Standards B-6, B-7 [Nov. 1999]). Moreover, the court improperly directed the Law Guardian to testify as a witness. The Law Guardian's testimony on behalf of petitioner in this case appears to have been in direct contravention of Code of Professional Responsibility DR 5-102 (c) (22 NYCRR 1200.21 [c]), which provides that "[i]f, after ***748** undertaking employment in contemplated or pending litigation, a lawyer learns or it is obvious that the lawyer ought to be called as a witness on a significant issue on behalf of the client, the lawyer shall not serve as an advocate on issues of fact before the tribunal . . . ." Present—Pigott, Jr., P.J., Hurlbutt, Scudder, Kehoe and Gorski, JJ.

37 A.D.3d 1060, 830 N.Y.S.2d 408, 2007 N.Y. Slip Op. 00773

In the Matter of Amy L.W., Respondent
v
Brendan K.H., Appellant.

Supreme Court, Appellate Division, Fourth Department, New York
February 2, 2007

CITE TITLE AS: Matter of Amy L.W. v Brendan K.H.

HEADNOTE

Parent, Child and Family
Custody

Brendan K.H., respondent-appellant pro se.
Williams, Heinl, Moody & Buschman, P.C., Auburn (Simon K. Moody of counsel), for petitioner-respondent.
James A. Leone, Law Guardian, Auburn, for Braxtyn W.
Appeal from an order of the Family Court, Cayuga County (Peter E. Corning, J.), entered May 8, 2006 in a proceeding pursuant to Family Court Act article 6. The order granted the petition and awarded petitioner sole custody of the parties' child and visitation to respondent.

It is hereby ordered that the order so appealed from be and the same hereby is unanimously affirmed without costs.

Memorandum: Family Court properly granted the petition seeking to modify the parties' existing joint custody arrangement by awarding sole custody of the parties' child to petitioner and visitation to respondent. Contrary to respondent's contention, the custody determination "is supported by a sound and substantial basis in the record" and thus will not be disturbed (*Sorce v Sorce*, 16 AD3d 1077, 1077 [2005]; *see Matter of Westfall v Westfall*, 28 AD3d 1229, 1230 [2006], *lv denied* 7 NY3d 706 [2006]; *Matter of Thayer v Ennis*, 292 AD2d 824, 825 [2002]). Also contrary to respondent's contention, the record establishes that the court properly weighed the appropriate factors in awarding sole custody to petitioner (*see generally Eschbach v Eschbach*, 56 NY2d 167, 171-174 [1982]; ***1061** *Matter of John P.R. v Tracy A.R.*, 13 AD3d 1125 [2004]; *Matter of Schlafer v Schlafer*, 6 AD3d 1202 [2004]), including an evaluation of the character and relative parental fitness of the parties (*see Matter of Pinkerton v Pensyl*, 305 AD2d 1113 [2003]; *see also Eschbach*, 56 NY2d at 173). The record does not support the contention of respondent that the court was biased against him (*see Matter of Jocelyne J.*, 8 AD3d 978 [2004]; *Matter of Angie M.P.*, 291 AD2d 932, 933 [2002], *lv denied* 98 NY2d 602 [2002]).

Respondent further contends that reversal is required because the court asked the Law Guardian to submit a "confidential report" to the court, ex parte, on the issue of custody (*see generally Matter of Cobb v Cobb*, 4 AD3d 747 [2004], *lv dismissed* 2 NY3d 759 [2004]). Respondent failed to preserve that contention for our review (*see generally Matter of Tracy v Tracy*, 309 AD2d 1252, 1253 [2003]). In any event, even assuming, arguendo, that the court requested the report and considered it, we conclude that "[i]t appears from the court's decision that the court placed [no] reliance" on the contents of the report (*id.*). In addition, the Law Guardian's report did not refer to any facts or allegations not otherwise fully explored at the hearing. We thus conclude that any error with ****2** respect to the alleged confidential report is harmless (*see id.; Matter of Jelenic v Jelenic*, 262 AD2d 676, 678 [1999]).

Finally, we decline to grant petitioner's request for an award of attorney's fees incurred in responding to this appeal (*cf. Burke v Burke*, 185 AD2d 625 [1992]). Present—Gorski, J.P., Fahey, Peradotto, Green and Pine, JJ.

McKinney's Consolidated Laws of New York Annotated
Family Court Act (Refs & Annos)
Article 10. Child Protective Proceedings (Refs & Annos)
Part 3. Preliminary Procedure

McKinney's Family Court Act § 1032

§ 1032. Persons who may originate proceedings

Currentness

The following may originate a proceeding under this article:

(a) a child protective agency, or

(b) a person on the court's direction.

Credits
(Added L.1973, c. 1039, § 9.)

McKinney's Family Court Act § 1032, NY FAM CT § 1032
Current through L.2019, chapter 144. Some statute sections may be more current, see credits for details.

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McKinney's Consolidated Laws of New York Annotated
Family Court Act (Refs & Annos)
Article 10. Child Protective Proceedings (Refs & Annos)
Part 3. Preliminary Procedure

McKinney's Family Court Act § 1033

§ 1033. Access to the court for the purpose of filing a petition

Currentness

Any person seeking to file a petition at the court's direction, pursuant to subdivision (b) of section one thousand thirty-two shall have access to the court for the purpose of making an ex parte application therefor. Nothing in this section, however, is intended to prevent a family court judge from requiring such person to first report to an appropriate child protective agency.

Credits
(Added L.1973, c. 1039, § 9.)

McKinney's Family Court Act § 1033, NY FAM CT § 1033
Current through L.2019, chapter 144. Some statute sections may be more current, see credits for details.

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294 A.D.2d 630, 740 N.Y.S.2d 730, 2002 N.Y. Slip Op. 03436

In the Matter of James MM., Respondent,
v.
June OO., Appellant. (Proceeding No. 1.)
In the Matter of James NN., et al., Children Alleged to be Neglected. D. Alan Wrigley, as Law Guardian, Respondent; June OO., Appellant. (Proceeding No. 2.)

Third Department,
(May 2, 2002)

CITE TITLE AS: Matter of James MM. v June OO.

Mercure, J.P.

Appeals (1) from an order of the Family Court of Columbia County (Czajka, J.), entered December 15, 2000, which, inter alia, granted petitioner's application, in proceeding No. 1 pursuant to Family Court Act article 6, for modification of a prior order of custody, and (2) from an order of said court, entered February 28, 2001, which granted petitioner's application, in proceeding No. 2 pursuant to Family Court Act article 10, to adjudicate respondent's children to be neglected and placed respondent under an order of supervision. ***631**

Respondent (hereinafter the mother) and petitioner James MM. (hereinafter the father) were divorced in 1996. They were awarded joint legal custody of their minor children, James NN. (born in 1988) and Betsy NN. (born in 1989), with physical custody to the mother. In December 1999, the father filed a petition (proceeding No. 1) alleging the mother's violation of a court order concerning visitation; he subsequently amended the petition to allege the mother's further violation of an order by allowing her paramour to reside with her and the children, thereby exposing the children to domestic violence committed by the paramour.

During the course of that proceeding, the children's Law Guardian became concerned about ongoing domestic violence in the mother's home. In March 2000, the Law Guardian filed a child neglect petition (proceeding No. 2) against the mother pursuant to Family Court Act § 1032, and the father filed a second amended petition, this time seeking sole custody of the children. The mother thereafter petitioned for sole custody of the children and, in May 2000, filed a violation petition against the father, alleging that he violated a court order by allowing their son to have contact with the mother's former paramour.

Following a fact-finding hearing at which Family Court heard testimony from the father and the mother, the children's therapist, the children's teachers, and a friend of the mother, the court found that the mother had neglected the children. It subsequently held a dispositional hearing, during which the Law Guardian noted that the children preferred to stay with their mother but, nonetheless, recommended that the father be awarded sole custody of the children. In December 2000, the court awarded the father sole custody of the children, awarded the mother regular visitation with the children, and dismissed the pending violation petitions. In February 2001, the court rendered an order of fact finding and disposition adjudicating the children to have been neglected by the mother and placing the mother under the supervision of the Columbia County Department of Social Services for one year. The mother appeals both orders.

We affirm. Initially, we reject the contention that the evidence adduced at the fact-finding hearing failed to support Family Court's findings that the mother neglected the children by exposing them to domestic violence and by denigrating the father in the children's presence. Pursuant to Family Court Act § 1012 (f) (i) (B), a child will be deemed to be neglected if the child's “physical, mental or emotional condition has been impaired or is in imminent danger of becoming impaired as a ***632** result of the failure of his [or her] parent or other person legally responsible for his [or her] care to exercise a minimum degree of

care" by failing to, among other things, provide proper supervision or guardianship necessary to ensure that the child is not harmed or at substantial risk of being harmed (*see, Matter of Larenzo SS.*, 289 AD2d 880, 881; *Matter of Ember R.*, 285 AD2d 757, 758, *lv denied* 97 NY2d 604).

It is well settled that a child's exposure to domestic violence in the home may form the basis for a finding of neglect (*see, Matter of Larenzo SS., supra* at 882; *Matter of Kathleen GG. v Kenneth II.*, 254 AD2d 538, 540). Here, the mother acknowledged that she had been the victim of physical abuse by her former paramour on several occasions. Significantly, she also admitted that the children were aware of the domestic violence, that they had reason to be afraid of the paramour and that she had jeopardized the children's welfare by allowing her paramour to repeatedly return to her home. Family Court specifically credited the testimony of the children's therapist, who indicated that the children had reported other instances of abuse, and the record reflects that the mother did not take action to remove her former paramour from the children's lives until December 1999. The evidence also supported Family Court's further finding that the mother continued to lack awareness of the impact of the domestic violence on her children.

In *Matter of Catherine KK.* (280 AD2d 732), this Court found that a child was neglected due, in part, to the father's use of "profanity and derogatory language when speaking to the mother during visitation exchanges" (*id.* at 735). In this case, Family Court specifically credited the therapist's testimony that she had witnessed the mother's denigration of the father in the children's presence, which continued despite the therapist's instructions to the contrary. We therefore conclude that Family Court did not err in its finding that the mother neglected the children by denigrating their father in their presence.

The mother's additional contentions do not warrant extended discussion. Based on Family Court's finding of neglect against the mother and its additional findings that there was a danger of further neglect because of the mother's failure to appreciate "the extent of emotional harm" that the children suffered due to her conduct and that the mother is unable to distinguish between her own interests and those of the children, all of which were supported by the evidence, there was a sufficient basis for the award of sole custody to the father (*see, Matter of Kathleen* ***633** *GG. v Kenneth II., supra* at 540). Finally, we are not persuaded that the Law Guardian breached his fiduciary duty to the children by prosecuting the instant neglect petition or by advocating a position contrary to the children's wishes. It is well settled that a "Law Guardian has [a] statutorily directed responsibility to represent [a] child's wishes as well as to advocate the child's best interest" (*Matter of Carballeira v Shumway*, 273 AD2d 753, 755, *lv denied* 95 NY2d 764; *see*, Family Ct Act § 241), and, in cases where there is a conflict between the two, the Law Guardian may advocate for the disposition that, in his or her judgment, promotes the child's best interest (*see, Matter of Carballeira v Shumway, supra* at 755-756 [Law Guardian did not act improperly in making recommendations contrary to the wishes of an 11-year-old child who suffered from several neurological disorders and could easily be manipulated]; *Matter of Dewey S.*, 175 AD2d 920, 921). Contrary to the mother's contention, the distinction between the facts underlying *Matter of Carballeira v Shumway* (*supra*) and the present case by no means requires dissimilar results.

The mother's additional contentions, including her claim of bias on the part of Family Court, have been considered and found to be unavailing.

Crew III, Peters, Spain and Lahtinen, JJ., concur.
Ordered that the orders are affirmed, without costs.

122 A.D.3d 1417, 998 N.Y.S.2d 541, 2014 N.Y. Slip Op. 08184

In the Matter of Corey L. Baxter, Respondent
v
Leah P. Borden, Appellant. (Appeal No. 1.)

Supreme Court, Appellate Division, Fourth Department, New York
November 21, 2014

CITE TITLE AS: Matter of Baxter v Borden

HEADNOTE

Parent, Child and Family
Custody
Relocation in Child's Best Interests

Charles J. Greenberg, Amherst, for respondent-appellant.
Paloma A. Capanna, Webster, for petitioner-respondent.
Scott A. Otis, Attorney for the Children, Watertown.

Appeal from an order of the Family Court, Jefferson County (Peter A. Schwerzmann, A.J.), entered August 1, 2013 in a proceeding pursuant to Family Court Act article 6. The order, among other things, awarded custody of the subject children to petitioner.

It is hereby ordered that the order so appealed from is unanimously affirmed without costs.

Memorandum: The mother of the subject children, who is the respondent in appeal No. 1 and a petitioner in appeal No. 2 (mother), filed a petition pursuant to Family Court Act article 6, seeking to modify a prior custody order, and she later filed, inter alia, an amended petition seeking custody. The children's father, who is the petitioner in appeal No. 1 and a respondent in appeal No. 2, also filed a petition seeking to modify the prior custody order. In appeal No. 1, the mother appeals from an order that, among other relief, awarded custody of the children to the father, granted the mother certain specified visitation with them, and ordered the father to pay 75% of the costs of transporting the children for visits. In appeal No. 2, she appeals from an order that, inter alia, dismissed her amended custody petition.

Contrary to the mother's contention in appeal No. 1, Family Court properly determined that the relocation was in the best interests of the children after considering all relevant factors (*see Matter of Tropea v Tropea*, 87 NY2d 727, 740-741 [1996]), ***1418** notwithstanding the fact that the father had already relocated with them (*see e.g. Matter of Baum v Torello-Baum*, 40 AD3d 750, 751 [2007]; *Matter of Donald C.O. v Carolyn D.V.B.*, 224 AD2d 930, 930 [1996]). “In cases involving the geographic relocation of the custodial parent, as in all other custody proceedings, the primary focus of the court is the best interests of the child[ren], not the mere fact of relocation” (*Donald C.O.*, 224 AD2d at 930). Here, we agree with the mother that “[t]he removal of [the children] without seeking permission should not be encouraged” (*Schultz v Schultz*, 199 AD2d 1065, 1066 [1993]). Nevertheless, we note that “[a]lthough the unilateral removal of the children from the jurisdiction is a factor for the court's consideration . . . , ‘an award of custody must be based on the best interests of the children and not a desire to punish a recalcitrant parent’ ” (*Matter of Tekeste B.-M. v Zeineba H.*, 37 AD3d 1152, 1153 [2007]). Consequently, after reviewing all relevant factors (*see generally Tropea*, 87 NY2d at 740-741), we conclude that the father met his burden of establishing by a preponderance of the evidence that the relocation was in the best interests of the children (*see Matter of Wahlstrom v Carlson*, 55 AD3d 1399, 1400 [2008]).

Contrary to the mother's contention in appeal No. 2, the court properly dismissed her amended petition seeking custody of the children. We agree with the mother that she made a " 'showing of a change in circumstances which reflects a real need for change to ensure the best ****2** interest[s] of the child[ren]' " (*Matter of Tarrant v Ostrowski*, 96 AD3d 1580, 1581 [2012], *lv denied* 20 NY3d 855 [2013]), and there are several factors that favor an award of custody to her. In reviewing an order of custody, however, we must consider all of the "factors that could impact the best interests of the child [ren], including the existing custody arrangement, the current home environment, the financial status of the parties, the ability of each parent to provide for the child[ren]'s emotional and intellectual development and the wishes of the child[ren]" (*Matter of Marino v Marino*, 90 AD3d 1694, 1695 [2011]; *see Eschbach v Eschbach*, 56 NY2d 167, 172-174 [1982]). Upon such review, we conclude that the court's determination that it is in the best interests of the children to award primary physical custody to the father is supported by a sound and substantial basis in the record (*see Matter of Weekley v Weekley*, 109 AD3d 1177, 1178-1179 [2013]).

We have considered the mother's remaining contentions in both appeals and we conclude that they are without merit. Assuming, arguendo, that the children are aggrieved by the issue raised on appeal by the Attorney for the Children (*cf. Matter of* ***1419** *Brittni K.*, 297 AD2d 236, 240 [2002]), we conclude that the issue is not before us in either appeal because the Attorney for the Children did not file a notice of appeal from either order (*see Matter of Yorimar K.-M.* [appeal No. 2], 309 AD2d 1148, 1149 [2003]; *Matter of Zena O.*, 212 AD2d 712, 714 [1995]). Present—Smith, J.P., Centra, Fahey, Lindley and Whalen, JJ.

151 A.D.3d 1879
Supreme Court, Appellate Division, Fourth Department, New York.

In the Matter of Cheris N. LAWRENCE, Petitioner–Respondent,
v.
Stephen C. LAWRENCE, Respondent–Respondent.
Susan B. Marris, Esq., Attorney for the Child, Appellant.

June 16, 2017.

Appeal from an order of the Family Court, Oswego County (Thomas Benedetto, R.), entered August 28, 2015 in a proceeding pursuant to Family Court Act article 6. The order dismissed the petition.

Attorneys and Law Firms

Susan B. Marris, Attorney for the Child, Manlius, appellant pro se.

Stephanie N. Davis, Attorney for the Child, Oswego.

Opinion

MEMORANDUM:

In this proceeding pursuant to Family Court Act article 6, the Attorney for the Child representing the parties' oldest child appeals from an order dismissing the mother's petition seeking modification of a custody order. Inasmuch as "the mother has not taken an appeal from that order[, the] child [ ], while dissatisfied with the order, cannot force the mother to litigate a petition that she has since abandoned" (*Matter of Kessler v. Fancher,* 112 A.D.3d 1323, 1324, 978 N.Y.S.2d 501). A child in a custody matter does not have "full-party status" (*Matter of McDermott v. Bale,* 94 A.D.3d 1542, 1543, 943 N.Y.S.2d 708), and we decline to permit the child's desires "to chart the course of litigation" (*Kessler,* 112 A.D.3d at 1324, 978 N.Y.S.2d 501).

***359** It is hereby ORDERED that said appeal is unanimously dismissed without costs.

WHALEN, P.J., PERADOTTO, DeJOSEPH, CURRAN, and WINSLOW, JJ., concur.

All Citations

151 A.D.3d 1879, 54 N.Y.S.3d 358 (Mem), 2017 N.Y. Slip Op. 05023