Bits and Bytes™

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Appellate Division, First Department

Expenses for a child's residential program in a therapeutic boarding school properly treated as medical or therapeutic, rather than educational, where the program did not offer classes or course credit

In Matter of Ning-Yen Y v Karen K, --- N.Y.S.3d ----, 211 A.D.3d 622, 2022 WL 17835664, 2022 N.Y. Slip Op. 07310 (1st Dept.,2023), the parties' parenting agreement provided that the children's educational costs were to be allocated 70% to the father and 30% to the mother, while unreimbursed, nonelective medical, therapeutic, and psychiatric expenses were to be allocated 92% to the father and 8% to the mother. The Appellate Division held that it was an improvident exercise of discretion for the Family Court to deny the mother's objection to the Support Magistrate's characterization of the residential treatment program in Idaho as an educational expense rather than a therapeutic expense. The evidence presented at the

hearing demonstrated that the subject program did not offer classes or course credit, and the father does not dispute that the child took online courses and classes at a local high school from which he received his high school diploma. Moreover, the father's email to the mother and testimony made clear that the overriding purpose of enrolling the child in the therapeutic boarding school ... was to provide the child with intensive psychiatric and substance abuse treatment in a residential setting. Accordingly, the expenses for the residential program were properly treated as medical or therapeutic rather than educational, and the amount allocated to the mother for the expenses of this program must be recalculated at 8% rather than 30%.

The child does not have full-party status and cannot veto a settlement reached by the parents and force a trial after the attorney for the child had a full a fair opportunity to be heard.

In Matter of Kylie P.--- N.Y.S.3d ----, 2023 WL 1826825 (Mem), 2023 N.Y. Slip Op. 00735 (1st Dept.,2023) after the court determined that there had been a change in circumstances warranting modification of the prior custody order, the parents entered into a settlement agreement, which the court incorporated into a modified custody order over the objection by the attorney for the older child. The Appellate Division held that although the attorney for the child in a custody proceeding has authority to pursue an appeal on behalf of the child, the child does not have full-party status and cannot veto a settlement reached by the parents and force a trial after the attorney for the child had a full a fair opportunity to be heard.

Appellate Division, Second Department

Bonds, purchased during the marriage with separate property and placed in both parties' names, were not the defendant's separate property

In Glessing v Glessing,--- N.Y.S.3d ----, 2023 WL 380072, 2023 N.Y. Slip Op. 00306 (2d Dept.,2023) the parties were married in 1992. In 2017, the plaintiff commenced this action for a divorce. A judgment of divorce was entered in 2019. Supreme Court denied the defendant a separate property credit of $220,000 for the purchase of the marital residence; (2) directed the defendant to remit half of the cash in a home safe to the plaintiff; (3) directed the defendant to remit $23,692.64 from a Chase bank account to the plaintiff; (4) directed the distribution of the net proceeds of certain bonds to be divided equally between the parties; (5) directed the defendant to pay the plaintiff half of the parties' marital credit card debt; and (6) awarded the plaintiff counsel fees.

The Appellate Division affirmed. It rejected the defendant's contention that the "I" bonds, purchased in both parties' names, were his separate property because he purchased them with proceeds from his disability pension. Pension benefits, except to the extent that they are earned or acquired before marriage or after commencement of a matrimonial action, constitute marital property because they are "in essence, a form of

deferred compensation derived from employment" during the marriage. However, any compensation a spouse receives for personal injuries is not considered marital property and is not subject to equitable distribution. Thus, to the extent a disability pension represents deferred compensation, it is subject to equitable distribution while to the extent that a disability pension constitutes compensation for personal injuries, that compensation is separate property which is not subject to equitable distribution. However, separate property that is commingled with marital property may lose its separate character. Here, although the Supreme Court determined that the plaintiff was not entitled to share in any portion of the defendant's pension that was attributable to the defendant's disability pension, it found that the "I" bonds, purchased during the marriage and placed in both parties' names, were not the defendant's separate property. Thus, the court providently exercised its discretion in ordering the net proceeds of the bonds to be divided equally between the parties.

Letter of intent between spouses was unenforceable because it did not comply with the DRL§ 236(B)(3) requirement that signatures must be acknowledged or proven in the manner required to record a deed.

In Chin-Cheung v Cheung, --- N.Y.S.3d ----, 2023 WL 379756, 2023 N.Y. Slip Op. 00301 (2d Dept.,2023) the parties were married in 1964. During the marriage, the parties signed an agreement entitled "Letther [sic] of Intent Between [the defendant] and [the plaintiff] Property Ownership Agreement" in which the parties agreed not to share assets with each other in the event of a divorce if the defendant transferred all shares of a certain corporation to their adult son. In 2018, the plaintiff commenced this action for a divorce. The plaintiff moved, inter alia, for a determination that the letter of intent is an invalid and unenforceable postnuptial agreement. Supreme Court, inter alia, granted the plaintiff's motion. The Appellate Division affirmed. The letter of intent was an agreement between spouses subject to Domestic Relations Law § 236(B)(3). A written agreement between spouses made before or during a marriage concerning the ownership, division, or distribution of property which does not meet the formalities of Domestic Relations Law § 236(B)(3) is not enforceable. The letter of intent was unenforceable because it did not comply with the Domestic Relations Law § 236(B)(3) requirement that signatures must be acknowledged or proven in the manner required to record a deed (see Galetta v. Galetta, 21 N.Y.3d at 192, 969 N.Y.S.2d 826, 991 N.E.2d 684; Matisoff v. Dobi, 90 N.Y.2d at 135, 659 N.Y.S.2d 209, 681 N.E.2d 376).

A suspension of child support payments is warranted where the custodial parent's actions rise to the level of deliberate frustration or active interference with the noncustodial parent's visitation rights

In Morgan v Morgan, --- N.Y.S.3d ----, 2023 WL 1425597, 2023 N.Y. Slip Op. 00424 (2d Dept.,2023) the mother was awarded sole custody of the children, and the father was directed to pay child support to the mother. In July 2019, the father moved to suspend his child support obligation, alleging, inter alia, parental alienation on the part of the mother. Family Court suspended his child support obligation on the ground of parental alienation.

The Appellate Division affirmed. It held that child support payments may be suspended 'where the noncustodial parent establishes that his or her right of reasonable access to the child has been unjustifiably frustrated by the custodial parent. A suspension of child support payments is warranted only where the custodial parent's actions rise to the level of deliberate frustration or active interference with the noncustodial parent's visitation rights. The evidence adduced at the hearing demonstrated that the children held distorted and illogical views regarding the father and his efforts to develop a relationship with them. There was evidence that the older child, for example, viewed the father's efforts to develop a relationship with the children as threatening, had homicidal thoughts with regard to the father, and refused to believe that the father had traveled to visit with her even when presented with photographs and the father's passport demonstrating that he had. There was also evidence that the mother failed to make efforts to assist the children in developing a relationship with the father, and instead encouraged the children's negative view of the father in an apparent effort to weaponize the children against him. The mother refused to produce the children for parental access on numerous occasions, particularly after sessions of supervised parental access that were seen as successful in moving the children towards reunification with the father, and she discussed the father's child support payments with one of the children. The mother had also refused to produce the children for an evaluation with the court-ordered forensic evaluator after having initially done so because, according to the mother, one of the children had been traumatized by an earlier session. The evaluator testified that the mother engaged in an intentional "pattern of alienation" in which she would withhold the children from parental access with the father following appropriate and positive interactions between them, claiming that the children had been traumatized by the visit.

There is no per se rule that a finding of abuse or neglect of one sibling requires a finding of derivative abuse or neglect with respect to the other siblings

In Mattter of Destiny R, --- N.Y.S.3d ----, 2023 WL 152067, 2023 N.Y. Slip Op. 00093 (2d Dept.,2023) the Appellate Divison observed that proof of the abuse or neglect of one child is admissible evidence on the issue of the abuse or neglect of any other child of, or the legal responsibility of, the respondent" (Family Ct Act § 1046[a][i]). There is no per se rule that a finding of abuse or neglect of one sibling requires a finding of derivative abuse or neglect with respect to the other siblings. The focus of the inquiry with respect to derivative findings is whether the evidence of abuse or neglect of another child or children demonstrates such an impaired level of parental judgment so as to create a substantial risk of harm for the other child or children in the parent's care.

Mother's 911 call fell within the excited utterance exception to the rule against hearsay where she made the call immediately after a startling and disturbing event, while still concerned for the safety of her children, and her demeanor indicated that the statements represented "impulsive and unreflecting responses" to the startling event.

In Matter of Omar G, --- N.Y.S.3d ----, 2023 WL 152056, 2023 N.Y. Slip Op. 00085 (2d Dept.,2023) the appellant, an adolescent offender was charged with criminal possession of a weapon in the second degree, among other offenses. At a fact-finding hearing in the

Family Court, a recording of the call placed by the mother to the 911 emergency number during the incident was admitted into evidence under the excited utterance exception to the hearsay rule. During this call, the mother told the 911 operator, in an anxious tone and without being prompted, that "I need police.... My son's got a gun and he's waving it.... I have kids in the house." She indicated that she needed to return to the apartment, which she had left in order to make the call. The Family Court also admitted into evidence, under the excited utterance exception, a video recording of a statement made by the mother during questioning by police officers in the apartment after the appellant had been arrested and taken to a police station, and permitted a police officer to testify as to the contents of the mother's statement. While being interviewed by police officers, the mother recounted to the police officers that the appellant, while displaying a gun, said to her "I will boom you," and also said that he would "boom" the mother's boyfriend. Family Court, inter alia, found that the appellant committed acts which, if committed by an adult, would constitute the crimes of criminal possession of a weapon in the second degree, criminal possession of a firearm, endangering the welfare of a child, and obstructing governmental administration in the second degree, and adjudicated him a juvenile delinquent. The Appellate Division held that the recording of the mother's 911 call fell within the excited utterance exception to the rule against hearsay. The mother made the call immediately after a startling and disturbing event, while she was still concerned for the safety of the two children in the apartment, and her demeanor indicated that the statements represented "impulsive and unreflecting responses" to the startling event. It erred however, in admitting as excited utterances the statements subsequently made by the mother while being interviewed by police officers in her apartment. Those statements, made after the appellant had been handcuffed and removed from the scene, were not spontaneous, but were made in narrative form and in response to prompting, after sufficient time had passed to render the mother capable of engaging in reasoned reflection. Although the mother raised her voice and became agitated as she recalled the incident, she was no longer acting under the stress of the incident itself, and her tone "did not evidence an inability to reflect upon the events" (People v. Cantave, 21 N.Y.3d 374, 382, 971 N.Y.S.2d 237, 993 N.E.2d 1257). The error in admitting those statements was not harmless with respect to the charge of criminal possession of a weapon in the second degree, and appellant was entitled to a new fact-finding hearing on the count of the petition charging criminal possession of a weapon in the second degree.

When a party has defaulted, the court must order child support based upon the needs or standard of living of the child, whichever is greater

In Rosenbaum v Festinger, --- N.Y.S.3d ----, 2023 WL 1808123, 2023 N.Y. Slip Op. 00684 (2d Dept.,2023) the parties were married in December 2001 and had two children, born in 2003 and 2004, respectively. In January 2013, the plaintiff commenced this action for a divorce. In September 2014, the plaintiff moved, inter alia, to direct the defendant to comply with certain discovery requests and, if the defendant failed to comply, to preclude him from offering evidence at trial relating to financial matters. In an order dated December 23, 2014, after a hearing, the Supreme Court granted the plaintiff's motion. It stated, inter alia, that, in the event that the defendant failed to comply with the order, the court would determine child support based on the children's needs as established at trial rather than upon consideration of the formula and factors set forth in the Child Support Standards Act. Subsequently, the defendant failed to comply with the conditional order of preclusion and,

consequently, was precluded from presenting evidence at trial regarding his financial circumstances. In a judgment of divorce the Supreme Court, inter alia, directed the defendant to pay child support to the plaintiff of $5,597 per month. The Appellate Division affirmed. It held that 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" (Domestic Relations Law § 240[1–b][k]). Here, as authorized, the Supreme Court calculated the defendant's monthly child support obligation on the basis of the children's needs and did not impute income to the defendant. Thus, the requirement that the court specifically state the amount of income imputed and the resultant calculations did not apply.

Under the UCCJEA, a court of New York shall treat a foreign country as if it were a state of the United States" and may treat a foreign nation as a home state

In Cavez v Maldonado, --- N.Y.S.3d ----, 2023 WL 1808086, 2023 N.Y. Slip Op. 00659 (2 Dept.,2023) the parties have one son, born in March 2009, who had resided in Guatemala with the mother since birth. The father lives in New York. On June 20, 2021, the mother and the child came to the United States on tourist visas. On July 6, 2021, the child came to New York to visit the father. In October 2021, when the father allegedly refused to return the child to the mother, the mother filed two petitions for writs of habeas corpus which were later "marked satisfied." On October 13, 2021, the father moved, by order to show cause, requesting the Family Court to exercise temporary emergency jurisdiction over the child pursuant to Domestic Relations Law § 76–c; he also filed a petition for custody of the child. On October 25, 2021, the mother cross-petitioned for custody. Subsequently, the court confirmed the referee's finding that New York is not the child's home state and that there was no basis for the court to exercise temporary emergency jurisdiction. In an order dated December 8, 2021, the court, inter alia, in effect, dismissed the father's petition on the ground that it lacked jurisdiction and directed that the child be released to the physical custody of the mother for the purpose of returning to Guatemala, the child's home state. The Appellate Division affirmed. It observed that the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) defines "home state" as "the state in which a child lived with a parent or a person acting as a parent for at least six consecutive months immediately before the commencement of a child custody proceeding" (Domestic Relations Law § 75–a[7]) Under the UCCJEA, a court of New York "shall treat a foreign country as if it were a state of the United States" (Domestic Relations Law § 75–d[1]) and thus, may treat a foreign nation as a home state. When the parties commenced their custody proceedings in October 2021, Guatemala was the child's home state for the purposes of the statute, and New York had never been the home state of the child. The Family Court therefore lacked jurisdiction to make an initial custody determination (see Domestic Relations Law § 76[1][a]).

Since the father testified that he was paying the mortgage and utility bills for the house in which the mother and the child were residing, the Support Magistrate erred in failing to ascertain and deduct from his child support obligation the shelter costs incurred by the father in providing housing for the mother and the child

In Glaudin v Glaudin, --- N.Y.S.3d ----, 2023 WL 1808087, 2023 N.Y. Slip Op. 00662 (2d Dept.,2023) the parties had one child together, who was born in November 2018 while the parties were in the process of obtaining a divorce. The father moved out of the marital residence, which was owned by him as separate property, and the mother and the child continued to live there. In January 2020, the mother filed a petition against the father for child support. After conducting a hearing, the Support Magistrate determined that the father's assertion that he was unable to procure employment lacked credibility and imputed certain income to him based on his reported monthly expenses. In an order dated January 13, 2021, the Support Magistrate, inter alia, directed the father to pay basic child support of $211 per week. The father filed objections to the Support Magistrate's order, asserting that he had lost his last job due to absences resulting from being required to attend Family Court proceedings, and that the mother was residing in his home without paying rent or utility bills. In an order dated February 19, 2021, the Family Court denied the father's objections. The Appellate Division held that the Support Magistrate providently exercised her discretion in imputing income to the father based on his work experience and earning capacity, and her assessment of his credibility. However, since the father testified without contradiction that he was responsible for paying the mortgage and utility bills for the house in which the mother and the child were residing, the Support Magistrate erred in "failing to ascertain and deduct from his child support obligation the shelter costs incurred by the [father] in providing housing for [the mother and the child]" As a result of the failure to award him a credit for the carrying charges he has incurred during the mother's exclusive occupancy of the marital residence, the father "was making double shelter payments". The father's objection to the failure to award him such a credit should have been granted. It remitted the matter to the Family Court for a recalculation of the father's child support obligation and child support arrears, with the father receiving a credit for any carrying charges incurred by him in providing housing to the mother and the child.

Appellate Division, Third Department

Visitation denied where exposing the children further to the mother, who continued to deny that sexual abuse took place, would retraumatize them and be harmful to their welfare

In Matter of William Z v Kimberly Z, --- N.Y.S.3d ----, 2023 WL 402039, 2023 N.Y. Slip Op. 00352 (3d Dept.,2023) Family Court granted sole custody to the father and denied the mother visitation. The Appellate Division affirmed. It found that the testimony of the children's three mental health counselors provided ample basis for the court's conclusion that sexual abuse by the grandfather took place and that the mother was aware of it but took no action to investigate the allegations or protect her children from their abuser. It found that exposing the children further to the mother, who continued to deny that the abuse took place, would retraumatize them and be harmful to their welfare. The record made clear that the mother failed to address or even acknowledge her involvement in the abuse via her own existing counseling. A sound and substantial basis in the record supported Family Court's determination to deny the mother visitation with the children.

Where the court does not identify the family offense(s) proven by the petitioner, the Appellate Division may independently review the record and determine whether the evidence supports Family Court's finding that the respondent committed one or more family offense.

In Matter of Pauline DD., v. Dawn DD.--- N.Y.S.3d ----, 2023 WL 402052, 2023 N.Y. Slip Op. 00353 (3d Dept.,2023) petitioner commenced a family offense proceeding. At the conclusion of the hearing, Family Court issued a bench decision, which found that the petitioner had committed the family offense of harassment in the second degree. The court also found that the respondent had committed an unspecified family offense and issued a two-year protection order. The Appellate Division held that where, as here, the court does not identify the family offense(s) proven by the petitioner, it may independently review the record and determine whether the evidence supports Family Court's finding that the respondent committed one or more family offenses.

Where Administrative Law Judge determination was properly before the Support Magistrate and Family Court because it was annexed to the petition and formed a part of that pleading it would not, standing alone, serve as proof of the father's allegations because it was not formally offered and received into evidence.

In Woodcock v Welt, --- N.Y.S.3d ----, 2023 WL 402096, 2023 N.Y. Slip Op. 00360 (3d Dept.,2023) in July 2019, the filed a support modification petition in which he claimed that he was disabled and unable to work. He provided support for that claim, however, annexing to the petition a May 2019 determination by an Administrative Law Judge (ALJ) who had presided over a hearing on his application for Social Security disability benefits. The ALJ determination included a description of the medical proof presented regarding the father's physical condition, and findings that the father was disabled as defined by federal law as of November 1, 2016 and entitled to supplemental security income. After a hearing on the father's petition, where the ALJ determination was a subject of inquiry but the written decision itself was never formally entered into evidence, the Support Magistrate issued a decision finding that the father, who had been laid off from his employment during the pendency of the proceeding, had demonstrated a change in circumstances since the prior support order in that he was physically impaired from working. The Support Magistrate found that the father remained capable of performing some work, imputed a lower annual income of $20,280 to him and, relying upon that figure, reduced his support obligation to $50 a month. Family Court denied the mother's objections. The Appellate Division affirmed. It held that although the ALJ determination was properly before the Support Magistrate and Family Court because it was annexed to the petition and formed a part of that pleading (see CPLR 3014), it would not, standing alone, serve as proof of the father's allegations because it was not formally offered and received into evidence. However, an order from a Support Magistrate is final and Family Court's review under Family Ct Act § 439(e) is tantamount to appellate review, and "the absence of timely objection" to evidence at a hearing will result in the waiver of any challenge to its consideration on appeal. The mother offered no objection to the consideration of the ALJ determination during the fact-finding hearing. Both counsel for the mother and the Support Magistrate questioned the father regarding the ALJ determination, and he testified regarding its existence, his purported inability to work

and his receipt of SSI. The mother waived her objection to consideration of the ALJ determination under these circumstances and, as such, Family Court properly denied it. The Appellate Division was satisfied that the father demonstrated a sufficient change in circumstances to warrant a downward modification in his child support obligation

Family Court's allocution in juvenile delinquency proceeding fell short of the statutory mandate warranting dismissal where Family Court failed to question respondent's mother regarding the acts to which respondent admitted, his waiver of the fact-finding hearing or her awareness of the possible dispositional options.

In Matter of Christian W.,--- N.Y.S.3d ----, 211 A.D.3d 1378, 2022 WL 17835265, 2022 N.Y. Slip Op. 07275 (3d Dept.,2022) petitioner commenced three juvenile delinquency proceedings against respondent (born in 2008). In satisfaction of all three petitions, respondent admitted to the charge of criminal mischief in the fourth degree, as alleged in the first petition, and consented to be placed in a nonsecure facility for one year. Respondent appealed. The Appellate Division held that respondent's argument that the plea allocution did not comply with Family Ct Act § 321.3 was not moot, despite the expiration of respondent's placement, because the delinquency determination challenged herein "implicates possible collateral legal consequences. Further, preservation of such a claim is not required. It held that Family Court must "ascertain through allocution of the respondent and his [or her] parent or other person legally responsible for his [or her] care, if present, that (a) he [or she] committed the act or acts to which he [or she] is entering an admission, (b) he [or she] is voluntarily waiving his [or her] right to a fact-finding hearing, and (c) he [or she] is aware of the possible specific dispositional orders" (Family Ct Act § 321.3[1]). Although respondent's mother was present at the April 2021 allocution, Family Court only asked her whether she had sufficient time to speak to respondent about the proceedings. The record reflected that the court failed to question respondent's mother regarding the acts to which respondent admitted, his waiver of the fact-finding hearing or her awareness of the possible dispositional options. As a result, Family Court's allocution fell short of the statutory mandate (see Family Ct Act § 321.3[1]) The order was reversed and the petition dismissed.

Appellate Division, Fourth Department

The Marihuana Regulation and Taxation Act) amended Family [Court] Act § 1046 (a) (iii), in pertinent part, by specifically foreclosing a prima facie neglect finding based solely upon the use of marihuana.

In Matter of Gina R, --- N.Y.S.3d ----, 211 A.D.3d 1483, 2022 WL 17882663, 2022 N.Y. Slip Op. 07321(4th Dept.,2023) a neglect proceeding, the Appellate Division, inter alia, agreed with the mother that the court erred in applying Family Court Act § 1046 (a) former (iii) in determining that petitioner established a prima facie case that the subject children were neglected based solely on the mother's use of marihuana, without presenting

evidence that the children's condition was impaired or at imminent risk of impairment (see Family Ct Act § 1046 [a] [iii]) and modified the order by vacating that finding. "The Marihuana Regulation and Taxation Act (L 2021, ch 92) amended Family [Court] Act § 1046 (a) (iii), in pertinent part, by specifically foreclosing a prima facie neglect finding based solely upon the use of marihuana, while still allowing for consideration of the use of marihuana to establish neglect, provided that there is a separate finding that the child's physical mental or emotional condition was impaired or is in imminent danger of becoming impaired.. The amendment to section 1046 (a) (iii) went into effect on March 31, 2021 (see L 2021, ch 92), two days before the court rendered its decision in this case and, as a general matter, a case must be decided upon the law as it exists at the time of the decision. Inasmuch as petitioner's presentation of evidence was based on the state of the law at the time of the hearing, petitioner may not have fully explored the issue of impairment. It remitted the matter to Family Court to reopen the fact-finding hearing on the issue whether the children's condition was impaired or at imminent risk of impairment as a result of the mother's use of marihuana.

Contract is unambiguous if language it uses has a definite and precise meaning, unattended by danger of misconception, and concerning which there is no reasonable basis for a difference of opinion.

In Vella v Vella, 2023 WL 1494924 (4th Dept.,2023) the Appellate Division held that whether an agreement is ambiguous is a question of law for the courts ... Ambiguity is determined by looking within the four corners of the documents, not to outside sources. (Kass v. Kass, 91 N.Y.2d 554, 566, 673 N.Y.S.2d 350, 696 N.E.2d 174 [1998]). A contract is unambiguous if the language it uses has a definite and precise meaning, unattended by danger of misconception in the purport of the [agreement] itself, and concerning which there is no reasonable basis for a difference of opinion'.

Family Court order staying petitions for custody is not appealable as of right

In Feltz v Yanucil, 2023 WL 1495062 (4th Dept.,2023) the father filed a petition seeking, inter alia, modification of the prior custody order and the Family Court determined that New York was an inconvenient forum and issued an order staying the proceedings pending the commencement of custody and visitation proceedings in Mercer County, New Jersey. The Appellate Division held that the order staying the father's petitions was not appealable as of right. (but granted leave to appeal on its own motion).

The court does not have the right to impose counseling and related conditions as a prerequisite to visitation

In Sharlow v Hughes --- N.Y.S.3d ----, 2023 WL 1495695, 2023 N.Y. Slip Op. 00518 (4th Dept.,2023) the Appellate Division held that the court erred in requiring the mother to participate in counseling, take her medications as prescribed, and provide proof of a negative hair follicle test prior to having therapeutic visitation with her children. Although

the court may include such directives as a component of visitation, it does not have the authority to make them a prerequisite to visitation.

Where a party fails to appear in court on a scheduled date but is represented by counsel, the order of protection is not one entered upon the default of the aggrieved party and appeal is not precluded.

In Matter of Bailey v Bailey, --- N.Y.S.3d ----, 2023 WL 1877874, 2023 N.Y. Slip Op. 00780 (4th Dept., 2023) the Appellate Division agreed with the father that Family Court erred in entering an order of protection upon his default based on his failure to appear in court. The record establishes that the father was represented by counsel, and it has previously determined that where a party fails to appear in court on a scheduled date but is represented by counsel, the order is not one entered upon the default of the aggrieved party and appeal is not precluded. It agreed with the father that the court erred in issuing an order of protection without adhering to the procedural requirements of Family Court Act § 154-c (3) ..., inasmuch as the court did not make a finding of fact that the mother was entitled to an order of protection based upon 'a judicial finding of fact, judicial acceptance of an admission by the father or judicial finding that the father has given knowing, intelligent and voluntary consent to its issuance. The court failed to specify which family offense the father committed. Nevertheless, remittal was not necessary because the record was sufficient for this Court to conduct an independent review of the evidence which was sufficient to establish by a fair preponderance of the evidence that the father committed the family offenses of criminal obstruction of breathing or blood circulation and stalking in the fourth degree warranting the issuance of an order of protection against him (see Family Ct Act § 832).

Effective appellate review, whatever the case but especially in child visitation, custody or neglect proceedings, requires that appropriate factual findings be made by the trial court

In Matter of Ianello v Colonomos, --- N.Y.S.3d ----, 2023 WL 1877715, 2023 N.Y. Slip Op. 00767 (4th Dept., 2023) the father appealed from an order that inter alia, awarded the parties joint legal custody of the child with primary physical custody to petitioner mother. The Appellate Division observed that in the order on appeal, the court failed to make any factual findings whatsoever to support the award of primary physical custody. It is well established that the court is obligated 'to set forth those facts essential to its decision. Here, the court completely failed to follow that well-established rule when it failed to issue any factual findings to support its initial custody determination, nor did it make any findings with respect to the relevant factors that it considered in making a best interests of the child determination. Effective appellate review, whatever the case but especially in child visitation, custody or neglect proceedings, requires that appropriate factual findings be made by the trial court—the court best able to measure the credibility of the witnesses. It reversed the order and remitted the matter to Family Court to make a determination on the petition and cross petition, including specific findings as to the best interests of the child, following an additional hearing if necessary.

Supreme Court

Supreme Court held that CPLR § 3122(d) was not intended to include reimbursement of attorneys fees within the context of a matrimonial action

In L.F.,v. M.F.,--- N.Y.S.3d ----, 2023 WL 1875169, 2023 N.Y. Slip Op. 23038 (Sup Ct, 2023) the Supreme Court held that CPLR § 3122(d) was not intended to include reimbursement of attorneys fees within the context of a matrimonial action. CPLR § 3122(d) provides as follows: (d) Unless the subpoena duces tecum directs the production of original documents for inspection and copying at the place where such items are usually maintained, it shall be sufficient for the custodian or other qualified person to deliver complete and accurate copies of the items to be produced. The reasonable production expenses of a non-party witness shall be defrayed by the party seeking discovery. After a close and fair reading of the plain language of CPLR § 3122(d), this Court did not find that the statute expressly or implicitly authorizes the reimbursement of attorney's fees for a non-party witness responding to a lawfully issued subpoena, especially within the context of a matrimonial action. Nowhere in the plain language of CPLR § 3122(d) are the words "legal fees", "counsel fees", "attorney's fees" or "fees".

New York's priest-penitent privilege belongs only to the penitent and only under circumstances affirmed by the New York Court of Appeals in *Lightman v. Flaum*, 97 N.Y.2d 128, 134, 736 N.Y.S.2d 300, 761 N.E.2d 1027 [2001] (only information imparted 'in confidence and to obtain spiritual guidance).

In L.M., v. M.A., 2023 WL 1810035 (Sup Ct, 2023) the Supreme Court declined to quash a subpoena requiring a Coptic Orthodox Church Bishop to testify in a matrimonial action over his objection, allegedly based on religious doctrine, where his testimony was necessary to determine whether or not he conducted a wedding ceremony for the two parties to this action. The parties disagreed about whether they were married in 2017, with the plaintiff stating that they were married, and the defendant stating that the Bishop "blessed" their relationship, but did not marry them. The Bishop refused to testify as to which ceremony he performed, allegedly because his religious conviction prevents him from testifying in a civil action involving church members, and the parties and their witnesses have testified to diametrically conflicting views as to which ceremony took place. The Court and the parties all asked the Bishop to testify. Defendant served a valid subpoena upon the Bishop and the Bishop, through counsel, moved to quash the subpoena, stating through counsel and an affidavit from a Coptic theologian, that it is contrary to the tenets of the religion for the Bishop to testify in civilian court "brother against brother."Both parties expressly waived any privilege and sought to compel the Bishop's testimony. The court found that Bishop A.B.'s testimony was necessary to make that "compelling State interest" determination of whether or not the parties were married.

Family Court

In Matter of I.M., N.M., J.A.D., D.M., K.D., B.M.,--- N.Y.S.3d ----, 2022 WL 18107290, 2022 N.Y. Slip Op. 22398 (Family Court, 2022) Administration for Children's Services ("ACS") filed an abuse petition against the respondent P.D. ("RF") on behalf of the children I.M., N.M., J.A.D., D.M. and K.D. A finding of abuse and neglect was entered against RF on behalf of all those children on August 2, 2022. On August 25, 2022, ACS filed another abuse petition against RF and T.M. ("RM"). On August 29, 2022, the attorney for SC B.M. and the attorney for SC D.M. filed separate applications for DNA testing to be done on RF to determine if he was the biological father of their respective clients. On September 1, 2022, ACS filed a separate application for DNA testing under separate legal grounds but indicated that they fully supported the motions filed by the attorneys for the children. On September 8, 2022, RM filed an application in opposition to the motions filed by the attorneys for the children and ACS. RF filed a response on October 24, 2022, after requesting extensions. Family Court granted the motion. It observed that Family Court Act 1038-a is clear that "upon the motion of a petitioner or attorney for the child, the court may order a respondent to provide non-testimonial evidence, only if the court finds probable cause that the evidence is reasonably related to establishing the allegations in a petition filed pursuant to this article. Such order may include, but not be limited to, provision for the taking of samples of blood, urine, hair or other materials from the respondent's body in a manner not involving an unreasonable intrusion or risk of serious physical injury to the respondent." In Matter of Abe A., 56 N.Y.2d 288, 452 N.Y.S.2d 6, 437 N.E.2d 265 (1982), the Court held that an order to obtain a blood sample of a suspect may be issued provided the People establish (1) probable cause to believe the suspect has committed the crime, (2) a "clear indication" that relevant material evidence will be found, and (3) the method used to secure it is safe and reliable." In re Anthony M., supra, the Court upheld that the agency had the ability to intervene and request paternity testing where paternity was disputed during a pending abuse matter. However, courts have not found probable cause in cases where the request for nontestimonial evidence was not related to the allegations. The Court granted the motions of the attorneys for the children and ACS and ordered RF and SC D.M. and B.M. to submit to DNA testing forthwith at an approved laboratory and in compliance with all regulations. The Court found probable cause to order RF to submit to DNA testing for the purpose of determining the paternity of both D.M. and B.M. The Court heard and credited the testimony of I.M. during the 2020 fact-finding against RF and his testimony established that RF repeatedly sexually assaulted RM and that both RM and RF made statements claiming that D.M. was their child together. Thus, this put D.M. paternity at issue, as there are conflicting statements from the parties as to his paternity. Establishing his paternity is in his best interests, as he will then know who his father is and there will be no uncertainty surrounding the father/child relationship. As to B.M., ACS alluded in their motion and had previously stated on the record that RF may have made statements in another forum about being the father of B.M. This put his paternity at issue as well and it is in the best interest of the child for him to know his father.

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