Bits and Bytes™

May 1, 2023 **Volume 20, No. 9**

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Appellate Division, First Department

Executive Order 8.202.8 tolled the statute of limitations until that order and subsequent Executive Orders extending the tolling period were rescinded. Since the period of the toll must be excluded from the calculation of the filing deadline, the juvenile delinquency petitions were timely filed on July 2, 2021

In Matter of Isaiah H., --- N.Y.S.3d ----, 2023 WL 2603170, 2023 N.Y. Slip Op. 01587 (1st Dept.,2023) the Appellate Division, reversed an order which granted the respondent's motion to dismiss the petitions charging him with acts, which, if committed by an adult, would constitute crimes, and the matter was remanded to Family Court for further proceedings. It held that Family Court erred in dismissing the petitions as untimely filed. By Executive Order No. 8.202.8, issued on March 20, 2020, due to the Covid–19 pandemic, the "time limit[s] for the commencement, filing, or service of any legal action, notice, motion, or

other process or proceeding, as prescribed by the procedural laws of the state" were "tolled" (9 NYCRR 8.202.8; see Matter of Oustatcher v. Clark, 198 A.D.3d 420, 421, 155 N.Y.S.3d 12 [1st Dept. 2021]). "A toll suspends the running of the applicable period of limitation for a finite time period, and the period of the toll is excluded from the calculation of the relevant time period. However, a suspension "simply delays expiration of the time period until the end date of the suspension". By its plain terms, Executive Order 8.202.8 tolled the statute of limitations, until that order and subsequent Executive Orders extending the tolling period were rescinded by Executive Order 8.210, issued on June 24, 2021, and effective the next day (9 NYCRR 8.210). Since the period of the toll must be excluded from the calculation of the filing deadline, the juvenile delinquency petitions were timely filed on July 2, 2021. Respondent allegedly committed his first unlawful act on December 21, 2019. Normally, the filing deadline for the petitions would have been the respondent's 18th birthday – June 7, 2021, which was 534 days after he allegedly committed the first act. When the first executive order took effect on March 20, 2020, there were 444 days remaining before the respondent's 18th birthday. By adding 444 days to June 24, 2021, when the executive order's tolling provisions were terminated, the Agency's deadline for filing the petitions was August 25, 2022. Here, the Agency refiled and served the second set of petitions on July 2, 2021, only eight days after the executive orders were rescinded. The order rescinding the prior Executive Orders meant that the statute of limitations would start running again, "picking up where it left off" (Artis v. District of Columbia, —— U.S. ——, 138 S. Ct. 594, 601, 199 L.Ed.2d 473 [2018]).

Appellate Division, Second Department

Where the plaintiff advised the defendant in an email that he would be "willing to cover the entire cost of [the child's] education" if the child attended a particular school Supreme Court providently exercised its discretion in directing the plaintiff to pay 100% of the child's tuition

In Abayomi v Guevara, --- N.Y.S.3d ----, 2023 WL 2904377, 2023 N.Y. Slip Op. 01880 (2d Dept.,2023) the plaintiff moved, inter alia, to modify the judgment of divorce to permit him to pay a portion of his child support obligation directly to the private school in which the child had been enrolled to cover his share of the tuition payment. There are no provisions in the order of support pertaining specifically to educational expenses or apportioning responsibility for that add-on expense between the parties. Supreme Court, denied his motion and, sua sponte, directed the plaintiff to pay 100% of the child's tuition. The Appellate Division affirmed and rejected the plaintiffs argument that the Supreme Court improvidently exercised its discretion by requiring him to pay 100% of the child's tuition. The evidence demonstrated that the plaintiff decided that the child should be enrolled in a particular private school, he commenced the application procedures for that school, and when he sought the defendant's cooperation in the process, he advised the defendant in an email that he would be "willing to cover the entire cost of [the child's] education" if the child attended that school. Further, the plaintiff did not contend that he was unable to support himself and pay 100% of the child's tuition. Under the circumstances, it held that the Supreme Court providently exercised its discretion in directing the plaintiff to pay 100% of

the child's tuition (see Sinnott v. Sinnott, 194 A.D.3d at 877, 149 N.Y.S.3d 441; Matter of Weissbach v. Weissbach, 169 A.D.3d at 704, 95 N.Y.S.3d 85).

The presumption that parental access is in the best interests of the child, even when that parent is incarcerated, was overcome by a showing, that parental access would be harmful to the child's welfare or not in the child's best interests

In Matter of Romero-Flores v Hernandez, --- N.Y.S.3d ----, 2023 WL 2590751, 2023 N.Y. Slip Op. 01516(2d Dept.,2023) the father and the mother were the parents of one child. In January 2019, the father, who had been incarcerated since August 2011, filed a petition seeking parental access to the child. At the close of the father's case at a hearing on his petition, the Family Court granted the motion of the attorney for the child to dismiss the petition. The Appellate Division affirmed. It held that parental access with a noncustodial parent is presumed to be in the best interests of the child, even when that parent is incarcerated. However, the presumption may be overcome upon a showing, by a preponderance of the evidence, that parental access would be "harmful to the child's welfare or not in the child's best interests." The evidence demonstrated that the father had been incarcerated since 2011 for attempted murder and arson. The father had set fire to the mother's vehicle and that fire spread to the mother's family's house. The fire caused the death of the child's uncle and endangered the child as well as the mother, who the father knew were inside the house at the time. Additionally, the child was eight months of age at the time the father was incarcerated, and the father has had no contact with the child since that time. At the time of the hearing, the child was 11 years old and would be more than 18 years of age at the time of the father's earliest release date. Under these circumstances, the court properly granted the motion

Where the plaintiff demonstrated that three years had passed since the judgment of divorce was entered, Supreme Court erred in summarily denying the plaintiff's motion to upwardly modify the defendant's basic child support obligation

In Cooper v Oliver --- N.Y.S.3d ----, 2023 WL 2994847, 2023 N.Y. Slip Op. 01981(2d Dept.,2023) the plaintiff moved, to modify the judgment of divorce to, among other things, upwardly modify the defendant's basic child support obligation. Supreme Court, denied the motion. The Appellate Division held that as relevant here, a court may modify an award of child support where three years have passed since the award was entered, last modified, or adjusted (see Domestic Relations Law § 236[B][9][b][2][ii][A]). In support of the plaintiff's motion, the plaintiff demonstrated that three years had passed since the judgment of divorce was entered. Under these circumstances, regardless of whether the plaintiff demonstrated a substantial change in circumstances, the Supreme Court erred in summarily denying that branch of the plaintiff's motion which was to modify the judgment of divorce to upwardly modify the defendant's basic child support obligation.

Consent to adoption is not required of a parent who evinces an intent to forego his or her parental rights and obligations by his or her failure for a period of six months to contact or

communicate with the child or the person having legal custody of the child although able to do so

In Matter of Ryan --- N.Y.S.3d ----, 2023 WL 2994924, 2023 N.Y. Slip Op. 02010 (2d Dept.,2023) the child was born in March 2017. The child's mother was killed in November 2018. In April 2021, the father was convicted of murder in the second degree for the killing of the mother. In June 2020, the petitioners filed a petition to adopt the child, alleging, inter alia, that pursuant to Domestic Relations Law § 111(2)(a), the father's consent to adoption was not required. After a hearing, Family Court determined that the father had abandoned the child and that the father's consent to the adoption of the child, therefore, was not required. The Appellate Division affirmed. It held that the petitioners met their burden of establishing, by clear and convincing evidence, that the father abandoned the child, and that the father's consent to the adoption therefore was not required. Under Domestic Relations Law § 111(2)(a), consent to adoption is not required of a parent who evinces an intent to forego his or her parental rights and obligations by his or her failure for a period of six months to contact or communicate with the child or the person having legal custody of the child although able to do so. Here, the evidence at the hearing established that the father had no contact with the child since 2018. The father's incarceration did not absolve him of the responsibility to maintain contact with the child. In addition, the evidence established that between March 2019, when the petitioners obtained custody of the child, and March 2022, when the hearing occurred, the father did not send any letters or gifts to the child or provide any financial support.

Custody determinations should generally be made only after a full and plenary hearing and inquiry. A court opting to forgo a plenary hearing must take care to clearly articulate which factors were or were not material to its determination, and the evidence supporting its decision

In Matter of Baez-Delgadillo v Moya, --- N.Y.S.3d ----, 2023 WL 2994903 (Mem), 2023 N.Y. Slip Op. 01994 (2d Dept.,2023) the parties, who were never married to each other, were the parents of a child born in 2012. The child had been in the physical custody of the mother since his birth. In September 2019, the mother filed a petition for sole legal and physical custody of the child. On December 16, 2021, the Supreme Court awarded the mother temporary custody of the child, awarded the father supervised parental access and directed the father to enroll in therapy. On the record that day, the court directed the father to enroll in batterer's intervention and alcohol treatment programs. The father failed to comply with the court's directives. In an order dated March 2, 2022, the court, without a hearing, granted the mother's petition for sole legal and physical custody and suspended the father's parental access to the child based on his failure to attend alcohol treatment and therapy. The Appellate Division reversed, It held that custody determinations should generally be made only after a full and plenary hearing and inquiry" (see S.L. v. J.R., 27 N.Y.3d 558, 563, 36 N.Y.S.3d 411, 56 N.E.3d 193). A court opting to forgo a plenary hearing must take care to clearly articulate which factors were—or were not—material to its determination, and the evidence supporting its decision. Similarly, visitation determinations should generally be made after a full evidentiary hearing to ascertain the best interests of the child". Here, the Supreme Court erred in making a final custody determination without a hearing and without inquiring into the best interests of the parties' child. Moreover, the

court failed to articulate the factors and evidence material to its determination The Supreme Court also erred in suspending the father's parental access without determining the best interests of the child. Furthermore, the court improperly conditioned the father's future parental access or reapplication for parental access rights upon his compliance with treatment The matter was remitted to the Supreme Court, to conduct a hearing and for new determinations.

Where a willful violation of an order of support is found, the determination as to the appropriate sanction lies within the Family Court's discretion

In O'Keeffe, v O'Keeffe, --- N.Y.S.3d ----, 2023 WL 2994936, 2023 N.Y. Slip Op. 02006 (2d Dept.,2023) the Support Magistrate, inter alia, found that the father willfully failed to comply with his child support obligations and in an order of commitment the Family Court, in effect, confirmed so much of the order of disposition as found that the father willfully failed to comply with his child support obligations, and committed the father to the Nassau County Correctional Facility for a period of 90 days unless he paid the purge amount of $15,000. The Appellate Division rejected the father's argument on appeal that the Family Court improperly issued an order of commitment since less drastic enforcement remedies were available, and that the purge amount set by the court was excessive. It held that where, as here, a willful violation of an order of support is found, the determination as to the appropriate sanction lies within the Family Court's discretion. Under the circumstances of this case, the court did not improvidently exercise its discretion.

Appellate Divison, Fourth Department

Mother neglected the children by, among other things, failing to provide a safe environment for them.

In Matter of Cameron J.S., --- N.Y.S.3d ----, 2023 WL 2547887, 2023 N.Y. Slip Op. 01416 (4th Dept.,2023) the Appellate Division affirmed an order which adjudged that the mother neglected the children by, among other things, failing to provide a safe environment for them. (Family Ct Act § 1012 [f] [i] [B]). The evidence presented by the petitioner established that one of the mother's adult children had previously sexually abused one of the subject children over the course of several years. That adult child was also mentally unstable, volatile, and violent, having physically fought with others in the home, punched holes in walls, and destroyed other property in the home. The evidence further established that the children witnessed those events and were, at times, the victims of those events. The police were repeatedly called to the residence to address issues involving the adult child, and his mere presence at the house left the subject children "uncomfortable" and "terrified." Despite the petitioner's requests that the mother adhere to a safety plan and ask the adult child to move from the residence, the evidence established that the adult child remained a constant presence in the home and that the mother refused to cooperate with the petitioner. It concluded that the evidence supported the determination that the mother failed to provide adequate supervision of the children. The mother's actions in continuing to allow the adult child to reside in or visit the home placed the children "at substantial risk of harm.

The **New York Matrimonial Trial Handbook** by Joel R. Brandes is available in **Kindle and ebook editions directly from the Consulting Services bookstore,** and in hardcover from **Bookbaby**, **as well as from Amazon, Barnes & Noble, and other booksellers**. **(For information click on links). New purchasers of the New York Matrimonial Trial Handbook from the Consulting Services Bookstore obtain a free copy of the New York Matrimonial Trial Handbook 2023 Update pdf Edition by submitting proof of purchase to divorce@ix.netcom.com and obtaining a coupon code that can be used on Consulting Services Bookstore website.**

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