Bits and Bytes™

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The New York Matrimonial Trial Handbook is a "how to" book. It focuses on the procedural and substantive law, as well as the law of evidence, that an attorney must have at his or her fingertips when trying a matrimonial action. The book deals extensively with the testimonial and documentary evidence necessary to meet the burden of proof. There are *thousands of suggested questions* for the examination and cross-examination of the parties and expert witnesses at trial. It is available in hardcover, as well as Kindle and electronic editions. See Table of Contents. The New York Matrimonial Trial Handbook 2023 Cumulative Update is available on Amazon in hardcover, paperback, Kindle, and electronic editions. See Table of Contents. (Click on links)

Appellate Division, Second Department

Father's contentions concerning the Support Magistrate's order were unpreserved for appellate review, where the father failed to raise these contentions in his objections before the Family Court

In Licitra v Licitra, 2023 WL 5419571 (2d Dep't, 2023) after the Support Magistrate dismissed the father's petition for modification of the support order the father filed objections in which he listed the reasons provided by the Support Magistrate for dismissing the petition, without raising any arguments addressed to the Support Magistrate's order. Family Court denied the father's objections on the ground that they were not specific within the meaning of Family Court Act § 439(e). The Appellate Division observed that the father's contentions concerning the Support Magistrate's order were unpreserved for appellate review because he failed to raise these contentions in his objections before the Family Court. Since the father's objections to the Support Magistrate's order were not specific within the meaning of Family Court Act § 439(e), the court properly denied his objections on that ground.

Support Order reversed where it contained language suggesting that the mother was advised of her right to seek counsel but the transcript of the hearing contained no proof that she was advised of this right or that she voluntarily and knowingly waived this right

In Moor v Moor, 218 A.D.3d 772, 193 N.Y.S.3d 250, 2023 N.Y. Slip Op. 03918 (2d Dept.,2023) the father filed a petition seeking, inter alia, an award of child support from the mother. After the father appeared with counsel and the mother appeared pro se the Support Magistrate, inter alia, in effect, granted the father's petition and directed the mother to pay child support. Although the order contained language suggesting that the mother was advised of her right to seek counsel as required by Family Court Act § 433, the transcript of the hearing contained no proof that the mother was advised of this right or that she voluntarily and knowingly waived this right and proceeded without counsel. The Appellate Division held that the Support Magistrate erred in failing to advise the mother that she had an absolute right to be represented by counsel at the hearing at her own expense and that she was entitled to an adjournment to retain the services of an attorney. The Support Magistrate also erred in proceeding with the hearing without an explicit waiver of the right to counsel from the mother as there was no word or act in the record upon which the Family Court could have concluded that the mother explicitly waived that right. It remitted the matter to the Family Court for a new hearing and determination.

A party seeking to vacate a default ordinarily must show a reasonable excuse for his or her default and a meritorious defense to the action or motion. In evaluating a proffered excuse, the court should take into account "the procedural history and particular facts of the case".

In Davis v Davis --- N.Y.S.3d ----, 2023 WL 5251144, 2023 N.Y. Slip Op. 04301 (2d Dept.,2023) the Appellate Division reversed an order which granted a default judgment of divorce. The parties married in 1984 and had two adult children. In December 2018, the plaintiff commenced this action for a divorce and later admitted that she was served with a summons with notice. The Appellate Division pointed out that under CPLR 5015(a)(1), a party seeking to vacate a default ordinarily must show a reasonable excuse for his or her default and a meritorious defense to the action or motion. In matrimonial actions, it applies a liberal policy with respect to vacating defaults. In evaluating a proffered excuse, the court

should take into account "the procedural history and particular facts of the case". It found that the Supreme Court improvidently exercised its discretion in denying the defendant's motion. After admitting that she was served with the summons with notice, the defendant voluntarily and actively participated in the divorce proceedings, including entering into a partial stipulation of settlement concerning issues of equitable distribution, up until her absences from the preliminary conference on October 4, 2019, and from the inquest on November 22, 2019. The defendant submitted affidavits explaining that she did not receive the notice of inquest because she was in Florida caring for a hospitalized family member for much of July 2019 through February 2020, as well as screenshots of text messages from July 2019, between her and the plaintiff, in which she advised the plaintiff that she would be traveling to Florida "over the coming months" to care for her family member. Additionally, the record did not contain proof that the defendant was notified of any of the court dates in question in any manner other than by mail service at her New York address, nor does the record contain a return receipt for the certified mailing of the notice of inquest. Moreover, upon returning to New York in February 2020, timely retained counsel and moved to vacate the judgment of divorce. The defendant proffered a reasonable excuse for her default. She also established a potentially meritorious defense, since despite having comparable finances, among other things, the Supreme Court did not equalize the parties' retirement accounts, distributed the defendant's pension but not the plaintiff's, and ordered the defendant to pay the plaintiff's counsel fees

Only competent, material, and relevant evidence may be admitted in a fact-finding hearing. The evidence presented in support of the Family Offense petition, including the father's testimony regarding statements made to him by his children, and a report from Child Protective Services, consisted primarily of inadmissible hearsay. He therefore failed to establish the allegations in the petition by competent evidence.

In Wedra v Greco, --- N.Y.S.3d ----, 2023 WL 5251467, 2023 N.Y. Slip Op. 04319(2d Dept.,2023) the Appellate Division observed that the determination of whether a family offense was committed is a factual issue to be resolved by the Family Court, and that court's determination regarding the credibility of witnesses is entitled to great weight on appeal unless clearly unsupported by the record (see Matter of Walsh v. Desroches, 118 A.D.3d at 814, 987 N.Y.S.2d 231; Matter of Harry v. Harry, 115 A.D.3d 858, 858, 982 N.Y.S.2d 379). 'Only competent, material and relevant evidence may be admitted in a fact-finding hearing' " (Family Ct Act § 834). Here, the evidence presented in support of the petition, including the father's testimony regarding statements made to him by his children, and a report from Child Protective Services, consisted primarily of inadmissible hearsay. The father, therefore, failed to establish the allegations in the petition by competent evidence. Accordingly, the Family Court properly, in effect, denied the father's family offense petition and dismissed that proceeding.

Seventeen-year-old Respondent in Family Offense Proceeding lacked the capacity to appear before the Family Court, rendering the proceeding void. As an infant, he could only appear by a parent or guardian as set forth in CPLR 1201.

In Cohen v Escabar, .--- N.Y.S.3d ----, 2023 WL 5251525, 2023 N.Y. Slip Op. 04313 (2d Dept.,2023) Jamie Cohen commenced this family offense proceeding against her ex-boyfriend, Louis Escabar, in 2021. At the time, Cohen was 16 years old and Escabar was 17 years old. Escabar did not appear for the hearing, but his attorney participated in his absence. The court found that Cohen had established that Escabar committed a family offense and issued an order of protection, from which Escabar appealed. The Appellate Division held that the order of protection was not entered upon Escabar's default. Although Escabar failed to appear at the hearing, his counsel appeared on his behalf and participated in the hearing. It also held that Escabar lacked the capacity to appear before the Family Court, rendering the proceeding void. and reversed the order. It noted that a natural person's status as an infant could disqualify that individual from seeking relief in court. An "infant" is "a person who has not attained the age of eighteen years" (CPLR 105[j]; see Family Ct Act § 119[c]). "Unless the court appoints a guardian ad litem, an infant shall appear by the guardian of his [or her] property or, if there is no such guardian, by a parent having legal custody, or, if there is no such parent, by another person or agency having legal custody, or, if the infant is married, by an adult spouse residing with the infant" (CPLR 1201). Escabar, who was 17 years old when Cohen commenced this proceeding, was an infant; Family Ct Act § 119[c]). As an infant, he could only appear by a parent or guardian as set forth in CPLR 1201, and he lacked the capacity to appear on his own behalf. Neither the presence of Escabar's mother in court nor the assignment of counsel, was sufficient to satisfy CPLR 1201. Although Escabar's mother was present at a prehearing court date, the court expressly prohibited her from appearing on Escabar's behalf. Counsel's representation of Escabar contravened CPLR 321 and 1201, and it, therefore, had "no legal effect".

Appellate Division, Fourth Department

Absent unusual circumstances an AFC cannot overrule the decision-making authority of a parent, and unilaterally take an appeal in a Family Offense Proceeding where the parent who is an aggrieved party has not done so.

In Joey L.F., v. Jerid A.F., --- N.Y.S.3d ----, 218 A.D.3d 1297, 2023 WL 4837130, 2023 N.Y. Slip Op. 04046(4th Dept., 2023) the petitioner filed a family offense petition on behalf of her son against the respondent. Respondent moved to dismiss the petition on the ground that it was facially insufficient. The Attorney for the Child (AFC) appealed from an order granting the motion. The Appellate Division held that under the circumstances of this case, the AFC lacked standing to bring an appeal on behalf of the subject child. It observed that generally speaking, the legislature has "demonstrated [its] preference for natural guardians," such as petitioner, to represent their minor children in a proceeding. Given that preference, it held that an AFC cannot, in most Family Court Act Article 8 proceedings, unilaterally take an appeal where a parent or guardian who is an aggrieved party has not done so. In this case, the petitioner did not appeal even though it was her petition that was dismissed. It also noted that there was no evidence that the petitioner had "an interest adverse to the" subject child that would warrant termination of her role as guardian in the proceeding, thereby permitting the AFC to bring an appeal on the child's behalf. To conclude that the AFC has standing to appeal where the petitioner has not done so would

effectively force a parent—the individual who originated the proceeding on the subject child's behalf—to litigate a position that they have abandoned. This would, in some cases, override a parent's reasonable decision-making authority. Absent unusual circumstances not present here, an AFC cannot overrule the decision-making authority of a parent, and take an appeal where the parent has not done so. Because the AFC lacked standing here it dismissed the appeal.

Family Court

Family Court follows the Rule of First and Third Departments that the ICPC "does not apply" to out-of-state noncustodial parents. It held that the Court can issue a Temporary (or final) Custody Order providing custody to a relative who does not reside in New York without invoking the provisions of the Interstate Compact on the Placement of Children where the child has not been placed in foster care.

In Peggy RR., v. JenellL RR.,--- N.Y.S.3d ----, 2023 WL 5282677, 2023 N.Y. Slip Op. 23252 (Family Court,2023) the question was whether the Court can issue a Temporary (or final) Custody Order providing custody to a relative who does not reside in the State of New York without invoking the provisions of the Interstate Compact on the Placement of Children where the child has not been placed in foster care? The Court answered the question in the affirmative. The facts were stated by the Court as follows: Petitioner (maternal grandmother) filed a petition under Article 6 of the Family Court Act prior to the initiation of any application or petition being filed under Article 10 of the Family Court Act; the subject child was born in, and has since resided in the State of New York from the time of her birth; at Peggy RR. resides and is otherwise domiciled in the State of West Virginia; and that the subject child has never been placed in foster care or in the custody of the Department of Social Services or any other agency; and that the Department of Social Services attempted to submit a referral to the New York State Office of Children and Family Services - ICPC office to initiate a home study under the ICPC, and the NYS OCFS - ICPC office refused to accept the referral citing their position that the circumstances and procedural history of this case do not invoke the provisions of the ICPC. The Court noted that D.L. v. S.B., 39 N.Y.3d 81, 86, 181 N.Y.S.3d 154, (2022) the Court of Appeals observed that the Appellate Division Departments have disagreed regarding the applicability of the ICPC to noncustodial parents who reside outside New York. The Second Department has repeatedly applied the ICPC to out-of-state noncustodial parents, holding that where the custody of a child who is under the supervision of the Commissioner of Social Service is transferred to the custody of a parent or relative in another state, the provisions of the ICPC apply" (Matter of Alexus M. v. Jenelle F., 91 A.D.3d 648 [2d Dept. 2012]). By contrast, the First Department has expressly declined to follow the Second Department's interpretation of the ICPC and, instead, has held that the ICPC "does not apply" to out-of-state noncustodial parents, reasoning that the plain language of the ICPC limits its application to placements in foster care or adoptive settings (Matter of Emmanuel B. [Lynette J.], 175 A.D.3d 49, 52,[2019]. The Third Department recently endorsed the First Department's approach, albeit in dicta (see Matter of David Q. v. Schoharie County Dept. of Social Servs., 199 A.D.3d 1179, 1181 [3d Dept. 2021]). The Court found that the case at bar was not one where there has been a foster care placement, and as a result, the provisions of the Interstate Compact on the Placement of Children are not invoked.

The New York Matrimonial Trial Handbook by Joel R. Brandes is available in Kindle and ebook editions directly from the Consulting Services Bookstore website and in hardcover from Bookbaby, as well as from Amazon, and other booksellers. New York Matrimonial Trial Handbook Table of Contents

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