Bits and Bytes™

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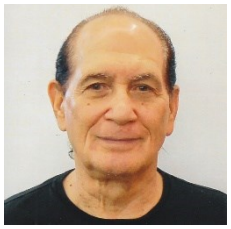

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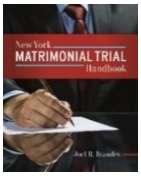


The New York Matrimonial Trial Handbook (Bookbaby) is a "how to" book. It focuses on the procedural and substantive law, as well as the law of evidence, that an attorney must have at his or her fingertips when trying a matrimonial action. The book deals extensively with the testimonial and documentary 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. New purchasers of the New York Matrimonial Trial Handbook in hardcover from Bookbaby, or in Kindle and ebook editions from the Consulting Services Bookstore can 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

The New York Matrimonial Trial Handbook 2023 Cumulative Update is available on Amazon in hardcover, paperback, Kindle, and electronic editions. This update includes changes in the law and important cases decided by the New York Courts since the original volume was published. It brings the text and case law up to date through and including December 31, 2022, and contains additional questions for witnesses. See Table of Contents.

Appellate Division, First Department

Family Court no longer has "exclusive, continuing jurisdiction" over an enforcement matter under the UCCJEA Domestic Relations Law § 75 et seq. where neither the children nor their parents presently lived in this State. A "significant connection" hearing is not required where Family Court properly found that it lacked exclusive, continuing custody jurisdiction

In Matter of Joshua A v. Shaquanda T, --- N.Y.S.3d ----, 2023 WL 8194305, 2023 N.Y. Slip Op. 06077 (1st Dept., 2023) the Appellate Division affirmed an order which dismissed with prejudice and on the ground of lack of jurisdiction, petitioner fathers' petition for enforcement of a visitation order. It found that Family Court no longer has "exclusive, continuing jurisdiction" over this matter under the Uniform Child Custody Jurisdiction and Enforcement Act, Domestic Relations Law § 75 et seq. as neither the children nor their parents presently lived in this State (Domestic Relations Law § 76–a[1][b]]). When the father filed the enforcement petition, he was living in New Jersey, and the mother and children were living in North Carolina. It rejected the father's argument that a hearing was required to determine whether the children retained a "significant connection" to New York, since Family Court properly found that it lacked exclusive, continuing custody jurisdiction based solely on its determination that the parents and children did not presently reside in New York (Domestic Relations Law § 76–a[1][b]). It rejected the father's argument in the alternative that, even if Family Court correctly found that it did not have exclusive, continuing jurisdiction under Domestic Relations Law § 76–a(1), it could have exercised discretionary jurisdiction under Domestic Relations Law § 76–a(2) if it found that it had initial child custody jurisdiction under Domestic Relations Law § 76. Neither child and neither parent lived in New York, and the father failed to make out a prima facie showing that the children and either parent have a "significant connection" to New York and that there is "substantial evidence . . . available in this state concerning the [children's] care, protection, training and personal relationships" (Domestic Relations Law § 76[1][a] and [b]). The father also pointed out that it appeared that no other court would have had original custody jurisdiction at the time the father filed his enforcement petition (Domestic Relations Law § 76[1][d]). Had he sought to modify the existing custody or visitation orders, this might have been a basis for Family Court to exercise jurisdiction. However, the father's petition sought only enforcement of the visitation order. The plain language of the discretionary provision of Domestic Relations Law § 76–a(2) provides jurisdiction only for modification of this state's custody orders, and the father had not provided any authority for application of Domestic Relations Law § 76–a(2) to requests for enforcement.

Appellate Division, Second Department

Where father failed to comply with Family Court Act § 424–a court should have precluded him from offering evidence regarding his financial ability to pay support, and should have determined the amount of child support based on the needs of the child.

In Matter of Grant v Seraphin, --- N.Y.S.3d ----, 2023 WL 8102714, 2023 N.Y. Slip Op. 06044 (2d Dept.,2023) the mother filed a petition seeking child support. At a hearing the mother made an application to determine the father's child support obligation based on the

needs of the child, as the father had failed to comply with required financial disclosure. The Support Magistrate denied the application and allowed the father to present evidence regarding his ability to pay support. The Support Magistrate, directed the father to pay child support of $283 biweekly. Family Court denied the mother's objections to the order. The Appellate Division observed that Family Court Act § 424–a "mandates the compulsory disclosure by both parties to a support proceeding of 'their respective financial states,' through the provision of tax returns, pay stubs, and sworn statements of net worth". Where a respondent in a child support proceeding fails, without good cause, to comply with the compulsory financial disclosure mandated by Family Court Act § 424–a, 'the court on its own motion or on application shall grant the relief demanded in the petition or shall order that, for purposes of the support proceeding, the respondent shall be precluded from offering evidence as to [the] respondent's financial ability to pay support. Here, the father failed to provide a sworn statement of net worth, a tax return, or a pay stub, and he did not offer an explanation for his failure to do so. Since the father failed, without good cause, to comply with the compulsory financial disclosure mandated by Family Court Act § 424–a, the Family Court was required to either grant the relief demanded in the petition or preclude the father from offering evidence as to his financial ability to pay support. Under the circumstances of this case, the court should have precluded the father from offering evidence regarding his financial ability to pay support, and should have determined the amount of child support based on the needs of the child, as requested by the mother (see Family Ct Act §§ 413[1][k]; 424–a[b]) It remitted the matter to the Family Court, for a new hearing and a new determination.

Supreme Court improvidently exercised its discretion in denying the defendant's motion for leave to amend her answer to change the date of the parties' marriage from the date of their civil marriage ceremony, which occurred after the passage of the Marriage Equality Act, to the date of the parties' religious marriage ceremony, which occurred six years prior to the passage of the Marriage Equality Act

In Mackoff v Bluemke-Mackoff, --- N.Y.S.3d ----, 2023 WL 7561813, 2023 N.Y. Slip Op. 05721 (2d Dept.,2023) the issue presented on this appeal, apparently an issue of first impression for an appellate court in this State, was whether the Supreme Court improvidently exercised its discretion in denying the defendant's motion for leave to amend her answer to change the date of the parties' marriage from the date of their civil marriage ceremony, which occurred after the passage of the Marriage Equality Act, to the date of the parties' religious marriage ceremony, which occurred six years prior to the passage of the Marriage Equality Act. On July 21, 2005, in New York City, the plaintiff, Robin Mackoff, and the defendant, Linda Bluemke–Mackoff, participated in a traditional Jewish marriage ceremony that was performed and solemnized by a rabbi. The parties did not obtain a marriage license for this ceremony since, at the time, New York State did not offer marriage licenses to same-sex couples or recognize same-sex marriages. After this ceremony, the parties continued living together and, according to the defendant, held themselves out as spouses. In June 2011, New York State enacted the Marriage Equality Act (hereinafter the MEA), which authorized same-sex couples to enter into civil marriages in New York State. On July 28, 2011, four days after the MEA went into effect, the parties obtained a New York State marriage license and were married in a civil ceremony. On January 23, 2019, the plaintiff commenced this action for a divorce . In her complaint, the plaintiff claimed that the

parties were married on July 28, 2011. On May 15, 2019, the defendant filed an answer, which did not refute the July 28, 2011 marriage date. The defendant was subsequently awarded certain pendente lite relief, including temporary spousal maintenance. On December 10, 2020, the defendant moved for leave to amend her answer to reflect that the parties were married on July 21, 2005, instead of July 28, 2011. The plaintiff opposed the motion. Supreme Court denied the defendant's motion, determining that the amendment would be prejudicial to the plaintiff in light of the amount of time that had elapsed and the pendente lite relief previously granted. The court also determined that the amendment lacked merit because the MEA did not confer validity to a same-sex marriage conducted prior to its enactment. The Appellate Division reversed. It held that because the request for leave to amend her answer was not prejudicial to the plaintiff, palpably insufficient, or patently devoid of merit, her motion for such relief should have been granted. While the Domestic Relations Law deems it necessary for all persons intending to be married to obtain a marriage license, a marriage is not void for the failure to obtain a marriage license if the marriage is solemnized. The Court pointed out that at this stage in the litigation, we are tasked only with determining whether the defendant should be permitted to amend her answer to make the claim that the date of the parties' marriage was July 21, 2005, not July 28, 2011. In the absence of prejudice or surprise to the opposing party, a motion for leave to amend the [pleadings] pursuant to CPLR 3025(b) should be freely granted unless the proposed amendment is 'palpably insufficient' to state a cause of action or is patently devoid of merit". It found that the defendant's proposed amendment was neither palpably insufficient nor patently devoid of merit. Contrary to the determination of the Supreme Court, the plaintiff failed to establish that the defendant's proposed amendment was prejudicial to her in such a way that the defendant's motion for leave to amend her answer should be denied. Neither the length of time between the defendant's original answer and her motion for leave to amend, nor the fact that the amendment may affect the plaintiff's maintenance and equitable distribution obligations, were sufficient to establish prejudice to the plaintiff (see R & G Brenner Income Tax Consultants v. Gilmartin, 166 A.D.3d at 687, 89 N.Y.S.3d 85).

The burden of repaying marital debt should be equally shared by the parties, in the absence of countervailing factors, and any such liability should be distributed in accordance with general equitable distribution principles and factors.

In Ilyasov v Ilyas, --- N.Y.S.3d ----, 2023 WL 7561961 (Mem), 2023 N.Y. Slip Op. 05717 (2d Dept.,2023) the parties were married in 1987. The defendant left the marital residence in 2010. The plaintiff commenced the action for a divorce in September 2015, the parties had one minor child. The parties stipulated that the only remaining issues were child support and equitable distribution with respect to the defendant's nursing degree and licenses, the defendant's pensions, and the marital residence. The Appellate Division held that Supreme Court providently exercised its discretion in declining to make any equitable distribution award to the plaintiff relating to the defendant's nursing degrees and licenses. The court's determination that the plaintiff did not substantially contribute to the defendant's acquisition of her nursing degrees Supreme Court directed that the plaintiff "buy out the defendant's share of the marital residence for $330,000," or, if sold, each party shall receive 50% of the proceeds of the sale, but adjustments for any outstanding mortgage or unpaid taxes associated would be deducted from the plaintiff's share of the proceeds With respect

to the marital residence, the Supreme Court providently exercised its discretion in determining that the plaintiff is responsible for paying unpaid property taxes. The burden of repaying marital debt should be equally shared by the parties, in the absence of countervailing factors, and any such liability should be distributed in accordance with general equitable distribution principles and factors. Here, contrary to the court's determination, the parties applied for a home equity line of credit in January 2004, and, as of October 1, 2010, prior to the commencement of this action, there was $212,125.73 outstanding on the credit line. Under the circumstances, the burden of repaying this marital debt, incurred during the marriage, should be equally shared by the parties. It modified the judgment to reflect that the parties were equally responsible for the $212,125.73 outstanding balance on the home equity credit line as of October 1, 2010. Supreme Court improvidently exercised its discretion in awarding the plaintiff only 30% of the marital portion of the defendant's pension with 1199 SEIU Health Care Employees Pension Fund based on its unelaborated finding that the defendant left the marital residence "due to the abusive environment created by the plaintiff." The general rule in New York is that marital fault should not be considered in determining equitable distribution. Egregious marital fault may be considered as a factor only in rare cases involving egregious and extraordinary conduct which shocks the conscience of the court This record did not support a finding of marital misconduct "so egregious or uncivilized as to bespeak of a blatant disregard of the marital relationship".

It is within the sound discretion of the court to accept a belated order or judgment for settlement. A court should not deem an action or judgment abandoned where the result 'would not bring the repose to court proceedings that 22 NYCRR 202.48 was designed to effectuate, and would waste judicial resources.

In Gargano v Gargano, --- N.Y.S.3d ----, 2023 WL 7560958, 2023 N.Y. Slip Op. 05715(2d Dept.,2023) the parties were married and, in 2011, the plaintiff commenced this action for a divorce. In a decision after trial dated June 7, 2018, the Supreme Court, directed the parties to settle judgment on notice within 60 days from the date of the decision. Thereafter, the parties made various posttrial motions, inter alia, to vacate and/or modify the decision after trial and to reopen the trial. In an August 2019 order, the court decided those motions and directed the parties to settle the judgment of divorce on notice within 30 days thereof. The parties failed to timely settle the judgment of divorce and, on March 2, 2020, the court, on its own motion, ordered that the parties "shall file the judgment roll on notice on or before March 31, 2020" and that, upon their failure to do so, the action "shall be deemed abandoned pursuant to 22 NYCRR § 202.48(b)." The March 31, 2020 deadline was tolled pursuant to Executive Orders issued in response to the public health crisis occasioned by the COVID–19 pandemic (see Executive Order [A. Cuomo] No. 202.8 [9 NYCRR 8.202.8]). On March 2, 2021, the defendant submitted the judgment roll. The plaintiff moved pursuant to 22 NYCRR 202.48 to dismiss the complaint as abandoned based upon the defendant's delay in submitting the judgment. Supreme Court, inter alia, denied the plaintiff's motion. On December 2, 2021, the court issued a judgment of divorce. The Appellate Division affirmed. It held that it is within the sound discretion of the court to accept a belated order or judgment for settlement. Moreover, a court should not deem an action or judgment abandoned where the result 'would not bring the repose to court proceedings that 22 NYCRR 202.48 was designed to effectuate, and would waste judicial resources'. Supreme

Court providently exercised its discretion in denying her motion pursuant to 22 NYCRR 202.48 to dismiss the complaint as abandoned, as the defendant demonstrated good cause for the delay in submitting the judgment roll and "since doing so brought finality to the proceedings and preserved judicial resources.

Family Court erred in making a final custody determination without completing the hearing on the father's petition and the mother's cross-petition where neither the father nor the mother rested their respective case or gave a closing argument

In Matter of Janvier v Santana-Jackson, --- N.Y.S.3d ----, 2023 WL 7562435, 2023 N.Y. Slip Op. 05732 (2d Dept.,2023) a hearing on the father's relocation petition and the mother's cross-petition for an award of sole physical custody recommenced in May 2019. The Family Court admitted into evidence copies of forensic reports; however, due to multiple factors, including the global COVID–19 pandemic and the court's scheduling issues, the hearing did not continue for many months. In an interim order dated August 28, 2019, the court, while acknowledging that "many facts [were] still in dispute," that "the trial [was] still ongoing," and that "it [was] pre-mature for [the] Court to make any findings and determinations," continued the award of sole physical custody of the child to the father and, essentially, permitted the father to enroll the child in preschool in New Jersey. After a virtual conference on April 21, 2021, the court ordered a second updated forensic evaluation. By order dated September 15, 2021, before completion of the second updated forensic evaluation, and although neither the father nor the mother rested their respective case or gave a closing argument, the court, inter alia, granted the father's relocation petition and denied the mother's cross-petition for an award of sole physical custody of the child. The Appellate Division held that Family Court erred in making a final custody determination without completing the hearing on the father's petition and the mother's cross-petition in order to determine what arrangement was in the best interests of the child. It remitted for the completion of the hearing and new determinations.

Family Court improvidently exercised its discretion in granting the fathers sanctions motion without affording the mother a reasonable opportunity to be heard, where the court never set a briefing schedule for the sanctions motion, and in effect, denied the mother's new counsel's request to file opposition papers thereto.

In Matter of Hunte v Jones, --- N.Y.S.3d ----, 2023 WL 7562855, 2023 N.Y. Slip Op. 05731 (2d Dept.,2023) in December 2020, the mother filed a petition in the Family Court to modify the parties' custody order to award her sole legal custody of the child and to grant her permission to relocate with the child to Florida. In February 2021, the father filed a petition to modify the prior custody orders and requesting, inter alia, additional parental access during the week. By order to show cause dated October 4, 2021, the father moved pursuant to 22 NYCRR 130–1.1 for the imposition of sanctions, costs, and reasonable attorneys' fees . The father contended, inter alia, that the mother engaged in frivolous conduct by relocating to Florida with the child without prior court approval, and by commencing a separate custody proceeding in Florida. The Family Court signed the order to show cause, setting a return date of November 22, 2021, for the sanctions motion, but not setting a briefing schedule. On April 4, 2022, while the sanctions motion remained pending

and undecided, the mother moved for the Family Court Judge to recuse from the proceedings. During proceedings on April 18, 2022, the Family Court indicated that the mother's prior assigned counsel was being relieved of his assignment, and acknowledged that the mother had new assigned counsel representing her. The court then stated that it intended to grant the mother's motion for recusal. The court also, in effect, denied the mother's new counsel's request to file opposition to the sanctions motion. In an order dated April 27, 2022, the Family Court granted that branch of the sanctions motion which was for an award of reasonable attorneys' fees for frivolous conduct, and directed the mother to pay attorneys' fees in the sum of $1,250 to the father. In a separate order the court granted the mother's motion for recusal. The Appellate Division observed that pursuant to 22 NYCRR 130–1.1(d), "[a]n award of costs or the imposition of sanctions may be made either upon motion in compliance with CPLR 2214 or 2215 or upon the court's own initiative, after a reasonable opportunity to be heard. The form of the hearing shall depend upon the nature of the conduct and the circumstances of the case." The Appellate Division agreed with the mother that the Family Court improvidently exercised its discretion in awarding the father reasonable attorneys' fees without affording her a reasonable opportunity to be heard. Notably, the court never set a briefing schedule for the sanctions motion, and the court, in effect, denied the mother's new counsel's request to file opposition papers thereto. Under these circumstances, the mother did not receive a "reasonable opportunity to be heard" on the allegations in the sanctions motion. Additionally, the Family Court improvidently exercised its discretion by deciding the sanctions motion after indicating to the parties during the April 18, 2022 court appearance that it intended to grant the mother's motion for recusal.

Under the circumstances of this case, the court should not have denied the mother's objections due to her failure to comply with the proof of service requirement of FCA § 439(e), where she timely filed her objections and timely served a copy thereof upon the father but filed proof of two weeks later and the father did not raise the proof of service issue.

In Matter of Benzaquen v Abraham, --- N.Y.S.3d ----, 2023 WL 7172458, 2023 N.Y. Slip Op. 05498 (2d Dept.,2023) by order of disposition dated February 15, 2022, made after a hearing, a Support Magistrate, inter alia, declined to award the mother the full amount of arrears sought by her. The Family Court mailed the order of disposition to the parties on February 24, 2022. On March 25, 2022, the mother filed objections with the court. On April 5, 2022, the father submitted a rebuttal to the mother's objections. By order dated August 31, 2022, the court denied the mother's objections based on her failure to timely file proof of service pursuant to Family Court Act § 439(e). The Appellate Division held that under the particular circumstances of this case, the court should not have denied the mother's objections due to her failure to comply with the proof of service requirement of Family Court Act § 439(e), and instead should have considered the merits of her objections. Family Court Act § 439(e) provides, in pertinent part, that a party filing objections shall serve a copy of such objections upon the opposing party, and that proof of service upon the opposing party shall be filed with the court at the time of filing of objections. Here, the Family Court improperly denied the mother's objections on the ground that she failed to timely file proof of service. The mother timely filed her objections and timely served a copy thereof upon the father in compliance with Family Court Act § 439(e). She failed to file proof

of service at the time of filing of the objections, as required by the statute, but nonetheless filed such proof two weeks later. Notably, the father submitted a rebuttal and did not raise the proof of service issue.

Appellate Division, Third Department

Supreme Court providently exercised its discretion in awarding the plaintiff 100% of the parties' interest in the marital residence, where the defendant was unable to contribute financially to the mortgage loan or to the support of the parties' child due to his long-term incarceration, and where the plaintiff was also responsible for 100% of the parties' marital debt

In Gigliotti v Gigliotti, --- N.Y.S.3d ----, 2023 WL 8102597, 2023 N.Y. Slip Op. 06029 (2d Dept., 2023) the parties were married on August 20, 2011, and had one minor child. The defendant was incarcerated since 2016, and was not scheduled for release until 2033. The plaintiff commenced this action in or about January 2018. A nonjury trial was scheduled on February 28, 2020. The defendant's attorney did not appear and did not properly request an adjournment pursuant to the rules of the trial part. The defendant appeared by phone. After the trial, the Supreme Court, inter alia, awarded the plaintiff 100% of the parties' interest in the marital residence, the parties' only marital asset, and allocated 100% of the parties' debt to the plaintiff. A judgment of divorce, upon the decision, was entered on January 25, 2021. The Appellate Division affirmed. It held that Supreme Court providently exercised its discretion in denying the defendant's application for an adjournment where his counsel did not properly seek an adjournment pursuant to the trial part's rules and subsequently failed to appear at trial. It also held that Supreme Court providently exercised its discretion in awarding the plaintiff 100% of the parties' interest in the marital residence, where the defendant was unable to contribute financially to the mortgage loan or to the support of the parties' child due to his long-term incarceration, and where the plaintiff was also responsible for 100% of the parties' marital debt

When determining the child's best interests, Family Court must consider the effect of having committed a family offense when the allegations are proven by a preponderance of the evidence.

In Matter of Jacklyn PP v Jonathan QQ, 2023 WL 8105077 (3d Dept.,2023) the Appellate Division found that a fair preponderance of the evidence supported the conclusion that the father committed the family offenses of stalking in the third degree and fourth degree. It rejected the fathers contention that granting the mother sole custody was not in the child's best interests and that Family Court erred in considering the father's family offenses in determining custody. Family Court properly considered the various factors in its best interest analysis, giving greatest emphasis to the father having committed family offenses and finding that presently the parties could not communicate.

Contrary to the father's contention, when determining the child's best interests, Family Court must consider the effect of having committed a family offense when the allegations are proven by a preponderance of the evidence.

Although the mother would have been unable to take an appeal from the orders entered upon her default, a defaulting party is still free to seek review of the proceedings on a contested inquest

In Matter of Daniel RR v Heather RR, 2023 WL 8104865 (3d Dept.,2023) the maternal grandfather of the children, commenced proceedings seeking, in relevant part, visitation with them. Upon the mother's default, Family Court issued two orders in March 2020 that awarded the grandfather visitation. After vacating the default and holding an inquest, the Family Court granted the grandfather visitation. The Appellate Division held, inter alia, that although the mother would have been unable to take an appeal from the March 2020 orders entered upon her default, a defaulting party is still free to seek "review ... of the proceedings on a contested inquest" (James v. Powell, 19 N.Y.2d 249, 256 n 3, 279 N.Y.S.2d 10, 225 N.E.2d 741 [1967]; see Matter of DiNunzio v. Zylinski, 175 A.D.3d 1079, 1080, 108 N.Y.S.3d 634 [4th Dept. 2019]). Counsel for the mother appeared at the inquest that led to the appealed-from orders, offered no objection to it occurring, and actively participated in it by cross-examining the grandfather. Family Court, moreover, did not hold the mother to have defaulted in appearance at the inquest. In view of those facts, it concluded that the mother did contest the inquest and that she may appeal from the ensuing orders.

Where Family Courts plethora of errors curtailed significant testimony that would have been relevant and denied the father a full and fair opportunity to present evidence, the custody order on appeal was reversed and remitted for a new fact-finding hearing before a different judge.

In Matter of Shayne FF., v. Julie GG, --- N.Y.S.3d ----, 2023 WL 7750133, 2023 N.Y. Slip Op. 05767 (3d Dept.,2023) the Appellate Division reversed an order of the Family Court which granted respondent's motion to dismiss petitioner's applications, to modify a prior order of custody and visitation. The Court observed that although not specifically raised by the parties, Family Court, seemingly driven by its overly narrow interpretation of the father's petition and amended petition, committed a plethora of errors which curtailed significant testimony that would have been relevant and material to the father's claim that a change in circumstances had occurred since entry of the 2012 order and that the best interests of the child would be served by modifying said order. Among other things, Family Court heavily limited testimony about the increased driving time and prevented any inquiry as to safety concerns that may have weighed against expanding the father's parenting time, as to the child's relationship with either parent, their significant others or their support systems, as to what parenting schedule the father sought, as to the mother's refusal to allow the father holiday time and as to the father's prior attempts at addressing that issue. Further, the order on appeal notes that the father "rejected an in court offer that was acceptable to [the mother] and to the [attorney for the child]"; Family Court was reminded that, except in very limited circumstances not applicable here, it cannot consider settlement negotiations among parties in its order (see CPLR 4547). This testimony would have been of particular

importance here, where the prior order was premised on the parties' consent rather than on a prior judicial determination, and such evidence could "give the court a view of the totality of the circumstances and family dynamics, including proof that relates to either party's fitness as a parent," and aid the court in its best interests analysis. As these errors compounded and denied the father a full and fair opportunity to present evidence, it reversed the order on appeal and remitted this matter for a new fact-finding hearing before a different judge.

Where the parental rights of both biological parents have been terminated, adoption is the sole and exclusive means to gain care and custody of the child

In Matter of Mirely M., v Wilbert L., --- N.Y.S.3d ----, 2023 WL 7749859, 2023 N.Y. Slip Op. 05772 (3d Dept.,2023) the Appellate Division held that where, as here, the parental rights of both biological parents have been terminated, adoption is the sole and exclusive means to gain care and custody of the child" and courts are "without authority to entertain custody proceedings commenced by a member of the child's extended family. Here, the stepmother sought only custody of the child; she has not sought adoption. The appeal from denial of the stepmother's custody petition was moot. Should she still seek care and custody of the child, the stepmother's sole recourse was to file for adoption.

Appellate Divison, Fourth Department

A mutual mistake exists where the parties have reached an oral agreement and, unknown to either, the signed writing does not express that agreement. Sufficiency of complaint sustained.

In Baird v Baird, --- N.Y.S.3d ----, 2023 WL 7982187, 2023 N.Y. Slip Op. 05824 (4th Dept., 2023) the Appellate Division affirmed an order which denied the defendants motion to dismiss the complaint pursuant to CPLR 3211 and for summary judgment dismissing the complaint pursuant to CPLR 3212. Plaintiff commenced this postjudgment matrimonial proceeding seeking to reform the parties' Property Settlement and Parenting Agreement (agreement), which was incorporated but not merged into their judgment of divorce. Plaintiff asserted that the agreement should be reformed to include an equitable distribution of her marital interest in defendant's pension, which she alleged was omitted from the agreement due to mutual mistake or fraud. The Appellate Division rejected defendants argument that the complaint failed to sufficiently plead a cause of action for reformation based on fraud or mutual mistake . It observed that a claim for reformation of a written agreement must be grounded upon either mutual mistake or fraudulently induced unilateral mistake'. "A mutual mistake exists where the parties have reached an oral agreement and, unknown to either, the signed writing does not express that agreement". "When an error is not in the agreement itself, but in the instrument that embodies the agreement, equity will interfere to compel the parties to execute the agreement which they have actually made, rather than enforce the instrument in its mistaken form". It concluded that the complaint sufficiently stated a cause of action for reformation of the agreement based on mutual mistake by alleging that the parties agreed to "the distribution of all assets owned jointly or

in the individual name of either party" and then omitted the distribution of plaintiff's marital interest in a defined benefit pension that defendant was entitled to because neither party was aware of defendant's entitlement to those benefits at the time the agreement was negotiated and executed. Those allegations contained sufficient detail to satisfy the particularity requirement of CPLR 3016 (b). It also concluded that the complaint sufficiently states a cause of action for reformation of the agreement based on fraud. "[A] fraud cause of action must allege that the defendant: (1) made a representation to a material fact; (2) the representation was false; (3) the defendant intended to deceive the plaintiff; (4) the plaintiff believed and justifiably relied on the statement and in accordance with the statement engaged in a certain course of conduct; and (5) as a result of the reliance, the plaintiff sustained damages". Here, the complaint alleges that defendant represented during the divorce negotiations that he did not have a defined benefit plan due to his employer's bankruptcy; that defendant's representation was false; that defendant intended to deceive plaintiff; that plaintiff justifiably relied on defendant's misrepresentation in negotiating the agreement; and that, as a result of her reliance, plaintiff did not receive her marital share of defendant's pension. Those allegations "sufficiently pleaded the elements of fraud ... and supplied sufficient detail to satisfy the specific pleading requirements of CPLR 3016 (b)"

Where Family Court Act articles 6 and 10 proceedings are pending at the same time, the court may jointly hear the hearing on the custody and visitation petition under article 6 and the dispositional hearing on the petition under article 10 provided, the court must determine the custody and visitation petition in accordance with the terms of article 6.

In Matter of Lillyana B., --- N.Y.S.3d ----, 2023 WL 7982309 (4th Dept., 2023) the Appellate Division held that where as here, Family Court Act articles 6 and 10 proceedings are pending at the same time, the court "may jointly hear the hearing on the custody and visitation petition under [article 6] and the dispositional hearing on the petition under article [10] ... ; provided, however, the court must determine the custody and visitation petition in accordance with the terms of ... article [6]" (Family Ct Act § 651 [c-1]; see § 1055-b [a-1]; Matter of Nevaeh MM. [Sheri MM.—Charles MM.], 158 AD3d 1001, 1002 [4th Dept 2018]). In an article 6 custody proceeding, it is well settled that, as between a parent and a nonparent, the parent has a superior right to custody that cannot be denied absent a finding that the parent has relinquished that right because of "surrender, abandonment, unfitness, persisting neglect or other extraordinary circumstances". If extraordinary circumstances are established, then the court may make an award of custody based on the best interests of the child (see Bennett, 40 NY2d at 548). It agreed with the court that extraordinary circumstances existed here based on the father's abandonment of the child.

In a contempt proceeding owever misguided and erroneous the father believed the court's order to have been he was not free to disregard it

In Matter of Pritty-Pitcher v. Hargis., --- N.Y.S.3d ----, 2023 WL 7982342, 2023 N.Y. Slip Op. 05886 (4th Dept.,2023) the Appellate Division held that however misguided and erroneous the father believed the court's order to have been he was not free to disregard it and decide for himself the manner in which to proceed. Inasmuch as the father did not contest the jurisdictional validity of the prior order and did not dispute that he violated the

order by refusing to abide by the provisions granting visitation to petitioner, it rejected his contention that the court erred in finding him in contempt.

Appellate Divison treats decision as order for purpose of taking an appeal where it "meets the essential requirements of an order"

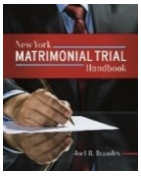
In Matter of Geer, v Collazo , --- N.Y.S.3d ----, 2023 WL 7982541 (Mem), 2023 N.Y. Slip Op. 05904 (4th Dept.,2023) the father appealed from a decision that denied his petition seeking, inter alia, visitation with the child. The Appellate Division held that although no appeal lies from a mere decision, the paper appealed from "meets the essential requirements of an order" (Nicol v Nicol, 179 AD3d 1472, 1473 [4th Dept 2020]) inasmuch as it was filed "with the Court Clerk and ... [it] resolved the [proceeding] and advised the father that he had a right to appeal" (Matter of Louka v Shehatou, 67 AD3d 1476, 1476 [4th Dept 2009]). It therefore treated it as an order.

Family Court

Under Domestic Relations Law § 76-a, a court cannot have exclusive continuing jurisdiction if it never had initial child custody jurisdiction in the first instance

In Matter of E.P.,v. B.S., --- N.Y.S.3d ----, 2023 WL 6819194, 2023 N.Y. Slip Op. 23318 Family Court, (2023) Family Court granted the fathers motion for an order dismissing the petitions on the grounds that New York lacked initial child custody jurisdiction because New York was not the "home state" of the children within the meaning of Domestic Relations Law § 75-a (7) because none of the children were living in New York for the six-month period immediately before the filing of the petitions in November 2022. The parties acknowledged that previous custody petitions had been filed in New York in 2017, that New York had issued temporary orders regarding custody and visitation in those proceedings, and that the Family Court in New York had a long history addressing the custody dispute between the mother and father. However, all the petitions filed in 2017 were dismissed in November 2022. When the 2017 proceedings were commenced, none of the children resided in New York. For a period of more than six months prior to the filing of the 2017 petitions, the children C. and A. had resided in Connecticut with the mother. According to the father, only the child M. lived in New York within the six-month period before the filing of the 2017 petitions. Indeed, in opposition to father's motion, the mother avers that all three children resided outside of New York "for about 7 years" and that when the father initiated the 2017 proceedings "the children already lived outside the state" (Affirmation in Opposition, p. 7). Even though none of the children resided in New York at the time of commencement of the 2017 proceedings, the mother argues that New York was the children's "home state" simply because New York had issued initial custody orders in those proceedings. Her argument relied upon Domestic Relations Law § 76-a entitled "exclusive continuing jurisdiction" and case law holding that "[a] New York court that has previously made a child custody determination has exclusive, continuing jurisdiction. The mother's argument was flawed and circular because Domestic Relations Law § 76-a, and

the case law interpreting it, presuppose that the New York court had initial child custody jurisdiction under Domestic Relations Law § 76 when it issued the initial custody order. In other words, under Domestic Relations Law § 76-a, a court cannot have exclusive continuing jurisdiction if it never had initial child custody jurisdiction in the first instance. Moreover, New York's exercise of initial child custody jurisdiction under Domestic Relations Law § 76 in an earlier proceeding that was subsequently dismissed does not necessarily confer jurisdiction to a later proceeding.. Here, the affidavits of the mother and the father indicate that none of the children resided in New York at the time of commencement of the 2017 proceedings.



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