Suffolk Academy of Law
Suffolk County Bar Association

HOT BUTTON ISSUES
in
MATRIMONIAL LAW

CUSTODY and VISITATION UPDATE

Professor Lewis A. Silverman
Director, Family Law Clinic
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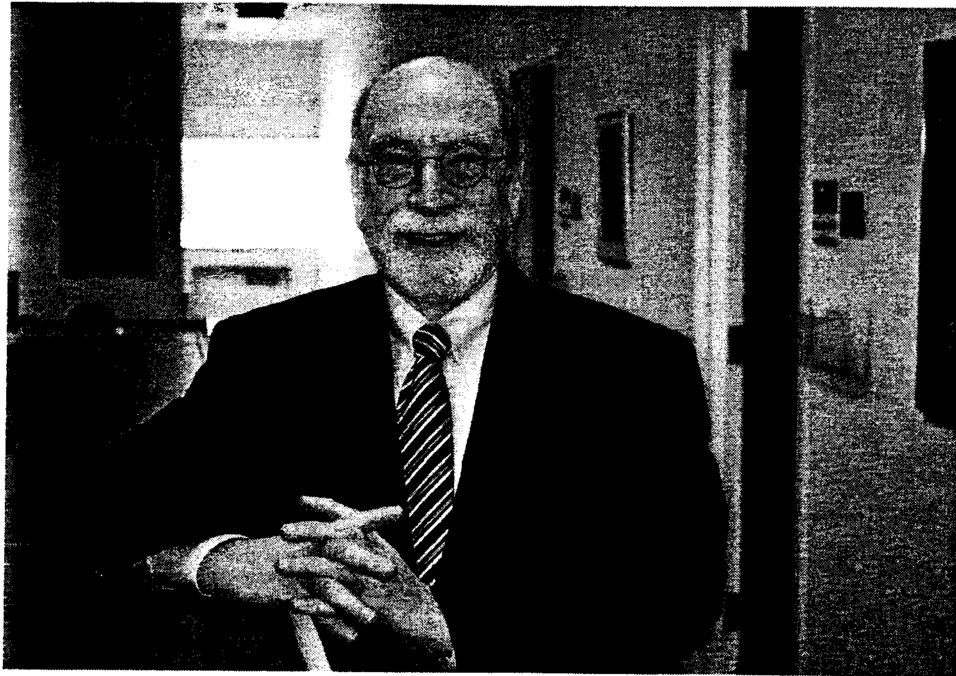
November 6, 2015



Lewis A. Silverman is Director of the Family Law Clinic and Associate Professor of Clinical Law at Touro College, Jacob D. Fuchsberg Law Center in Central Islip, New York. B.A., 1973, New York University; J.D., 1976, Boston University. He served from 1976-1985 as an Assistant Suffolk County Attorney assigned to the Family Court Bureau, including Unit Head of the Child Abuse/Neglect Unit and Deputy Bureau Chief of the Family Court Bureau. From 1985 until joining the Law Center in 1995 he was a Hearing Examiner in Suffolk County Family Court where he presided at hearings to determine child support and spousal support obligations. He served as President of the New York State Hearing Examiners Association from 1988 to 1995 and had numerous decisions published by the *New York Law Journal*. He has also served as chair of the New York State Bar Association's Committee on Social Services, as an officer of the Suffolk Academy of Law, and the first chair of the Suffolk County Bar Association's Family Court Committee, and presently serves on the New York State Bar Association's Special Committee on LGBT People and the Law. In addition to his duties as Director of the Family Law Clinic, Professor Silverman also teaches courses in Family Law, Rights of Children, Sexual Orientation and Law, and Civil Procedure, and serves as a faculty advisor to the Moot Court Board. He has served as an Adjunct Professor of Law at Hofstra University School of Law in Hempstead, New York and St. John's University School of Law in Jamaica, New York. Professor Silverman has published several articles and presented at numerous conferences and programs on topics on family law and civil rights for sexual minorities. He has served as a resource for the press and been quoted frequently in print and television news. He has also been recognized five times by the Suffolk County Bar Pro Bono Foundation for his pro bono activities. Professor Silverman was also Village Justice for the Incorporated Village of Lake Grove in Suffolk County, New York, from 1998 to 2006.

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BAR ADMISSIONS

New York State; United States District Court for the Eastern District of New York

EXPERIENCE

Touro College Jacob D. Fuchsberg Law Center, Central Islip, NY
Associate Professor of Clinical Law/Director of Family Law Clinic 1995 – Present
Established Family Law Clinic. Duties include teaching and supervising student interns in clinical legal education program encompassing all aspects of family law including divorces, domestic violence, child support and child custody. Supervision includes judicial proceedings, student-client relations, case management, and supervision of internships and externships. Preparation of grant proposals. Moot Court faculty advisor and chair of Awards and Graduation Committee.
Director of Externship Programs 2009 - 2013
Direct five seminar externship programs and independent externships. Meet with students and arrange externship placements. Secure new potential placements with private attorneys and government offices, and public interest organizations. Supervise adjuncts teaching externship seminars to ensure academic viability of program. Preparation of Strategic Planning Report.
Classes taught: Family Law Clinic, Civil Procedure, Family Law, Rights of Children, Advanced Family Law, Sexual Orientation & Law, Pre-Trial Litigation, Foundations of Legal Analysis.
Awards: Judge George C. Pratt Moot Court Award in Appellate Advocacy: 1996, 2000, 2009;
The Dean's Award for Distinguished Service; Socrates Professor of the Year; Student Bar Association "Professor of the Year"

St. John's University School of Law, Jamaica, NY
Adjunct Professor of Law Fall 2012
Taught Family Law course.

Hofstra University School of Law, Hempstead, NY
Adjunct Professor of Law Fall 2008
Taught Family Law course.

Village of Lake Grove, Lake Grove, NY
Justice 1995 – 2006
Presided over Court, hearing misdemeanors and violations of Vehicle & Traffic Law and Lake Grove Village Code.

Suffolk County Family Court, Central Islip, NY
Hearing Examiner 1985 – 1995
Heard and determined Family Court child support and spousal maintenance cases. Presided at hearings conducted pursuant to the Family Court Act and Civil Practice Law and Rules (CPLR). Researched relevant statutory and decisional law. Drafted and issued memorandum decisions and orders (decisions published in the *New York Law Journal*). Supervised auxiliary staff and personnel, including uniformed court officers, court clericals, and law school interns. Prepared, reviewed, and implemented administrative forms and procedures.

New York State Hearing Examiners Association, New York, NY
President 1987 – 1995
Liaised with Office of Court Administration. Assisted members with personnel issues. Taught and advised continuing education programs for members. Edited newsletter, including review of legal decisions issued by colleagues.

Suffolk County Department of Law, Hauppauge, NY
Assistant County Attorney 1976 – 1985
Responsible for civil prosecution of all Family Court matters and proceedings, including child support, paternity, juvenile delinquency, PINS, and child abuse and neglect. Supervised Abuse/Neglect Unit (four attorneys). Counsel to Suffolk County Department of Social Services. Conducted legal research and drafted pleadings, memoranda of law, and appellate briefs. Advised departmental personnel and conducted in-service training programs.

Suffolk County Board of Ethics, Hauppauge, NY
Counsel 1979 – 1985
Served as legal advisor to county administrative board. Drafted advisory opinions interpreting Suffolk County Code of Ethics.

PUBLICATIONS

"Vermont Civil Unions, Full Faith and Credit, and Marital Status", 89 Kentucky Law Journal 1075, (2000-2001).

"Suffer the Little Children: Justifying Same-Sex Marriage from the Perspective of a Child of the Union", 102 West Virginia Law Review 411 (1999).

"New York's Uniform Support of Dependent's Law: A Call for a More Uniform Interpretation", Journal of the Suffolk Academy of Law, vol. 5, 1988, pp. 34-47.

"Contempt for Non-Payment of Support: Roadblocks Removed", New York Law Journal, October 17, 1995, page 1.

"Adoption, Custody, and the Rights of Children", chapter in DEFENDING SAME-SEX MARRIAGE, Volume I, "*'Separate but Equal' No More*", Praeger Press, 2006.

"Same-Sex Marriage in New York", 1 TOURO J. RACE GENDER & ETHNICITY 37 (2006), accessible at http://www.tourolaw.edu/journrge/ Issues/Issue1/Silverman.pdf

Presenter: International Society of Family Law, North American Regional Conference, 1999; West Virginia University School of Law, *Symposium on Family Law in the Year 2000*, 2000; International Society of Family Law, 12th World Conference, 2005.

"Criminal Statute Invalidation Complicates Family Offenses," New York Law Journal, July 8, 2014.

"Emancipating Minors: Punishing the Child for the Sins of the Parent", work in progress.

PROFESSIONAL ASSOCIATIONS

American Bar Association, Family Law Section
International Society of Family Law
New York State Bar Association:
- Chair, Committee on Social Services, 1989 – 1993
- Law Guardian Task Force
- Special Committee on LGBT People and the Law, 2008 - present

Suffolk County Bar Association:
- Chair, Family Court Committee, 1996
- Officer, Suffolk Academy of Law, 1987-1991
- Chair, Law Day Committee, 1990-1991 (Program received Public Service Award from ABA Committee on Matrimonial and Family Law)

Award of Recognition, 1989, 1991
Certificate of Merit, 1990
- Pro Bono Attorney of the Month: January 1996, September 1999, September 2005, April 2011, October 2014

Pro Bono Recognition Award, 1997, 2000, 2012
LeGal (Lesbian & Gay Law Association of Greater New York)
- Volunteer, Suffolk Walk-In Clinic

Matrimonial Bar Association of Suffolk County

COMMUNITY SERVICE

Task Force to Prevent Family Violence, Suffolk County, NY, member,
For Our Children and Us, Inc. (FOCUS), Board of Trustees, Vice-President
Lecturer in Law (numerous civic and education groups)

EDUCATION

Boston University School of Law, Boston, MA
Juris Doctor, 1976

New York University, New York, NY
Bachelor of Arts in Political Science, 1973

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The author expresses his appreciation to his Research Assistant, Igor Stolyar, Touro Law Center Class of 2016, for his invaluable assistance with this project.

THE STANDARD: Best Interests of the Child

Friederwitzer v. Friederwitzer, 55 NY2d 893 (1982)
Eschbach v. Eschbach, 56 NY2d 167 (1982)

Domestic Relations Law §240
Family Court Act §651

THE RULES:

1. The court should be gender-neutral.

Linda R. v. Richard E., 162 AD2d 48 (2nd Dept. 1990)
Domestic Relations Law §81

2. Between parent and non-parent, parent is entitled to custody absent unfitness or extraordinary circumstances.

Matter of Bennett v. Jeffreys, 40 NY2d 543(1976)
Matter of Dickson v. Lascaris, 53 NY2d 204 (1981)

3. Custody should be decided for the long-term and should not be changed absent substantial change in circumstances and the child's best interests.

Dintruff v. McGreevy, 34 NY2d 887 (1974)
Obey v. Degling, 37 NY2d 768 (1975)
Friederwitzer v. Friederwitzer, 55 NY2d 893 (1982)

4. Siblings should not be separated without good reason.

Obey v. Degling, 37 NY2d 768 (1975)
Eschbach v. Eschbach, 56 NY2d 167 (1982)

5. Joint custody should not be awarded absent agreement of the parents.

Braiman v. Braiman, 44 NY2d 584 (1978)
Bliss o/b/o Ach v. Ach, 56 NY2d 995 (1982)

6. Visitation is a joint right of parent and child.

Weiss v. Weiss, 52 NY2d 170 (1981)
Matter of Granger v. Misercola, 21 NY3d 86 (2013)

THE FACTORS:

1. Primary caregiver

Garska v. McCoy, 167 W.Va. 59, 278 SE2d 357 (1981)

2. Psychological Bond

3. Work Schedule of parent

4. Mental Health of parents

5. Physical ability to parent

6. Past Performance

7. Sexual Activity of parent – nexus rule

8. Substance abuse

9. Financial advantages (overwhelming) of one parent

10. Race

11. Religion

Matter of Gribeluk v. Gribeluk, 120 AD3d 579 (Second Dept. 2014)

12. Child's Preference

Dintruff v. McGreevy, 34 NY2d 887 (1974)
Matter of Ebert v. Ebert, 38 NY2d 700 (1976)
Matter of Nehra v. Uhlar, 43 NY2d 242 (1977)
Matter of Melanie Dykstra v. Charles Bain Jr. 127 A.D.3d 1516 (*Third Dept. 2015)*

13. Facility to support contact with other parent

Bliss o/b/o Ach v. Ach, 56 NY2d 995 (1982)

14. Domestic Violence

Allen v. Farrow, 197 AD2d 327 (1st Dept. 1994)

15. False allegations about other parent

BEST INTERESTS OF THE CHILD

Factors

In General

Matter of Bowe v. Bowe, 124 AD3d 645 (Second Dept. 2015)
Angelova v. Ruchinsky, 126 AD3d 828 (Second Dept. 2015)
Matter of Tejada v. Tejada, 126 AD3d 985 (Second Dept. 2015)
Matter of Denise v. Denise, 129 AD3d 1539 (Fourth Dept. 2015)

Stability

The child had been in father's care for at least two years prior to the hearing and was happy and well-adjusted.
Matter of McLennan v. Gordon, 122 A.D.3d 742 (Second Dept. 2014)

Primary Caregiver

Appellate Division reversed trial court's finding that neither parent was the primary caregiver, finding that the mother had been until temporary custody awarded to father just before hearing. Award of custody to father reversed and custody granted to mother on appeal.
Matter of Guiracocha v. Amaro, 122 A.D.3d 632 (Second Dept. 2014)

Parental alienation

Mother's interference with father-child relationship justified change in custody.
Matter of Preciado v. Ireland, 125 A.D.3d 662 (Second Dept. 2015)

Trial record suggested that mother less likely to foster child's relationship with father, based on her surreptitiously having taken the child from the father's custody and she refused to allow him to take the child to a father-daughter event at school because it was during her parenting time, despite the fact he had allowed her to take the child to a mother-daughter event on his parenting time. Mother also had less stable home environment. Custody to father affirmed. [It appears mother really cooked her own goose here; she is lucky she wasn't restricted to supervised visitation.]
Matter of Kayla Y. v. Peter Z., 125 AD3d 1126 (Third Dept. 2015)

Father granted change of custody because of parental alienation by mother.
Matter of Halioris v. Halioris, 126 AD3d 973 (Second Dept. 2015)

Mother repeatedly filed false reports with CPS and violated court orders regarding visitation. "A concerted effort by one parent to interfere with the other parent's contact with the child is so inimical to the best interests of the child…as to, per se, raise a strong possibility that the interfering parent is unfit." Custody granted to father and mother awarded only supervised visitation.
Matter of Ordona v. Cothern, 126 AD3d 1544 (Fourth Dept. 2015)

Mother interfered with father's relationship with child by blatantly and repeatedly violating court's directive not to discuss the litigation with the child, attempting to instill in child a fear of the father, and encouraging the child to medicate herself before visiting the father.
Matter of Viscuso v. Viscuso, 129 AD3d 1679 (Fourth Dept. 2015)

A rather classic case of how the *noncustodial* parent engaged in extensive alienation and attempts to sabatoge the child's relationship with the moither, the primary custodian. Father wound up with only supervised visitation.
Matter of Vanita UU. V. Mahender VV., 130 AD3d 1161 (Third Dept. 2015)

Trial court found that mother had successfully alienated two teenage boys from father and was on the way to doing same with 11-year old daughter. Father given primary custody to attempt to remedy situation.
*T.K. v. D.K., NYLJ 1202734169959, at *1 (Nassau County Supreme Court 7/17/2015)*

Extensive documentation of a pattern of alienation to the point that the 13-year old child refused to visit with the father. Appellate Division directed that the father's child support obligation be suspended prospectively.
Matter of Coull v. Rottman, 131 AD3d 964 (Second Dept. 2015)

Sad and tragic tale of parental alienation by mother. Nevertheless, trial court awarded custody of two teenage sons to her because to do otherwise would only fuel their pathological hatred for their father. Court did, however, transfer custody of the younger daughter to the father because living in the home which had an atmosphere poisoned by her mother and brothers was detrimental to her.

Kramer v. Kramer, 48 Misc.3d 1215(A), 2015 NY Slip Op. 41142(U), 2015 WL 4635732 (Nassau Cty. Sup. Ct. 7/17/2015) [N.B. Not Dustin Hoffman and Meryl Streep, sadly.]

Domestic violence

Despite fact that father had two indicated reports of physical violence while the family was together, he had attended anger management counseling sessions and there were no further incidents. He had a stable home. Mother, on the other hand, not only made false allegations, she coached her other children to lie and she gave "dubious" testimony. [A nice way of saying she was lying.] Custody to father.
Matter of Koch v. Koch, 121 AD3d 1201 (Third Dept. 2014)

Although mother had initially removed the child from NY to California with the intention of frustrating father's rights, she had since remedied this, and Family Court felt that she was sincere and the reason was partly because of father's domestic violence, which ultimately cost him custody, although he received a considerable amount of parenting time.
Matter of Brown v. Akatsu, 125 AD3d 1163 (Third Dept. 2015)

Order of Protection impeded father's ability to obtain physical custody of children, and mother has been primary caregiver.
Matter of Mariam D. v. Adama D., 126 AD3d 474 (First Dept. 2015)

Fact that mother continued to reside with the father of her other children weighed against her fitness because he had committed sexual abuse of their oldest child.
Matter of Donegan v. Torres, 126 AD3d 1357 (Fourth Dept. 2015)

Modification granted and mother awarded sole custody where, although child had not observed domestic violence incident between father and his live-in girlfriend, she witnessed his arrest and the house was in disarray when the mother arrived to retrieve the child, who was visibly upset by the incident.
Matter of Fountain v. Fountain, 130 AD3d 1107 (Third Dept. 2015)

Religion

Parties had agreed children would be raised in the Jewish faith and amended order provided that son shall attend Hebrew School, but was silent as to transportation. Appellate Division modified by requiring whichever parent had physical custody when child scheduled to attend would transport.
Matter of Genitrini v. Grill, 127 AD3d 970 (Second Dept. 2015)

Trial court gave father sole decision-making authority with respect to children's religious practice but also required mother to obtain his written consent to obtain religious services with them. Appellate Division modified by deleting that provision, and alternating religious holidays between the parents.
Matter of Ann D. v. David S., 128 AD3d 520 (First Dept. 2015)

Child's Preference

13-year old child communicated strong preference to reside with mother as relationship with father had deteriorated since last custody order. Dismissal of mother's petition reversed and custody award dot mother by Appellate Division.
Matter of Burke v. Cogan, 122 A.D.3d 625 (Second Dept. 2014)

Although not specifically mentioned as a factor, child who was 15 wanted to live with his father because he had to provide child care for younger sibling and was missing out on activities. Court refashioned the joint custody arrangement to relieve the child of having to care for his younger sister. [Clearly the record contains more than was included by the Appellate Division; otherwise the father should have received sole custody instead of primary residence for school purposes.]
Matter of Kent v. Ordway, 125 AD3d 1203 (Third Dept. 2015)

14-year old child's preference entitled to great weight, age and maturity make input particularly meaningful.
Matter of Cannella v. Anthony, 127 AD3d 745 (Second Dept. 2015)

Children were ages 13 and 12 at time of order, and their preference was entitled to great weight.
Matter of Worner v. Gavin, 128 AD3d 981 (Second Dept. 2015)

Family Court correctly suspended all visitation between the mother and the children and found that therapeutic visitation would not be in the children's best interests. Children's wishes, ages 15 and 13, entitled to great weight.
Matter of Rosenblatt v. Rosenblatt, 129 AD3d 1091 (Second Dept. 2015)

Interesting discussion of the role of the child's preference in custody determinations. Child was 13 at time of trial court order and 15 at time of Appellate Division decision. Majority found that trial court had properly weighed child's preference, but dissent disputed the weight (or lack of it) and the underlying facts, believing the trial court erred by awarding custody to the mother against the child's wishes.
Sheridan v. Sheridan, 129 AD3d 1567 (Fourth Dept. 2015)

Reasons for child's preference (8 years old) indicate no weight should be given to his choice.
Matter of Lao v. Gonzales, 130 AD3d 624 (Second Dept. 2015)

Court affirmed grant of custody of 16-year-old to father when child refused to reside with mother.
Matter of Battin v. Battin, 130 AD3d 1265 (Third Dept. 2015)

Court found that 13 year old child's preference entitled to great weight, even though he did not wish to see his father.
Matter of Coull v. Rottman, 131 AD3d 964 (Second Dept. 2015)

Wishes of [13-year-old] child not controlling but entitled to great weight, particularly where their age and maturity would make their input particularly meaningful.
Matter of Wosu v. Nettles-Wosu, --AD3d--, 2015 NY Slip Op 07282 (Second Dept. 10/7/2015)

Other factors

Mother compromised child's safety, had emotional and substance problems. Custody to father affirmed.
Matter of Adam MM. v. Toni NN., 124 A.D.3d 955 (Fourth Dept. 2015)

Thoughtful decision affirming trial court award of custody to mother. Both parents were young (23 and 21), both had engaged in some self-help, and each had positive and negative attributes. Mother had been primary

caregiver and was in a stable relationship and child had half-siblings but had performed a ruse to retrieve the child when father took her; father had steady job and home but had anger issues and was reluctant to allow the mother to have a relationship with the child. Of note was the Appellate Division's suggestion that the father might be able to move to Michigan because his job was transplantable (See *Tropea v. Tropea*, 87 NY2d 727 (1996)).
Matter of Benjamin v. LeMasters, 125 AD3d 1144 (Third Dept. 2015)

Mother admitted allegations regarding her emotionally destructive and sometimes violent behavior towards father and the subject children. Custody determined on papers rather than a hearing.
S.L. v. J.R., 126 AD3d 682 (Second Dept. 2015)

In light of mother's untreated mental health condition, she was unfit to act as custodian. She testified that she found treatment more hurtful than helpful.
Matter of Donegan v. Torres, 126 AD3d 1357 (Fourth Dept. 2015)

Father at least twice failed to comply with court orders to return child from Texas to NY. Appellate Division felt this was a very important factor to consider.
Matter of Nia Dara B. v. Jonathan B., 127 AD3d 518 (First Dept. 2015)

While mother was primary caregiver, she shoplifted while the children were in her care and, at times, used them to aid her in those endeavors. She even exposed them to one of her arrests for shoplifting. Custody to father affirmed.
Matter of Daniel TT. v. Diana TT. 127 AD3d 1514 (Third Dept. 2015)

Family Court properly accepted evidence of father's criminal history and conduct while incarcerated. A parent's criminal history may militate against custody.
Matter of Springstead v. Bunk, 128 AD3d 1516 (Fourth Dept. 2015)

Affidavit switching primary custody and not reduced to an order was only one factor to consider in a modification proceeding.
Matter of Lugo v. Hamill, 129 AD3d 1532 (Fourth Dept. 2015)

Child had resided wit mother and half-siblings for his entire life and courts will not disrupt sibling relationships unless there is an overwhelming need to do so.

Matter of Lao v. Gonzales, 130 AD3d 624 (Second Dept. 2015)

Mother made numerous unfounded allegations of sexual abuse against the father and her behavior was erratic and inappropriate. Father more likely to foster a relationship between the child and noncustodial parent.
Matter of Goldfarb v. Szabo, 130 AD3d 728 (Second Dept. 2015)

Mother's relocation to Texas and then Georgia was one factor to be considered in an initial custody proceeding, but strict application of the relocation factors is not required.
Matter of Wright v. Wright, 131 AD3d 1256 (Second Dept. 2015)

Father granted custody of three-year old child. Trial court found lack of credibility in mother's testimony, and found father more fit in every category considered.
*B.K. v. J.N., NYLJ 1202734307378, at *1 (Sup. Ct, Richmond Cty., 7/30/2015)*

Joint Custody

Both parents had deficiencies, but both were attempting to address their shortcomings and were fit and had stable homes. Appellate Division affirmed award of joint custody and equal parenting time.
Matter of Steven Anthony Teri v. Summer Joy Elliot, 122 AD3d 1092 (Third Dept. 2014)

Where relationship of parties has become so antagonistic that they are unable to cooperate on decisions regarding the subject child, award of sole custody justified instead of prior award of joint custody.
Matter of Sterling v. Silva, 124 A.D.3d 669 (Second Dept. 2015)

Joint custody properly awarded as the parties were not so embattled and embittered as to effectively preclude joint decision making, and the mother indicated she was not opposed to joint legal custody.
Matter of Mayes v. LaPlatney, 125 AD3d 1488 (Fourth Dept. 2015)

Joint custody is encouraged primarily as a voluntary alternative for relatively amicable parents behaving in a civilized fashion, not where the parties are antagonistic to each other and have demonstrated an inability to cooperate on matters concerning the child.

Angelova v. Ruchinsky, 126 AD3d 828 (Second Dept. 2015)

Joint custody not feasible when parents unable to communicate or cooperate with each other.
Matter of Liliana C. v. Jose M.C., 128 AD3d 496 (First Dept. 2015)

In initial custody determination, trial court awarded joint legal custody but physical custody to father. Affirmed.
Matter of Psaros v. Mitchell-Ortega, 128 AD3d 703 (Second Dept. 2015)

Trial court essentially awarded shared physical custody but divided decision-making authority between the parents; affirmed. The fact that the antagonistic relationship precluded and award of joint legal custody did not mean shared physical custody was inappropriate. The separate areas of authority carved out for each parent were supported by the record.
Matter of Hardy v. Figueroa, 128 AD3d 824 (Second Dept. 2015)

Although some problems between the parents in reaching joint custody decisions, they managed to deal with the problems without impacting the children's well-being; father's application for sole custody denied without a hearing. [I'm confused. There was no hearing in the matter yet the Appellate Division acknowledged problems, and even affirmed the assignment of a parent coordinator. Seems to me there should have been some kind of hearing.]
Shannon v. Shannon, 130 AD3d 604 (Second Dept. 2015)

Lengthy decision wherein the trial court awarded joint custody, shared parenting time, and gave father final authority on educational matters. Court discussed at length why case did not fit into the general joint custody prohibition of *Braiman v. Braiman*, 44 NY2d 584 (1978).
*I.L.H. v. A.H., NYLJ 1202736928143, at *1 (Sup. Ct. Nassau Cty. 8/31/2015)*

<u>Parent v. Non-Parent</u>

Extraordinary circumstances established by the fact that the parents surrendered custody to the aunt for much of the child's life and withdrew almost completely from the parental role for an extended period of time.
Matter of Battisti v. Battisti, 121 AD3d 1196 (Third Dept. 2014)

Trial court properly found extraordinary circumstances based on the mother's inability to provide a safe home environment for the child. Mother allowed access by her husband who had untreated mental health issues and refused medication.
Matter of Van Dyke v. Cole, 121 AD3d 1584 (Fourth Dept. 2014)

A parent cannot be displaced merely because another person would do a "better job" of raising the child or because the child has bonded psychologically with the nonparent.
Matter of Bailey v. Carr, 125 A.D.3d 853 (Second Dept. 2015)

Extraordinary circumstances established based on mother's prolonged separation from child and lack of involvement, failure to contribute financial support, and the strong emotional bond between the child and non-parents.
Matter of Jerrina P. June H. – Shondell N.P.), 126 AD3d 980 (Second Dept. 2015)

Extraordinary circumstances existed for both guardians to maintain custody where mother, despite rehabilitation for substance abuse, still did not demonstrate sufficient appreciation of her parental duties and responsibilities.
Matter of Sweeney v. Sweeney, 127 AD3d 1259 (Third Dept. 2015)

The fact that twelve year old child has been in primary physical residence of paternal grandparents virtually since birth was not deemed extraordinary circumstance to overcome mother's superior right to custody. The court noted that the mother was not unfit nor had she abandoned the child, and reversed the trial court to grant her custody.
Matter of Suarez v. Williams, 128 AD3d 20 (Fourth Dept. 2015)

Extraordinary circumstances established by fact that child had been with non-parent for nine years, mother only exercised sporadic visitation, and was usually addicted to cocaine. Child also had strong bond with non-parent.
Matter of Hoch v. Wilks, 129 AD3d 1146 (Third Dept. 2015)

Extraordinary circumstances established by mother's prolonged separation from the child and lack of significant involvement in the child's life, and strong emotional bond between child and nonparent petitioners, and mother's failure to contribute to child's support.
Matter of Culberson v. Fisher, 130 AD3d 827 *(Second Dept. 2015)*

Great-aunt found to have standing and granted custody based on extraordinary circumstances which included the fact that child resided with her vast majority of her life, had a close relationship with the child, and the mother neglected to maintain a continuous relationship with the child.
Matter of Sharon D. v. Dara K., 130 AD3d 1179 (Third Dept. 2015)

Extraordinary circumstances established where father neglected the child's developmental, educational and medical needs, was frequently absent and abdicated any parental responsibility, and engaged in conduct detrimental to the child's well-being.
Matter of Yandon v. Boisvert, 130 AD3d 1257 (Third Dept. 2015)

<u>Miscellaneous</u>

Court properly denied custody petition of adult cousin for custody of child in non-kinship foster home. Among other factors Petitioner remained in household which included a registered sex offender for a year after she made her request, and might have to return there for financial reasons.
Nikole S. v. Jordan W., 123 AD3d 497 (First Dept. 2014)

Grandmother properly denied custody of child in foster care because she failed to appreciate the danger in allowing the mother access, where mother beat the child's brother and did not get medical assistance until he died. Visitation also denied [see grandparent visitation, *infra.*]
Matter of Albertina C. v. Administration for Children's Services, 125 AD3d 483 (First Dept. 2015)

Court properly dismissed custody petition of maternal uncle, allowing child to be adopted by foster parents, as uncle had not visited or communicated with child in three years and had not made himself available for a forensic evaluation.
Matter of Ender M.Z.-P v. Administration for Children's Services, 128 A.D.3d 713 (Second Dept. 2015)

MODIFICATION

Change in Circumstances

In General

Father's allegations that court's modification of prior custody agreement violated his constitutional rights in unavailing. No agreement can bind a court to a disposition other than a weighing of all of the best interest factors. [The father appeared pro se on the appeal.]
Sequeira v. Sequeira, 121 AD3d 406 (First Dept. 2014)

Modification of a court-approved stipulation setting forth the terms of visitation is permissible only on a showing that there has been a change in circumstances such that a modification is necessary the ensure the best interests and welfare of the child.
Hughes v. Hughes, 131 AD3d 1207, 2015 NY Slip Op 07009 (Second Dept. 2015)

Modification Granted

Father's conduct demonstrated a wholesale disregard of his responsibilities as joint custodian, including having mother and children evicted from home that he owned and where they lived, rent-free, for nine years.
Matter of Lazo v. Cherrez, 121 A.D.3d 1002 (Second Dept. 2014)

Child's relationship with father had deteriorated since last order, mother exhibited greater sensitivity to child's emotional and psychological needs, and father denigrated mother in child's presence. Trial court reversed and sole custody awarded to mother.
Matter of Burke v. Cogan, 122 A.D.3d 625 (Second Dept. 2014)

Family Court denied competing petitions to modify joint custody; Appellate Division reversed and awarded sole custody to mother based on extreme acrimony between the parties. [Mother had always had residential custody; case was really about decision-making authority which escalated into full-blown custody hearing.]
Matter of Florio v. Niven, 123 A.D.3d 708 (Second Dept. 2014)

Where relationship of parties had become so antagonistic that they are unable to cooperate on decisions regarding the subject child, award of sole custody justified instead of prior award of joint custody.
Matter of Sterling v. Silva, 124 AD3d 669 (Second Dept. 2015)

Shared residential custody, with child moving each Wednesday, no longer practical once child started school.
Matter of Biagini v. Parent, 124 AD3d 1368 (Fourth Dept. 2015)

Mother's interference with father-child relationship justified change in custody.
Matter of Preciado v. Ireland, 125 A.D.3d 662 (Second Dept. 2015)

Modification affirmed and father granted custody. Mother's life had become unstable with allegations of alcohol abuse and association with men unsafe for the children to be around. Children had done well in school in the year they resided with father in Colorado
Matter of Colona v. Colona, 125 AD3d 1123 (Third Dept. 2015)

Prior agreement no longer working. Father awarded custody based on mother's interference with the children's relationship with the father and her inappropriate questioning of the son about his conversations with his AFC, which the Appellate Division characterized as emotional abuse.
Heather B. v. Daniel B., 125 AD3d 1157 (Third Dept. 2015)

Mother found to have medically neglected one child and derivative neglected other child. Father awarded custody of the second child.
Matter of Jaelin L. (Kimrenee C.), 126 AD3d 795 (Second Dept. 2015)

Mother awarded sole custody and father's visitation rights suspended. Order of Protection also entered. Light on facts, but apparently the child opposed visitation and was afraid of the father.
Matter of Lyons v. Knox, 126 AD3d 798 (Second Dept. 2015)

Father granted change of custody because of parental alienation by mother.
Matter of Halioris v. Halioris, 126 AD3d 973 (Second Dept. 2015)

Relationship between mother and 14-year old child had deteriorated; child's school performance improved while with father. Change of custody to father affirmed.

Matter of Cannella v. Anthony, 127 AD3d 745 (Second Dept. 2015)

Trial court changed primary residential custody from mother to father based on his ability to provide direct care when the child was out in school while the mother had a work schedule which required an after-school program. Further, the child was thriving in school because of the father's involvement. Finally, mother was financially dependent on maternal grandmother which, under the circumstances was not healthy.
Matter of Lodge v. Lodge, 127 AD3d 1521 (Third Dept. 2015)

Extreme acrimony between the parties was a change of circumstances warranting a modification of custody.
Matter of Skipper v. Pugh, 128 AD3d 972 (Second Dept. 2015)

Relationship between mother and children had deteriorated, children wished to reside with father, and father more likely to foster a relationship between the children and the noncustodial parent.
Matter of Worner v. Gavin, 128 AD3d 981 (Second Dept. 2015)

Family Court correctly modified divorce Stipulation to award mother sole custody. Parties' relationship had deteriorated to the point that they could not communicate and rendered them unable to engage in joint decision-making. Father had volatile temper, limited insight into his behavior, and a tendency to blame the mother for his strained relationship with the child.
Matter of D'Amico v. Corrado, 129 AD3d 718 (Second Dept. 2015)

Modification granted and mother awarded sole custody where, although child had not observed domestic violence incident between father and his live-in girlfriend, she witnessed his arrest and the house was in disarray when the mother arrived to retrieve the child, who was visibly upset by the incident.
Matter of Fountain v. Fountain, 130 AD3d 1107 (Third Dept. 2015)

Modification affirmed from joint legal, physical residence with mother, to sole custody to mother. Father amply demonstrated that he had fundamental deficiencies in his parenting abilities, including returning the child with soiled diapers and rashes, failing to feed the child frozen breast milk provided by the mother, and returning the child sick on one occasion. He apparently also had some kind of criminal conviction for corporal punishment of his older children.

Matter of Demers v. McLear, 130 AD3d 1259 (Third Dept. 2015)

Modification granted where mother failed to comply with visitation and communication provisions of prior court order.
Matter of Lopez v. Alvarez, --AD3d--, 2015 NY Slip Op 07503 (Second Dept. 10/14/2015)

Both parents filed for modification alleging joint parenting was not working. Trial court found that, in fact, the parents could not cooperate with each other and that the mother had willfully violated the existing order and denied the father parenting time. Assessing the child's best interests, and mental illness of both parents, the court found the father would provide more stability and more likely foster a relationship with the other parent and awarded him custody.
*Matter of D.T. v. V.T., NYLJ 1202735484043, at *1 (Onondaga County Fam. Ct. 7/16/2015)*

<u>Modification Denied</u>

Court properly denied father custody when record revealed that father had not exercised parenting time for five years before parties reconciled, and that, following reconciliation, father engaged in domestic violence in the presence of the children.
Matter of Chris X. v. Jeanette Y., 124 AD3d 1013 (Third Dept. 2015)

Father sought sole custody alleging mother had violated previous order by withholding visitation and by interfering with his access to and relationship with the child. Family Court granted his petition but Appellate Division reversed, finding that the trial court gave insufficient weight to father having ceased visitation prior to previous order and father's rejection of therapeutic visitation, as well as fact that child had been with mother since birth.
Matter of Connolly v. Walsh, 126 AD3d 691 (Second Dept. 2015)

Although the parties have an acrimonious relationship, they were able to put aside their antagonism to facilitate decision-making and to cooperate in the best interests of the child.
Matter of Quezada v. Long, 126 AD3d 907 (Second Dept. 2015)

Trial court award of custody to father reversed. Appellate Division found too much reliance by trial court on father's recent moved closer to his

extended family (in Texas). Court should have considered relatively stability of mother's relationship and stability for child of remaining in NY. Court also noted that father had, at least twice, failed to comply with court orders to return the child from Texas to NY.
Matter of Nia Dara B. v. Jonathan B., 127 AD3d 518 (First Dept. 2015)

Father's request for custody ultimately denied after trial court made some adjustments to keep the subject child away from the mother's step-daughter, who exhibited periods of violence. Under the particular facts, the child was not at risk and the shared custody arrangement was properly continued.
Matter of Bailey v. Blair, 127 AD3d 1274 (Third Dept. 2015)

Family Court correct in denying modification. Child had resided with mother and half-sisters his entire life and mother was not unfit. Circumstances relied on by father "constituted either common parenting issues or isolated events". Child's (8 years old) preference given little weight.
Matter of Lao v. Gonzales, 130 AD3d 624 (Second Dept. 2015)

The evidence was stale by the time the Family Court issued its order, and the trial concentrated on the acrimonious relationship between the parties and too little evidence about the children's current circumstances and best interests. Remanded for a new hearing, and to conduct in camera interviews of the children.
Matter of Middleton v. Stringham, 130 AD3d 627 (Second Dept. 2015)

Appellate Division had previously remanded for a full hearing after trial court dismissed father's petition at end of his case for failure to establish a prima facie case. On remand, Family Court held full hearing; once again dismissed father's petition. This time affirmed.
Matter of Oakley v. Cond-Arnold, 130 AD3d 737 (Second Dept. 2015)

Trial court correctly dismissed mother's modification petition at conclusion of mother's case. Here, granting her every favorable inference, she failed to present a prima facie case which would require modification of father's visitation.
Matter of C.H. v. F.M., 130 AD3d 1028(Second Dept. 2015)

Relocation

Relocation denied from Chemung County to Ohio. Mother failed to prove that the children's economic, emotional or educational well-being would be substantially enhanced by the move. Significantly, the father had moved to NY specifically to be with the children.
Matter of Cowper v. Vasquez, 121 AD3d 1341 (Third Dept. 2014)

The removal of the children without seeking permission should not be encouraged and is a factor for the court's consideration, but an award of custody must be based on the best interests of the children and not a desire to punish a recalcitrant parent.
Matter of Baxter v. Borden, 122 AD3d 1417 (Fourth Dept. 2014)

Relocation allowed from Suffolk County to ??? [decision does not say]. Child custody orders are not subject to res judicata effect and are subject to modification based on changed circumstances to ensure the continued best interests of the child.
Matter of Estevez v. Perez, 123 AD3d 707 (Second Dept. 2014)

Relocation allowed from Rockland County to Florida. Move would provide financial security to the mother and child and extended family support.
Matter of Pepe v. Pepe, 124 AD3d 898 (Second Dept. 2015)

Relocation denied from NY to Texas as it would cause too much of a disruption in the father's relationship with the children, and mother expressed a reluctance to send children back to NY to visit with father. Court also noted that, in a relocation case, the proposed relocation is the "change of circumstances" and the parent need not plead and prove any other change.
Matter of Julie E. v. David E., 124 AD3d 934 (Third Dept. 2015)

Relocation permitted from NY to Camp Lejeune NC. The move would afford the child emotional and economic stability.
Matter of Adams v. Robertson, 124 AD3d 946 (Second Dept. 2015)

Relocation permitted from Albany to Virginia. Relocation will substantially improve the child's quality of life.
Matter of Spaulding v. Stewart, 124 AD3d 1111 (Third Dept. 2015)

Mother moved to North Carolina then sought custody and permission. Court granted father custody finding, among other reasons, that her move raised concerns about her commitment to encourage a relationship between the father and the child.
Matter of Bush v. Lopez, 125 AD3d 1150 (Third Dept. 2015)

Relocation denied from Village of Tannersville, Greene County to City of Kingston, Ulster County. While move would have benefitted mother personally, it would have caused the children to lose their academic and extracurricular pursuits and their established friendships.
Matter of Gates v. Petosa, 125 AD3d 1161 (Third Dept. 2015)

Relocation to Netherlands denied in original custody determination, where it is but one factor in best interests analysis.
Forrestel v. Forrestel, 125 AD3d 1299 (Fourth Dept. 2015)

Relocation denied from NY to Tennessee. Mother failed to establish economic necessity in that she failed to show that the job she was offered in Tennessee would last for any significant period of time and that there were no similar opportunities in NY.
Matter of Hill v. Flynn, 125 AD3d 1433 (Fourth Dept. 2015)

Relocation permitted from Erie County to Massachusetts, based on economic necessity.
Matter of Newman v. Duffy, 125 AD3d 1474 (Fourth Dept. 2015)

Relocation denied from Queens to Georgia, but mother also denied custody, apparently a de novo custody hearing.
Matter of Inabinett v. Kelly, 126 AD3d 701 (Second Dept. 2015)

Relocation granted from Nassau County to India. [Unfortunately, no facts offered in the decision.]
Matter of Rizvi v. Shah, 126 AD3d 984 (Second Dept. 2015)

Relocation denied from Oneonta, NY to Syracuse, NY (109 miles) because it would affect father's parenting time and his ability to participate in medical decisions regarding child.
Matter of Cook-Lynch v. Valk, 126 AD3d 1062 (Third Dept. 2015)

Relocation by mother denied from Nassau County to North Carolina. Apparently, by the time of the hearing, the child was residing (and thriving) with the father, who also received custody.
Matter of Melgar v. Sevilla, 127 AD3d 1092 (Second Dept. 2015)

Relocation allowed from Westchester County to London, England. Mother demonstrated economic necessity, enhancement of children's lives emotionally and educationally, and no negative impact on children's future contact with the father.
Lecaros v. Lecaros, 127 AD3d 1037 (Second Dept. 2015)

Relocation denied from Ulster County to Brooklyn. Mother failed to demonstrate that relocation would enhance the child's educational, economic or emotional well-being.
Matter of Lodge v. Lodge, 127 AD3d 1521 (Third Dept. 2015)

Trial court reversed and relocation granted from Nassau County to Richmond County (Staten Island.) Appellate Division found that proposed move would have little impact on father's ability to participate in child's extracurricular activities, would improve the mother's economic situation, and bring her closer to her parents and extended family. The Appellate Division also called into question the father's motives because he had previously opposed a move from Suffolk County to Nassau County. Child also wanted to move.
Matter of DeCillis v. DeCillis, 128 AD3d 818 (Second Dept. 2015)

Relocation allowed from Bronx to Georgia (no facts).
Matter of Peter R. v. Samara B., 129 AD3d 579 (First Dept. 2015)

Relocation permitted from NY to North Carolina. It probably did not help the father that he occasionally interfered with the child's educational process.
Matter of Rebecca HH. V. Gerald HH., 130 AD3d 1158 (Third Dept. 2015)

Relocation permitted from Saratoga County to Monroe County. In this case economic necessity presented a particularly persuasive ground for permitting the move.
Matter of Moredock v. Conti, 130 AD3d 1472 (Fourth Dept. 2015)

Mother's relocation to Texas and then Georgia was one factor to be considered in an initial custody proceeding, but strict application of the relocation factors is not required.
Matter of Wright v. Wright, 131 AD3d 1256 (Second Dept. 2015)

Mother's original application to relocate with the child denied, but Appellate Division remanded for new hearing and *Lincoln* hearing with the child based on new information disclosed by the AFC.
Matter of Tavares v. Barrington, 131 AD3d 619 (Second Dept. 2015)

Relocation denied from NY to Georgia, but facts more complicated. Apparently mother and child had moved to Georgia many years before, and child visited with father in both NY and Georgia. Mother obtained a job overseas and moved for formal permission to relocate to Georgia [perhaps to have relatives care for child?] and father cross-moved for custody. Father granted custody based on child's wishes, child had thrived in father's care, and recommendations of forensic psychologist and AFC.
Matter of Wosu v. Nettles-Wosu, --AD3d--, 2015 NY Slip Op 07282 (Second Dept. 10/7/2015)

Relocation granted from Nassau County to Florida where father's failure to pay support (he owed over $100,000) was a major trigger for the need for the move. Further, the father has somewhat limited contact with the child and did not take advantage of all of the opportunities offered him.
*JL v. ML, NYLJ 1202735209934, at *1 (Sup. Ct. Nassau Cty. 7/22/2015)*

VISITATION

Supervision

Evidence that father had diabetes and unhealthy blood sugar level on several occasions did not justify finding that unsupervised visitation would be detrimental unless the father received "medical clearance."
Matter of Dolan v. Masterson, 121 AD3d 979 (Second Dept. 2014)

ACS given sole authority to determine whether supervised visitation would occur; affirmed based on father's lack of insight into his actions and reluctance of children to visit with him.
Matter of Victoria P (Victor P.), 121 AD3d 1006 (Second Dept. 2015)

In light of mother's disruptive behavior during visits and her admitted unwillingness or inability to comply with court directives regarding her interactions with the child, the court properly directed that the mother's visitation with the child be supervised. [Mother was found to have neglected child who was released to father's custody.]
Matter of Bobby J.C. (Faith C.), 124 AD3d 648 (Second Dept. 2015)

Order restricting visitation to supervision by the maternal grandmother (who was awarded custody – not an issue on appeal) reversed for lack of a hearing on appeal by AFC. Court ordered forensics of mentally ill mother and transfer to a different judge.
Matter of Sanchez v. Russo, 124 A.D.3d 904 (Second Dept. 2015)

In a neglect case, Family Court should not have authority in father's therapist to determine when therapeutic visitation should commence. The therapy was made a condition of visitation, not a condition precedent.
Matter of Brianna A.-C. (Edward A.-M.), 125 AD3d 771 (Second Dept. 2015)

Order granting father some unsupervised visitation affirmed. Nothing in record which would give rise to conclusion that some unsupervised visitation would be detrimental to the child, who wanted it.
Matter of Anthony M.P. v. Ta-Mirra J.H., 125 AD3d 868 *(Second Dept. 2015)*

Father's visitation supervised when he engaged in an altercation with the child's grandmother in front of the child, resulting in police intervention, and the father fired a shot from a BB gun that narrowly missed the child when she was trying to set up a target.
Matter of Rice v. Cole, 125 AD3d 1466 (Fourth Dept. 2015)

Mother enjoyed Article 6 unsupervised visitation with her two oldest children. An Article 10 petition was brought regarding other, half-siblings and the trial court, *sua sponte*, restricted her visitation to supervised. Appellate Division found this was error on the facts, but not on the law.
Matter of Damian D., 126 AD3d 12 (Third Dept. 2015)

Trial court should have set a minimum duration for mother's supervised visitation each month. Further, the counseling directive in the trial court's order should have been a component of visitation, but not a prerequisite.

Matter of Ordona v. Cothern, 126 AD3d 1544 (Fourth Dept. 2015)

Supervised visitation with father affirmed. Eleven year old child had serious physical and mental health challenges, had not seen the father in several years, and became agitated when he saw his father.
Matter of Lopez v. Lopez, 127 AD3d 974 (Second Dept. 2015)

Order of supervised visitation and supervised phone calls to the mother in child's best interests. Further, Family Court had the power to direct mother, as a component of visitation, to participate in both individual and group therapy to improve her parenting skills for the child's benefit. [Yet had the court ordered the therapy as a *condition of receiving visitation*, it would have been reversed. Just semantics.]
Matter of Skipper v. Pugh, 128 AD3d 972 (Second Dept. 2015)

Family Court correctly suspended all visitation between the mother and the children and found that therapeutic visitation would not be in the children's best interests. Children's wishes, ages 15 and 13, entitled to great weight.
Matter of Rosenblatt v. Rosenblatt, 129 AD3d 1091 (Second Dept. 2015)
Therapeutic visitation for mother was justified by her repeated unfounded allegations of sexual abuse and her continued attempts to undermine father's ability to form a relationship with the child, but Family Court erred in failing to set a schedule for therapeutic supervised visitation, implicitly leaving it to the parties and provider to determine.
Matter of Goldfarb v. Szabo, 130 AD3d 728 (Second Dept. 2015)

Court properly directed supervision of father's visitation based on his clear unwillingness to parent by electing not to visit when he had the opportunity and the children's unfamiliarity with him. [Father apparently presented *attitude* to the trial court. Not a good thing.]
Matter of Sparbanie v. Redder, 130 AD3d 1172 (Third Dept. 2015)

Denial of the right to visitation must be based on substantial evidence that visitation would be detrimental only to the welfare of the child. Here, the parties disputed the reason for the cessation of therapeutic visitation and the Family Court should have held an evidentiary hearing.
Matter of Seeback v. Seeback, 131 AD3d 535 (Second Dept. 2015)

Father concerned that mother would abscond to China with child. Mother properly awarded unsupervised visitation but with no overnights and certain

geographical restrictions. Family Court properly found that father's claims that mother planned to abscond with child were without basis, but other restrictions upheld.
Matter of O'Neil v. O'Neil, --AD3d--, 2015 NY Slip Op 07275 (Second Dept. 10/7/2015)

Mother's supervised visitation suspended in 2010. She subsequently sought supervised, therapeutic visitation with the subject child, and his half-brothers sought visitation, which was initially granted on consent of the father. AFC subsequently moved to make those visits supervised. Apparently 12-year-old child did not want any visitation with mother or half-siblings. After hearing, mother and half-siblings all received supervised, therapeutic visitation with the child, and half-siblings' visitation modified accordingly; father appealed. Child's wishes taken into account but they were not controlling and order affirmed over father's appeal. No evidence that therapeutic visitation would be detrimental to the child.
Matter of Ottaviano v. Ippolito, --AD3d--, 2015 NY Slip Op 07276 (Second Dept. 10/7/2015)

Other Issues

Trial court properly denied visitation to incarcerated father with 8-year-old son where father was incarcerated before child born, had never met the child, and the child did not want to see him.
Matter of Fewell v. Ratzel, 121 AD3d 1542 (Fourth Dept. 2014)

Father denied visitation until he completes another sex offender risk assessment. Child was a product of rape of the underage mother and he refused to accept responsibility for his actions.
Matter of Cardwell v. Mighells, 122 AD3d 1293 (Fourth Dept. 2014)

Visitation with a non-custodial parent is presumed to be in the best interests of the child, even when that parent is incarcerated. Mother's OSC should have been signed.
Matter of Georghakis v. Matarazzo, 123 A.D.3d 711 (Second Dept. 2014)

Mother sought enforcement of visitation provision in judicial surrender. Trial court dismissed the petition after colloquy with AFC and attorney for Respondents. Reversed and remanded for a full hearing on the merits.
Matter of Jayden A., 123 AD3d 816 (Second Dept. 2014)

Trial court dismissed father's visitation petition without hearing. Affirmed by Appellate Division because father failed to allege a change in circumstances. [Apparently the father had been without visitation for three years at time of the hearing. While the facts which caused the original denial are unknown, visitation is a right of the child and the father should have been allowed a hearing *in the child's best interests.]*
Matter of Castagnini v. Hyman-Hunt, 123 A.D.3d 926 (Second Dept. 2014)

Change in father's work schedule interfering with his visitation was sufficient to allege a change in circumstances and he should have been granted a hearing.
Matter of Hillord v. Davis, 123 A.D.3d 1126 (Second Dept. 2014)

Previous visitation arrangement no longer feasible and trial court should have addressed issue of father being able to communicate with children.
Matter of Chris X. v. Jeanette Y., 124 AD3d 1013 (Third Dept. 2015)

Visitation with a non-custodial parent, even when incarcerated, is presumed to be in child's best interests. Here Appellate Division reversed a trial order granting father only indirect contact and ordered in-person visitation with the child.
Matter of Torres v. Pascuzzi-Corniel, 125 A.D.3d 675 (Second Dept. 2015)

Incarcerated father only granted three visits a year based on father's "poor character and poor criminal behavior" and lack of an established relationship with the child, as well as the necessary travel time to the child.
Matter of Lapham v. Senecal, 125 AD3d 1210 (Third Dept. 2015)

Trial court suspended all physical visitation by mother because relationship had deteriorated to the point child did not wish to visit. Reversed; no substantial evidence that visitation detrimental to the child's welfare, and child's wishes not determinative.
Matter of Tuttle v. Mateo, 126 AD3d 731 (Fourth Dept. 2015)

Visitation ordered with incarcerated parent over mother's objections which included fact that six-year-old child thought that his step-father was his biological father and had not seen the applicant in at least four years, but Appellate Division cut the number from twelve a year to four.
Matter of Kadio v. Simons, 126 AD3d 1253 (Third Dept. 2015)

Family Court correctly granted mother three weeks of summer visitation despite children's preference and position of AFC, but Appellate Division modified to have the visitation occur within New York.
Matter of Blazek v. Zavelo, 127 AD3d 854 (Second Dept. 2015)

Order granting mother (on a change of custody) limited visitation reversed and remanded for a more liberal schedule, and directed an updated forensic evaluation.
Matter of Stones v. Vandenberge, 127 AD3d 1213 (Second Dept. 2015)

Order granting a two year "stay away" Order of Protection and denying father visitation affirmed. Father failed to recognize the effect his actions had on the children.
Matter of Mohamed Z.G. v. Mairead P.M., 129 AD3d 516 (First Dept. 2015)

Family Court erred in restricting mother's visitation to within New York State and outside the presence of a named individual.
Matter of DeCastro v. McLean, 129 AD3d 720 (Second Dept. 2015)

Father sought a change in his contact with the children, which had been restricted (father was incarcerated) to written communications based on the children's adverse reaction to telephone calls. Father alleged that he had completed substance abuse programs and vocational counseling. Petition dismissed without a hearing; it failed to allege a change in the *children's* circumstances. [Remember, modification is about the children, not the parents.]
Matter of McIntosh v. Clary, 129 AD3d 1392 (Third Dept. 2015)

Record supports restrictions on father's visitation, which require visitation to occur in New York State and outside the presence of two named individuals.
Matter of Brown v. Brown, 130 AD3d 923 (Second Dept. 2015)

Trial court issued order limiting father's parenting time with child to when half-siblings not present (at one point visits with the older children were supervised) so that father could focus exclusively on this child. Appellate Division noted the law favors the development and encouragement of sibling bonds, but remanded for further development of the record which was to limited for appropriate review.
Matter of Demers v. McLear, 130 AD3d 1259 (Third Dept. 2015)

Changes in the circumstances of the mother's residence and the father's employment schedule warranted modification of the existing visitation schedule.
Matter of Kavanagh v. Kavanagh, --AD3d--, 2015 NY Slip Op 07279 (Second Dept. 10/7/2015)

Compliance

Biological mother brought petition to enforce visitation contained in a surrender instrument. Trial court, which had presided over several neglect petitions, dismissed the petition without a hearing. Appellate Division reversed, noting that the Court had to make a finding whether or not the visitation was in the child's best interests. The record presented on appeal, was simply inadequate and the trial judge did not elaborate on the reasons why. A spirited dissent noted that the trial judge was very familiar with the case and had sufficient information to make a determination without a hearing. [Given the passage of time, the dissent is completely off-base on the lack of need for a hearing, especially as the trial judge had initially approved the agreement.]
Matter of Jayden A. (Jennifer A.), 123 AD3d 816 (Second Department 2014)

Finding that mother was in civil contempt for failing to return children on time and at a certain location reversed, as order was not clear as to point where children were to be returned, and father exacerbated situation by refusing to travel to where mother had the children. While Appellate Division deferred to Family Court's factual determination, it vacated the contempt finding.
Matter of Wright v. McIntosh, 125 AD3d 679 (Second Dept. 2015)

Father established by clear and convincing evidence that mother was in civil contempt for failing to engage in family therapy.
Matter of Halioris v. Halioris, 126 AD3d 973 (Second Dept. 2015)

Stipulation provided that children would attend Hebrew School but was silent as to which parent would transport; finding of willful violation against father reversed as no clear order, but Appellate Division [wisely] directed that whichever parent had physical custody was to transport.
Matter of Gentrini v. Grill, 127 AD3d 970 (Second Dept. 2015)

Family Court denied father's petition to enforce visitation or, in alternative, to suspend his child support. Reversed as to the child support issue. Record amply supported a pattern of alienation by the mother, who stated many times that she would never allow the father to see the child, and child refused to visit with father. But Appellate Division found that the evidence justified a suspension of the father's future child support obligation.
Matter of Coull v. Rottman, 131 AD3d 964 (Second Dept. 2015)

Mother admitted that she refused to turn over the child for the father's parenting time for two months, alleging the transfers were "becoming violent." Willful violation established; no sanction imposed. [Maybe because father got custody.]
*Matter of D.T. v. V.T., NYLJ 1202735484043, at *1 (Family Court Onondaga Cty., 7/16/2015)*

Grandparent Visitation

In light of paternal grandmother's efforts to establish and maintain a relationship with the child, trial court properly found standing and properly awarded her visitation.
Matter of Luft v. Luft, 123 A.D.3d 831 (Second Dept. 2014)

Grandmother, who already had extensive visitation, sought overnights. Family Court dismissed the petition on motion but Appellate Division reversed and remanded for a hearing, finding a close bond between Petitioner and subject child that might be worthy of overnight visitation, and child old enough to express her wishes. [I'm sure the facts are very specific, but I keep hearing *Troxel v. Granville*, 530 US 57 (2000) in my head when I read this one.]
Matter of Lisa M. Ford v. Jessica Baldi, 123 AD3d 1399 (Third Dept. 2014)

Grandmother denied visitation (and custody) because of her flawed understanding of the death of the child's brother (killed by the mother), and fact that child became defiant and aggressive after the visits, and therapists's reports that they were detrimental to the child.
Matter of Albertina C. v. Administration for Children's Services, 125 AD3d 483 (First Dept. 2015)

Court found grandfather lacked standing because he failed to demonstrate that mother had frustrated his visitation; he resisted her attempts to promote

it. Grandmother was found to have standing, but Family Court correctly concluded it was not in the best interests of the grandchildren.
Matter of Troiano v. Marotta, 127 AD3d 877 (Second Dept. 2015)

Family Court properly found it lacked standing because this was not a matter in which it would be equitable to confer standing upon the grandparents. Finding that visitation not in children's best interests also affirmed. [No facts offered.]
Matter of Moskowitz v. Moskowitz, 128 AD3d 1070 (Second Dept. 2015)

PROCEDURE

Standing

Custody petition brought by non-biological former domestic partner of mother; mother sought to dismiss on basis of *Alison D.* and *Debra H.* Trial court distinguished those cases because biological mother had already alleged a "child in common" in order to get child support, received and estoppel hearing, and testified that the non-biological "mother" "was in fact a parent." Biological mother was judicially estopped from asserting inconsistent legal positions in different proceedings. This slightly distinguishes the case from the traditional equitable estoppel doctrine espoused in *Shondel J.*
Estrellita A. v. Jennifer D., 40 Misc.3d 219 (Family Court Suffolk Co. 2013); aff'd as Matter of Arriaga v. Dukoff, 123 A.D.3d 1023 (Second Dept. 2014). See also J.P. v. J.P., Sup. Ct. Westchester Cty. 3/27/2015, attached to Appendix.

Not a custody case, but relevant. Biological father sought to vacate Respondent's acknowledgment of paternity, determining that he was the child's biological father and seeking an amended birth certificate. Respondent had originally acknowledged paternity, but a subsequent DNA showed Petitioner to be father (child born in 2000) and biological father received custody in 2011 on default. Trial court denied on basis of res judicata, but Appellate Division reversed, essentially on basis that everyone knew who was and was not the father, the child was, in fact, residing with his biological father, and the acknowledged father did not oppose the petition, only seeking visitation with the child and so the child could visit his half-sibling.

Matter of Frost v. Wisniewski, 126 AD3d 1305 (Fourth Dept. 2015)

Presumption of legitimacy creates a biological status, not a legal status, and the non-gestational spouse in a same-sex marriage, who could not allege extraordinary circumstances, had no standing to seek custody. [Trial decision was reported in the 2014 Update. An area ripe for legislative clarification.]
Matter of Paczkowski v. Paczkowski, 128 AD3d 968 (Second Dept. 2015)

AFC appealed dismissal of petition by same-sex partner of mother based o best interests. Court affirmed dismissal as there was no marriage, no adoption, and no legal basis for standing. Equitable estoppel does not apply even when the nonparent has enjoyed a close relationship with the child and exercised some control over the child with the parent's consent.
Matter of Barone v. Chapman-Cleland, 129 AD3d 1486 (Fourth Dept. 2015)

Father lacked standing to seek visitation with former stepchildren. [Judicial estoppel not properly raised.]
Matter of Rossborough v. Alatawneh, 129 AD3d 1537 (Fourth Dept. 2015)

Parties entered into California civil union and then valid marriage in California. Three children were born of the relationship (all fathered by the same sperm donor); one to Kelly S. and two to Farah M. Sometime after the family had relocated to New York the parties separated and various support and visitation petitions were filed, as well as paternity petitions against the biological father. The Suffolk County Family Court initially reviewed California law, which would have granted the non-biological mother standing, but found that it was in direct conflict with New York's public policy and comity could not be granted based on both *Matter of Alison D. v. Virginia M.* and *Debra H. v. Janice R.* Applying *Debra H.*, however, the court found a valid California marriage to which New York would grant recognition, and the custody and visitation rights flowed from that marriage and scheduled a best interests hearing. The paternity petitions against the biological father were dismissed.
*Matter of Kelly S. v. Farah M., NYLJ 1202721838331, at *1 (Suffolk County Family Court March 13, 2015).*

In the absence of an Article 10 petition naming the non-respondent parent, he has a Constitutional right to seek custody pursuant to Article 6 and DSS has the burden of demonstrating extraordinary circumstances. Interesting

discussion on the interplay between Articles 6 and 10 regarding a non-respondent parent in the latter proceeding.
*Matter of Javaya R. v. Gashier M., NYLJ 1202725037639, at *1 (NY County Family Court, 3/23/2015)*

Hearing

Defective Petition

Visitation with a non-custodial parent is presumed to be in the best interests of the child, even when that parent is incarcerated. Mother's OSC should have been signed.
Matter of Georghakis v. Matarazzo, 123 A.D.3d 711 (Second Dept. 2014)

Change in father's work schedule interfering with his visitation was sufficient to allege a change in circumstances and he should have been granted a hearing.
Matter of Hillord v. Davis, 123 A.D.3d 1126 (Second Dept. 2014)

Where father's petition contained sufficient specific allegations that the parties' ability to cooperate with respect to the children had deteriorated so seriously that the child were being harmed, his petition should not have been dismissed at intake.
Matter of Klotz v. O'Connor, 124 A.D.3d 662 (Second Dept. 2015); Franco v. Franco, 127 AD3d 810 (Second Dept. 2015)

Mother's petition to change custody correctly denied without a hearing. Her allegations were unsubstantiated and conclusory. The one difficulty she alleged, that she had difficulty in scheduling therapeutic supervised visitation, the Appellate Division found that the divorce decree allowed the parties to agree on another service provider. [And the children may have been denied their right to visitation with their mother during all this time.]
Matter of Besen v. Besen, 127 AD3d 1076 (Second Dept. 2015)

Family Court should not have dismissed mother's change of custody petition without a hearing. Parties' submission raised sharply conflicting allegations and the mother was alleging that the father willfully interfered with her visitation.
Matter of Ruiz v. Sciallo, 127 AD3d 1205 (Second Dept. 2015)

No hearing required where there was no change in circumstances from original custody determination (even though parties had reconciled and separated in the interim.)
Matter of Valencia v. Ripley, 128 AD3d 711 (Second Dept. 2015)

Father's modification petition, filed only one month after an agreement, contained only unsubstantiated allegations and was properly dismissed.
Matter of Lowe v. Bonelli, 129 AD3d 1135 (Third Dept. 2015)

Petition to modify visitation properly dismissed without a hearing where the father alleged changes in his circumstances but did not address the reason visitation was limited in the first place.
Matter of McIntosh v. Clary, 129 AD3d 1392 (Third Dept. 2015)

Conduct of Hearing

Application to change custody based on allegations that subject child may have been sexually abused by older half-sister. Trial court should not have permitted father to testify that subject child told him the other daughter "did it" as it was inadmissible hearsay and was not harmless as it was the only evidence presented regarding the purported sexual abuse and who had done it. Further, trial court should not have allowed testimony from treating physician of older child, as it violated her HIPAA rights. It also was not harmless as it portrayed the other daughter as seriously disturbed.
Matter of Brown v. Simon, 123 AD3d 1120 (Second Dept. 2014)

Summary judgment granting father custody reversed, as SJ was based on an Order of Protection subsequently vacated by the Appellate Division.
Matter of Boyke v. Charles, 125 AD3d 854 (Second Dept. 2015)

Mother and AFC challenged testimony of father's psychiatrist concerning the older child's out-of-court statements. A child's out-of-court statements are admissible in a custody dispute if the statements relate to abuse or neglect, provided that they are corroborated by other evidence. The degree of corroboration required is relatively low.
Heather B. v. Daniel B., 125 AD3d 1157 (Third Dept. 2015)

No hearing required where Mother admitted allegations regarding her emotionally destructive and sometimes violent behavior towards father and

the subject children in affidavits and a forensic evaluation was presented to the Court.
S.L. v. J.R., 126 AD3d 682 (Second Dept. 2015)

No hearing necessary when relationship between child and parents was amply demonstrated at family offense hearing and court had report of forensic evaluator.
Navarrete v. Navarrete, 126 AD3d 801 (Second Dept.2015)

Here, Family Court possessed sufficient information to grant mother's custody petition (father was incarcerated). But remanded for a hearing on visitation.
Matter of Bell v. Mays, 127 AD3d 1179 (Second Dept. 2015)

Modification hearing consisted of *in camera* interview of child and mother's testimony. Court then granted custody to father; reversed. Mother raised significant issues about father's fitness and court should have been required to testify.
Matter of Mills v. Rieman, 128 AD3d 1486 (Fourth Dept. 2015)

Trial court essentially shifted custody from mother to father, without a hearing, because she stated in open court that she would not abide by the court's visitation orders. Despite her defiance, there were questions because the child had been in the mother's sole custody for several years, the father did not yet have overnight visitation, and the court repeatedly expressed concerns about the father's ability to care for the child for an extended period in his home. Remanded for a full custody hearing.
Matter of Kadyorios v. Kirton, 130 AD3d 732 (Second Dept. 2015)

Father's visitation petition dismissed when correctional facility did not produce the father and the facility was not responding. Reversed, no basis for dismissal for failure to prosecute.
Matter of Davis v. Koch, 130 AD3d 1027 (Second Dept. 2015)

Following mother's direct testimony, Family Court dismissed the petition. Reversed; there should have been a full best interests hearing. Because there was no prior custody order, this was not simply a relocation hearing. Court remanded to a different judge because of a lack of impartiality.
Matter of Varner v. Glass, 130 AD3d 1215 (Third Dept. 2015)

Denial of the right to visitation must be based on substantial evidence that visitation would be detrimental only to the welfare of the child. Here, the parties disputed the reason for the cessation of therapeutic visitation and the Family Court should have held an evidentiary hearing.
Matter of Seeback v. Seeback, 131 AD3d 535 (Second Dept. 2015)

Supreme Court held several *in camera* discussions with counsel and then limited the trial testimony to "positive" aspects of parenting. Appellate Division remanded for a new trial at which all issues could be fully examined on the record.
Lee v. Xu, 131 AD3d 1013 (Second Dept. 2015)

Court properly dismissed custody petition at close of mother's case as she failed to present evidence sufficient to establish a prima facie change in circumstances.
Matter of Cruz v. Figueroa, --AD3d--, 2015 NY Slip Op 07266 (Second Dept. 10/7/2015)

No hearing necessary on father's visitation petition when Family Court fully familiar with relevant background facts because it had long been involved with the various court proceedings involving the parties. [Apparently this was just one in a series of petitions by the father, but this is the one he chose to appeal.]
Matter of Naclerio v. Naclerio, --AD3d--, 2015 NY Slip Op 07274 (Second Dept. 10/7/2015)

Right to counsel

Mother's sole argument on appeal was that she received ineffective assistance of counsel. Record reflected that counsel conducted an effective direct examination and appropriately cross-examined the father.
Matter of Robinson v. Bick, 123 AD3d 1242 (Third Dept. 2014)

Mother expressed a desire for counsel. Family Court found, based on $54,000 disability payments, that she was not entitled to court-appointed counsel. Mother alleged several attempts to retain counsel over the course of a year but ultimately the Family Court proceeded to a hearing on the merits. Appellate Division reversed the denial of counsel, finding that trial court should have inquired into mother's financial circumstances including

expenses, and that waiver must be founded on an explicit and intentional relinquishment which is supported by a clear understanding of the right. Here, the record was clear the mother made no such waiver and the Court denied her *fundamental* right to counsel.
Matter of Pugh v Pugh, 125 AD3d 663 (Second Dept. 2015)

As a petitioner, mother not entitled to assigned counsel in proceeding she brought to modify her visitation.
Matter of Ali v. Hines, 125 AD3d 851 (Second Dept. 2015)

Mother made a knowing, voluntary and intelligent decision to waive her right to counsel and proceed pro se.
Matter of Brown v. Brown, 127 AD3d 1180 (Second Dept. 2015)

Trial court incorrectly allowed mother's attorney to withdraw without notice; therefore mother did not default and could appeal the order in question [and got a reversal – see UCCJEA].
Matter of Bretzinger v. Hatcher, 129 AD3d 1698 (Fourth Dept. 2015)

Family Court properly advised father of his right to counsel and the dangers and disadvantages of self-representation, and he knowingly, voluntarily and intelligently waived the right to counsel.
Matter of Seeback v. Seeback, 131 AD3d 535 (Second Dept. 2015)

In succession, three assigned counsel for the mother were granted motions to be relieved. The trial court then refused to assign another attorney for the mother. A party to a Family Court [custody] proceeding who has the right to be represented by counsel may only proceed without counsel if that party has validly waived his or her right to representation, and the court must conduct a searching inquiry to ensure that the waiver is unequivocal, voluntary and intelligent. Here there inquiry was not complete and revealed that the mother did not wish to proceed pro se. Decision reversed and remanded for new inquiry and, if necessary, a new hearing on custody.
Matter of Tarnai v. Buchbinder, --AD3d--, 2015 NY Slip Op 07671 (Second Dept. 10/21/2015)

Father sought assignment of counsel by the court. Mother opposed, claiming father has the education and resources to earn sufficient funds to retain private counsel. After reviewing applicable case law, court appointed

counsel but court directed father to seek employment and cautioned him of its power to direct reimbursement of those funds.
*Abadi v. Abadi, NYLJ 1202723812545, at *1 (Sup. Ct. Kings Cty. 4/8/2015)*

Attorney for the Child

AFC should not have had particular position in mind at outset of case before gathering evidence and without having conducted a complete examination. On remand (for other reasons) a new AFC was to assigned.
Matter of Brown v. Simon, 123 AD3d 1120 (Second Dept. 2014)

Custody order entered on consent of the parents but over objections of AFC. He had a right to appeal and the matter was remanded for forensics, in camera interviews with the children, and an evidentiary hearing. [A very questionable decision which calls into question the ability of parents to decide custody vs. the court's role of *parens patraie*.]
Matter of Velez v. Alvarez, 129 AD3d 1096 (Second Dept. 2015)

Court found that AFC was justified in not advocating child's position because it would have resulted in risk of imminent, serious harm to the child based on mother's persistent pattern of alienation.
Matter of Viscuso v. Viscuso, 129 AD3d 1679 (Fourth Dept. 2014)

Father lacks standing to seek disqualification and disallowance of AFC's fee on the ground of legal malpractice.
Kerley v. Kerley, 131 AD3d 1124 (Second Dept. 2015)

Disqualification of counsel

Mother consulted with an attorney who subsequently represented the father. Mother waited eight months to move to disqualify the attorney; Appellate Division reversed trial court and stated attorney should not have been removed.
Matter of Valencia v. Ripley, 128 AD3d 711 (Second Dept. 2015)

Trial court should not have *sua sponte* disqualified attorney in SIJS proceeding merely because the attorney was representing both mother and

child in federal court. The court's assertions and speculations as to a conflict of interest were insufficient to warrant a disqualification.
Matter of Sosa v. Serrano, 130 AD3d 636 (Second Dept. 2015)

Discovery

Extensive discussion of the role of discovery in custody proceedings. Factual issues included husband alleging he was primary caregiver and wife countering that he spent much time abroad, and seeking his passport and travel records, and wife alleging that husband had installed audio and video surveillance in the marital home and recorded both parties and their children.
*S.R.E.B. v. E.K.E.B., NYLJ 1202736030089, at *1 (Sup. Ct. Kings Cty. 8/6/2015)*

Dispute by parents as to parenting time by mother. Court discusses discovery of her Facebook and social media records.
*A.D. v. C.A., NYLJ 1202735606003, at *1 (Sup. Ct. Westchester Cty. 8/13/2015)*

In camera interview (*Lincoln* hearing)

In an Article 6 *Lincoln* hearing, counsel for the parents should not have been present and the transcript should have been sealed. The right to confidentiality belongs to the child and is superior to the rights or preferences of the parents.
Matter of Julie E. v. David E., 124 AD3d 934 (Third Dept. 2015)

Under unique facts of this case, and despite their relatively young ages, the Family Court should have conducted *in camera* interviews with the children. Matter remanded for a new hearing.
Matter of Middleton v. Stringham, 130 AD3d 627 (Second Dept. 2015)

On appeal, mother argued trial court should have held *Lincoln* hearing with 16-year-old. This directly contradicted her trial position where she asserted that child was too old for *Lincoln* hearing and should have testified. (He was not called as a witness.) Appellate Division stated that *Lincoln* hearing was preferred method to interview child who was subject of custody petition, even if old enough to testify. Here, matter not remanded because the trial

court had enough information (and the child flat-out refused to live with the mother.).
Matter of Battin v. Battin, 130 AD3d 1265 (Third Dept. 2015)

Service

Although mother had actual notice of the custody proceedings, service was not properly made through the Central Authority of India; order vacated.
Vikram J. v. Anupama S., 123 AD3d 625 (First Dept. 2014)

Petitioner's counsel drafted the proposed order for substituted service and then did not follow it. Dismissal of petitions affirmed.
Matter of Keith X. v. Kristin Y., 124 AD3d 1056 (First Dept. 2015)

Affidavits of mother's process server constituted prima facie evidence of proper service of the custody petition which the father failed to rebut.
Matter of Xioa-Lan Ma v. Washington, 127 AD3d 982 (Second Dept. 2015)

Custody petition properly dismissed when aunt failed to serve copy on putative father or present evidence of diligent efforts.
Matter of Breaker v. ACS-Kings, 129 AD3d 715 (Second Dept. 2015)

Court dismissed petitions after father failed to serve by publication after mother admitted service of two petitions and other two were served on her by court clerk. Appellate Division reversed. [Huh? She was personally served and the trial court still directed service by publication?]
Matter of Sarabia v. Sarabia, 130 AD3d 635 (Second Dept. 2015)

Referee

When a claim of bias is raised, the inquiry on appeal is limited to whether the judge's bias, if any, unjustly affected the result to the detriment of the complaining party.
Matter of Bowe v. Bowe, 124 A.D.3d 645 (Second Dept. 2015)

Order of reference without consent of parties to determine means that referee did not have authority to sign OSC to stay enforcement and for a motion to modify.
Albert v. Albert, 126 AD3d 921 (2015)

Whether to grant an adjournment after first full day of trial was within court's discretion, and denial to father who had history of missing court dates was justified.
Matter of Xioa-Lan Ma v. Washington, 127 AD3d 9982 (Second Dept. 2015)

Appeals

Developments brought to the attention of the Appellate Division by AFC justified vacating the order in question and remanding for a reopened hearing. [It appears father was now consenting to the very arrangement he had opposed in his successful modification petition.]
Matter of Bosque v. Blazejewski-D'Amato, 123 A.D.3d 704 (Second Dept. 2014); Matter of Tavares v. Barrington, 131 AD3d 619 (Second Dept. 2015)

Appeal pending when child turns 18 must be dismissed as academic.
Matter of Kripfgans v. Kripfgans, 123 A.D.3d 930 (Second Dept. 2014)

Appeal moot when it called for review of child's school enrollment prior to May 31, 2014 deadline and no other relief, and that deadline had passed.
Matter of Bederman v. Bederman, 123 AD3d 1029 (Second Dept. 2015)

Trial court properly declared mother in default after she failed to appear despite personal service. Although a public defender appeared on her behalf, the attorney did not provide any explanation for the mother's absence and did not participate in the hearing. Mother could not appeal; she had to file a motion to vacate her default.
Matter of Deshane v. Deshane, 123 AD3d 1243 (Third Dept. 2014)

Appeal must be dismissed as academic when subject child turns 18.
DelGaudio v. DelGaudio, 126 AD3d 848 (Second Dept. 2015)

When order is made on default, review is limited to matters which were the subject of the contest below; here, only denial of the father's adjournment request was reviewable.
Matter of Xioa-Lan Ma v. Washington, 127 AD3d 982 (Second Dept. 2015)

Father died during appeal. Court found that his application for custody was an equitable claim personal in nature and dismissed the appeal. Mother was not aggrieved by this decision and her appeal was rendered academic and dismissed.

Matter of Charle C.E. (Chiedu E.), 129 AD3d 721 (Second Dept. 2015)

Custody order entered on consent of the parents but over objections of AFC. AFC had a right to appeal and the matter was remanded for forensics, *in camera* interviews with the children, and an evidentiary hearing. [A very questionable decision which calls into question the ability of parents to decide custody vs. the court's role of *parens patraie*.]
Matter of Velez v. Alvarez, 129 AD3d 1096 (Second Dept. 2015)

No appeal lies from an order entered on consent.
Matter of Lowe v. Bonelli, 129 AD3d 1135 (Third Dept. 2015)

<u>Miscellaneous</u>

Trial court properly rejected forensic psychlogist's findings as court had more extensive contact with the parties over several years.
Matter of Dean W. v. Karina McK., 121 AD3d 440 (First Dept. 2014)

Where there exist sharp factual disputes that affect the final determination, forensic evaluations should have been ordered. [There were a lot of errors by the trial court and I assume there was a lot of information that justified this conclusion.]
Matter of Brown v. Simon, 123 AD3d 1120 (Second Dept. 2014)

Disputes concerning child custody and visitation are not subject to arbitration as the court's role as *parens patraie* must not be usurped. Award of custody by Beth Din (rabbinical arbitration tribunal), confirmed by trial court, reversed.
Matter of Goldberg v. Goldberg, 124 A.D.3d 779 (Second Dept. 2015)

Trial court properly granted mother's motion to remove the court-appointed forensic evaluator as he had been removed from the Mental Health Professionals Panel jointly established by the First and Second Departments.
Carlin v. Carlin, 124 AD3d 817 (Second Dept. 2015)

Counsel fees affirmed, but Family Court's award of $26,805 cut in half (no facts).
Matter of Liebenstein v. Irani, 125 AD3d 970 (Second Dept. 2015)

Trial court properly allowed child's out-of-court statements which were corroborated by other evidence including the mother's confirmation and it constituted emotional abuse on her part. The degree of corroboration required is relatively low and the hearing court has considerable discretion.
Heather B. v. Daniel B., 125 AD3d 1157 (Third Dept. 2015)

Family Court not authorized to retain jurisdiction to determine petition for custody and visitation after subject child turns 18.
Matter of Batista v. Gaton, 126 AD3d 895 (Second Dept. 2015)

Father failed to establish either a reasonable excuse for his default or a potentially meritorious defense to the petition.
Matter of O'Keefe v. Ky, 129 AD3d 731 (Second Dept. 2015)

Mother properly order to pay counsel fees based on her lengthy delays because of repeated replacement of attorneys and periods of pro se litigation, much of which was unwarranted under th ecircumstances. Father not required to show that he could not pay his counsel fees.
Matter of Viscuso v. Viscuso, 129 AD3d 1679 (Fourth Dept. 2014)

Trial judge admonished for his questioning of mother, which included pointed and persistent challenges to her credibility. Court should not take on "either the function or appearance of an advocate at trial."
Matter of C.H. v. F.M., 130 AD3d 1028 (Second Dept. 2015)

Trial court properly exercised its discretion in enjoining father from commencing further proceedings with respect to custody or visitation without prior court approval. The repeated motions by the father had become abusive and vexatious.
Matter of Naclerio v. Naclerio, --AD3d--, 2015 NY Slip Op 07274 (Second Dept. 10/7/2015)

Father failed to produce evidence demonstrating he could not get an impartial hearing since he offered only conclusory allegations, beliefs, suspicions and feelings of possible bias or the appearance of impropriety.
Matter of Rodriguez v. Liegey, --AD3d--, 2015 NY Slip Op 07668 (Second Dept. 10/21/2015)

Father's attorneys sanctioned for frivolous conduct by repeatedly making misrepresentations and knowingly false statements and claims to the court.

L.G. v. M.G., Sup. Ct. NY County 8/21/2015 (Attached to Appendix)

UCCJEA , SIJS, HAGUE CONVENTION and ICWA

UCCJEA

Original custody order in NY; father and child subsequently moved to Virginia. Trial court found no jurisdiction, but Appellate Division reversed finding that child still had significant connection with NY, the evidence was primarily located in NY, and NY court could resolve the dispute more expeditiously.
Matter of Miller v. Shaw, 123 A.D.3d 1131 (Second Dept. 2014)

Court finds jurisdiction over grandparent visitation petition. Court conceded that grandmother is not a "person acting as a parent" but found the child had no home state and that child had significant connections with NY and that substantial evidence existed in NY. [Important and possibly erroneous decision, especially because of the Court's clear attempt to circumvent lack of standing in Florida.]
Matter of Breselor v. Arciega, 123 AD3d 1413 (Third Dept. 2014)

Although NY not the home state to establish custody jurisdiction, Family Court properly invoked temporary emergency jurisdiction in a neglect proceeding.
Matter of Christianti G. (Diana S.), 125 AD3d 859 (Second Dept. 2015)

Petition dismissed as to one child because no longer maintained a significant connection with NY; dismissed as to other child as NY never was her "home state."
Matter of Tamari E. v. Auther L., 126 AD3d 697 (Second Dept. 2015)

Father (Pennsylvania resident) commenced modification petition 12 days after mother moved to Connecticut. Trial court dismissed. Appellate Division held that, although trial court incorrectly labeled Connecticut as the child's home state, in fact substantial evidence no longer existed in New York and Connecticut was the more convenient forum to decide the modification.
Matter of Luis F.F. v. Jessica G., 127 AD3d 496 (First Dept. 2015)

As mother and children had moved to California and father to Maryland, trial court correctly decided that NY was an inconvenient forum and properly denied his visitation petition.
Pelgrim v. Pelgrim, 127 AD3d 710 (Second Dept. 2015)

Original order and modification were issued in New Jersey. Mother sought modification (to sole custody) in New York. After informal communication with the New Jersey court where a petition was also pending, NY court dismissed. Reversed; Family Court did not follow all procedures of DRL (UCCJEA) because it did not create a record of its communications with the NJ court and did not afford the parties an opportunity to present facts and legal arguments on jurisdiction. [Given the time period that elapsed from initial dismissal to Appellate Division decision, one might surmise that New Jersey had not accepted jurisdiction in this matter or it was still pending.]
Matter of Frankel v. Frankel, 127 AD3d 1186 (Second Dept. 2015)

NY divorce decree. Sometime thereafter, child went to visit father in Georgia and mother allowed child to remain there for an entire school year. Two years after the child left the mother sought to enforce the divorce decree. The Appellate Division discussed the interrelationship between Titles II and III of the UCCJEA but ultimately affirmed trial court's determination that neither the child nor the father had significant connections with NY and substantial evidence was located in Georgia.
Matter of Wengenroth v. McGuire, 127 A.D.3d 1278 (Third Dept. 2015)

Arkansas had original jurisdiction. Mother and child supposedly moved to Nevada and father received temporary emergency order from Nevada court. Mother thereafter received order from Arkansas that it had never relinquished jurisdiction and that she and the child were still residents of Arkansas. Father, in the meantime, sought to enforce the temporary Nevada order in NY. Order denying father's petition affirmed as Arkansas retained exclusive, continuing jurisdiction.
Matter of Baptiste v. Baptiste, 128 AD3d 815 (Second Dept. 2015)

Texas had issued original order and had exclusive, continuing jurisdiction. Father's allegations insufficient for NY court to exercise temporary emergency jurisdiction and court did not immediately communicate with the Texas court. Father's petition should have been dismissed.
Matter of Bretzinger v. Hatcher, 129 AD3d 1698 (Fourth Dept. 2015)

Supreme Court erred in not allowing parties to present evidence regarding jurisdiction and summarily deciding that NY no longer home state. Remanded for a jurisdictional hearing.
Pyronneau v. Pyronneau, 130 AD3d 707 (Second Dept. 2015)

Original order issued in NY in 1999. In 2003 custodial grandparent and child relocated to Florida. In 2014 mother sought custody, including an allegation that the child was with her, having been kicked out by grandmother. Family Court dismissed the petition, stating Florida was now the home state. Reversed. When NY has issued an order, it has continuing exclusive jurisdiction until it finds that it should relinquish jurisdiction because the child does not have a significant connection with NY and substantial evidence is no longer available in NY regarding the child's care, protection, training and personal relationships. Remanded for jurisdictional hearing.
Matter of Nelson v. McGriff, 130 AD3d 736 (Second Dept. 2015)

SIJS

Children became dependent on juvenile court when family offense filed against father. Family Court should have further conducted a hearing to determine whether it would not be in the best interests of each child to return to Albania. Fact that child has one fit parent available to care for him does not preclude an SIJS finding.
Matter of Fifo v. Fifo, 127 AD3d 748 (Second Dept. 2015)

Trial court affirmed in denying SIJS status because reunification possible – parents resided in United States and child left there residence because it was "uncomfortable."
Matter of Miguel A.G.G. (Matter of Milton N.G.G, 127 AD3d 858 (Second Dept. 2015)

Remanded for a hearing on SIJS status. Trial referee reminded that while Family Court is called upon to utilize its particularized training and expertise in the area of child welfare and abuse in order to determine the best interests of the child and potential for family reunification, the Federal government retains control over the *immigration* determination of whether the child receives SIJS, and considerations whether the child ought to receive SIJS are not properly before the Family Court. [emphasis in original]
Matter of Pineda v. Diaz, 127 AD3d 1203 (Second Dept.2015)

Record did not support finding that reunification not viable.
Matter of Argueta v. Ruiz, 128 AD3d 689 (Second Dept. 2015)

Reunification with child's father not viable, SIJS granted.
Matter of Haide L.G.M. v. Santo D.S.M, 130 AD3d 734 (Second Dept. 2015)

The inability of the subject child's parents, who live in poverty in Guatemala, to provide him with a college education and financial assistance does not support a finding that reunification with his parents is not viable due to parental abuse, neglect or abandonment.
Matter of Jeison P.-C. (Conception P.), --AD3d--, 2015 NY Slip Op 07665 Second Dept. 10/21/2015)

Trial court cannot find that reunification with father is not viable; particular incident in question was only time he used force against the child and she may have caused some of the problem.
Matter of Martha R.Y. v. Antonio S., NYLJ 1202732275763, at 1 (Nassau County Family Court, July 1, 2015)

Hague Convention

Children have become so settled in their new environment that repatriation is not in their best interests.
Gwiazdowski v. Gwiazdowska, 14-CV-1482, NYLJ 1202722909386, at 1 (EDNY April 3, 2015)

Court found the removal was based on consent and child had sufficient maturity to object to his return to Greece. Petition denied.
Matter of Adamis v. Lampropoulou, 14-CV-5836, NYLJ 1202726710059, at 1 (EDNY, May 14, 2015)

The Court found that the child was a habitual resident of Canada, the retention in NY violated her custody rights under Quebec law, and she was exercising these rights at the time of the retention. Further, Respondent failed to prove either Petitioner's consent or acquiescence. Court also declined to issue a stay pending appeal.
Sanguineti v. Boqvist, 15-CV-3159, NYLJ 1202735100885, at 1 (SDNY July 24, 2015)

Because Petitioner essentially consented to the removal of the child to the US, her petition was denied.
Moreno v. Pena, 15-CV-2372, NYLJ 1202735692861, at 1 (SDNY August 19, 2015)

Indian Child Welfare Act

Plaintiffs essentially challenged jurisdiction of the Onondaga Nation, to which custody proceedings were transferred by Oswego DSS and Family Court after abuse allegations. Court found under ICWA that jurisdiction was properly transferred and dismissed the complaint.
Pitre v. Shenandoah, 5:14-CV-293, NYLJ 1202719003460, at 1 (NDNY February 17, 2015)

SUPPLEMENTAL MATERIALS

J.P. v. J.P., Supreme Court, Westchester County, Christopher, J., 10/27/2015.

L.G. v. M.G., Supreme Court, New York County, Gesmer, J., 8/21/2015.

To commence the statutory time
for appeals as of right (CPLR 5513 [a],
you are advised to serve a copy of this
order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER
---X

J. P.,

Plaintiff,

-against-

J. P.,

Defendant.
---X

AMENDED
DECISION AND ORDER

CHRISTOPHER, J.

The following papers numbered 1- 26 were considered in connection with defendant's motion brought by Order to Show Cause:

PAPERS	NUMBERED
Order to Show Cause/Affidavit of Defendant/Affirmation of Nussair P. Habboush, Esq./Exhibits	1 - 8
Plaintiff's Affidavit in Opposition/Exhibits/Memorandum of Law	9 - 22
Defendant's Affidavit in Reply/Reply Affirmation of Nussair P. Habboush, Esq.	23 - 24
Affirmation in Opposition of Kathleen M. Hannon, Esq., Attorney for the Child, I. M.	25
Affirmation of Robin D. Carton, Esq., Attorney for the Children, J. P. and A. P.	26

In this matrimonial action the defendant moves for an order: 1) removing I. M., DOB

--/--/2006, from the Court's Temporary Visitation Access Order and declaring that plaintiff is a biological stranger and third party stranger to I. with no rights under the laws of the State of New York; 2) finding plaintiff in contempt of court for his willful violation of the Court's child support order; and 3) awarding defendant counsel fees in the amount of $7000 in connection with bringing this application.

The parties and counsel appeared before the Court on February 24, 2015 at which time the Court denied all branches of the defendant's motion and rendered a Decision and Order from the bench. With regard to defendant's motion for an order removing I. M., DOB –/--/2006, from the Court's Temporary Visitation Access Order and declaring that plaintiff is a biological stranger and third party stranger to I. with no rights under the laws of the State of New York, the Court denied said motion on the basis of judicial estoppel with written decision and order to follow.

Background

Plaintiff and defendant were married on – --, 2010[1] and have two children together, A. P. (DOB –/--/2010) and J. P., (DOB –/--/2012). Defendant also has three children from prior relationships, one of whom is I. M., (DOB 2/16/2006). It is undisputed that I. is neither the biological nor adopted child of plaintiff.

Plaintiff and defendant met in -- 2007, when I. was 20 months old, and moved in together shortly thereafter; plaintiff claims they moved in together one month later, defendant claims it was six months after they met. Defendant does not dispute the attorney for the child's assertion that I. last saw her biological father in December 2006, when she was less than one year old and that she has never known him. It is undisputed that plaintiff is the only father I. has known.

In or about May 2013, the parties separated. On May 21, 2013 defendant filed a Support

1The issue of whether the parties were legally married is one the Court must determine.

Petition in the Family Court of Westchester County seeking child support for the two P. children, I. and her two other children from prior relationships, G. C. and J. V. (See Plaintiff's Exhibit C).

On August 14, 2013 a Temporary Order of Support was issued by Support Magistrate Esther R. Furman in connection with defendant's Support Petition directing plaintiff to pay child support to defendant for the two P. children and I. (See Plaintiff's Exhibit D). The Temporary Order of Support states

> J. V.-P. filed a petition in ths Court on May 21, 2013 alleging that J. P. is chargeable with the support of :
>
> | Name | Date of Birth | Social Security Number |
> |---|---|---|
> | A. P. | --, 2010 | |
> | I. M. | --, 2006 | |
> | J. P. | --, 2012 | |

Id. Pursuant to said Temporary Order of Support, plaintiff was directed to "pay the sum of $400.00 weekly to J. V.-P. payable through the Support Collection Unit, such payments to commence on August 16, 2013, for and toward the support of J. P.'s children;" as well as "80% of reasonable child care expenses for the children for whom support is ordered direct upon presentation of bills & receipts." *Id.* The Family Court issued the Temporary Order of Support and sent a copy to the parties, as well as to defendant's counsel, Jayne L. Brayer, Esq.

On January 8, 2014, the parties appeared, *pro se*, before this Court, and the Court consolidated the Family Court support proceeding with the matrimonial matter. On the same date, the defendant consented to a Temporary Access Order awarding plaintiff access with both P. children and I. (See Plaintiff's Exhibit F).

Arguments

Defendant now seeks to have the Court remove I. from the Temporary Access Order and

have plaintiff declared a biological stranger to I. In essence, defendant asserts that because plaintiff is not I. 's biological parent, pursuant to the holding in *Alison D. v. Virginia M.*, 77 NY2d 651 (1991), he lacks standing pursuant to DRL §70, to seek access rights to I. who is properly in the custody of defendant, her biological mother. *Allison D.*, 77 NY2d 651. Moreover, defendant argues that as I.'s biological parent she has the right to custody and control of the child, including the right to determine who may or may not associate with I. *Id.*; *Ronald FF. v. Cindy GG.*, 70 NY2d 141 (1987). In support of her argument, defendant also asserts, *inter alia*, that she does not agree with the way plaintiff parents I. and that I. has expressed to her that she does not want to be forced to visit with plaintiff. Plaintiff and Ms. Hannon, the attorney for I., dispute defendant's allegations regarding plaintiff's parenting skills, and assert that I. wants to visit with plaintiff and enjoys her time with him. These arguments, while relevant to a best interest analysis, are not germane to this motion which is limited to the issue of whether plaintiff, who is not I.'s biological father, has standing to seek access with I.

Plaintiff and Ms. Hannon, the attorney for I., argue that under the doctrine of judicial estoppel, defendant's motion to remove I. from the Temporary Access Order and have plaintiff declared a biological stranger to I. must be denied, as defendant is estopped from arguing that plaintiff lacks standing as a parent of I., as she assumed a contrary position in a prior proceeding and obtained a favorable result on the basis of that position. *See, Arriaga v. Dukoff*, 123 AD3d 1023 (2nd Dept. 2014). As set forth hereinabove, on May 21, 2013 defendant filed a Support Petition in the Family Court of Westchester County seeking child support for the two P. children, I. and her two other children from prior relationships, G. C. and J. V., that resulted in an order dated August 14, 2013, directing plaintiff to pay child support to defendant for the two P. children and I.

Plaintiff states that when he appeared before the Support Magistrate in August 2013 to answer the petition, he was not represented by counsel, but defendant was represented by Jayne L. Brayer, Esq. who is not defendant's attorney in the Supreme Court. Defendant does not dispute that she was represented by counsel at the August 2013 court appearance. According to plaintiff, during the appearance, defendant again requested that the Support Magistrate direct him to pay child support for all five children. He asserts that he told the Support Magistrate that he was the biological father of A. and J., and that he has raised I. and been her father since she was one year old. Plaintiff contends that the Support Magistrate agreed with defendant's allegation in the petition that he is the father of A., J. and I., but she did not agree that he was the father of defendant's two other children, J. and G., who are 24 and 17 years old, respectively.

Plaintiff further submits that in this same motion wherein defendant is seeking to sever the relationship between I. and him, she is claiming he owes child support on behalf of I. He asserts that she is requesting the Temporary Order of Support continue to be enforced, including the portion of it for I. Additionally, plaintiff points out, and defendant does not dispute, that most of the add-on expenses for which she is seeking payment from him, are for I.'s activities.

In Reply defendant argues that judicial estoppel does not apply in the instant matter. According to defendant's counsel, defendant did not "lead" the Family Court to find that I. M. was plaintiff's child. Defendant alleges that when she filed her petition for child support she did not know what to do. She claims when she saw the clerk to explain what she was seeking, he asked how many children she had, and advised her to list them all on the petition. It is her contention that she never would have listed I. on the petition, had she known plaintiff would attempt to use that to estop her from "protecting [her] own rights and[her] own daughter." Defendant asserts that plaintiff did not wish to pay child support for I., and not until the Support

Magistrate ordered him to do so, did he begin seeking visitation rights to I.

Also, defendant's Supreme Court counsel's rendition of the course of events that occurred during the support proceeding, differ somewhat from plaintiff's.[2] Counsel asserts that upon information and belief, during the support proceeding, plaintiff denied I. was his child. Defendant's counsel also claims that it was not defendant who requested the Support Magistrate to compel plaintiff to pay support for I. Counsel asserts that upon information and belief, the Support Magistrate asked plaintiff how many children he had, and when plaintiff only acknowledged the two P. children, the Support Magistrate became angry and inquired about the other children, and *sua sponte* ordered plaintiff to pay support for I. as well as the two P. children.

Analysis

Pursuant to DRL §70 "either *parent* may apply to the supreme court for a writ of habeas corpus to have such minor child brought before such court; and on the return thereof, the court, on due consideration, may award the natural guardianship, charge and custody of such child to either *parent* for such time, under such regulations and restrictions, and with such provisions and directions, as the case may require." (emphasis added). In *Alison D.*, 77 NY2d 651, the Court of Appeals determined that DRL§70 also applies to the issue of visitation rights. Declining to extend the meaning of the term "parent" in DRL §70 to include *de facto* parents, or parents by estoppel, the Court held that only a biological parent or a parent by virtue of adoption, is a "parent" under DRL§70. *Alison D.*, 77 NY2d 651. Accordingly, the *Alison D.* Court held that only a biological parent or adoptive parent has standing pursuant to DRL §70 to seek visitation

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2The Court notes that it is defendant's counsel, not defendant, who disputes plaintiff's rendition as to what transpired when the parties appeared before the Support Magistrate. Defendant did not comment in her affidavit with regard to plaintiff's assertions regarding said court appearance.

with a child in the custody of a fit parent, who has the right to decide what is in the child's best interests. *Id.*

In *Debra H. v. Janice R.*, 14 NY3d 576 (2010), the Court of Appeals reaffirmed its holding in *Alison D.*, and noted the importance of protecting a "parent's 'fundamental constitutional right to make decisions concerning the rearing of' [his or her] child (citation omitted)". *Debra H.,* 14 NY3d at 595. The Court also noted the benefits conferred by "the certainty that *Alison D.* promises biological and adoptive parents and their children." *Id.* at 600. However, in *Debra H.*, the Court of Appeals was faced with a special set of circumstances, pursuant to which, notwithstanding the prevailing law, the Court found that a nonbiological parent had standing to seek visitation with her partner's biological child. In *Debra H.*, same sex partners had entered into a civil union in the State of Vermont prior to the child's birth. The *Debra H.* Court found that as result of the Vermont civil union, the partner who was not the biological parent of the child, was considered the child's "parent" under Vermont law. As a matter of comity, the Court recognized the parentage created by the civil union in Vermont for purposes of conferring standing upon the partner, who was not the biological parent, to seek visitation and custody of the child under New York law. *Debra H.*, 14 NY3d 576.

Most recently, in 2014, in *Arriaga v. Dukoff*, 123 AD3d 1023 (2nd Dept. 2014), based on the unique facts presented, the Second Department affirmed an order of the Suffolk County Family Court that granted visitation to the non -birth mother partner in a same sex domestic partnership on the basis of judicial estoppel. Under the doctrine of judicial estoppel, " 'a party who assumes a certain position in a prior legal proceeding and secures a favorable judgment therein is precluded from assuming a contrary position in another action simply because his or her interests have changed' (citations omitted)." *Id.*

In *Arriaga*, the parties separated when the child was almost 4 years old, and the child's biological parent filed a petition in Family Court seeking support from her partner who was a biological stranger to the child. A hearing was held on the issue of equitable estoppel, pursuant to which the Family Court issued an order determining that the non-birth mother was a parent to the child and chargeable with the support of the child. The non-birth mother commenced a custody/visitation proceeding as the child's "adjudicated parent", which the biological parent moved to dismiss on the ground that the non-birth mother did not have standing under DRL §70 since she was not a biological or adoptive parent of the child. The Family Court, affirmed by the Second Department, denied the motion to dismiss, finding that the biological parent was judicially estopped from arguing in the custody/visitation proceeding that the non-birth mother was not a parent of the child, as she had already asserted in the support proceeding that her partner, the non-birth mother, was a parent of the child, and it was on that basis, that the biological parent had obtained an order in her favor awarding her child support; she could not now assume a contrary position because her interests had changed. *Id.*

The Second Department's holding in *Arriaga,* 123 AD3d 1023, is instructive in the instant matter where the facts are decidedly similar to those in *Arriaga* . In the matter before this Court, defendant, the biological parent of I., filed a petition in Family Court alleging that plaintiff, a non-biological, non-adoptive parent, was chargeable with child support for I., and she was successful in a Family Court appearance, while represented by counsel, in securing an award of child support for I. It is of no moment that defendant claims that she did not know what to do when she filed her petition for support and relied on the advice of a clerk when she listed that plaintiff was chargeable with the support of all 5 of her children. Even assuming, *arguendo*, that defendant is credited with these facts, there is no denying that she accepted the order of

support, did not dispute it and accepted the support from plaintiff for I. While there are differences in the parties' versions as to what transpired when the parties appeared before the Support Magistrate in August 2013 when the Temporary Order of Support was issued, the Court finds it curious that defendant did not submit her rendition via a sworn statement in her affidavit, but rather she relies on assertions set forth by her current counsel, who was not present at that court appearance. Notwithstanding, under either party's version, the salient facts remain the same. Defendant filed a petition alleging plaintiff is chargeable for the support of I., and she received a support order directing plaintiff to pay support for I. While defendant contends that she never would have listed I. on the petition, had she known plaintiff would attempt to use that to estop her from "protecting [her] own rights and[her] own daughter," it is significant that when the parties appeared before the Support Magistrate in August 2013 in connection with the support petition, and defendant received the Temporary Order of Support for the two P. children and I., she was represented by counsel. Also, the Court notes that defendant did not request I. be removed from the Temporary Order of Support when it was issued in August 2013, nor has she made such a request since then. In fact, in this same motion wherein defendant is seeking to remove I. from the Temporary Order of Access, and sever the relationship between plaintiff and I., defendant is seeking a contempt finding against plaintiff for alleged basic child support arrears and arrears for add-on expenses, the majority of which, it is undisputed, are for I.'s activities.[3]

3While defendant asserts that pursuant to the records of the Support Collection Unit plaintiff's basic child support arrears were in the sum of $6310 as of January 2, 2015, plaintiff claims that as of January 23, 2015 his total child support obligation was in the amount of $30,000, $26,339 of which had been paid; of the $26,339, plaintiff alleges that $1850 was paid directly to defendant in February and March 2014. He claims only $3660 was owed as of January 23, 2015. With regard to his share of the add-on expenses that defendant claims plaintiff has not paid, plaintiff claims, and defendant does not dispute that she had not requested payment or presented bills or receipts for these expenses.

Based on defendant's affirmative act in filing a petition alleging plaintiff is chargeable with the support of I., which resulted in the Court's award of child support for I., defendant is judicially estopped from arguing that plaintiff is not a parent to I. for purposes of visitation. Defendant cannot now assume a contrary position because her interests have changed. "[I]n colloquial terms, the relief sought by [defendant is] known as ' having your cake and eating it too' (citation omitted)." *Arriaga*, 123 AD3d 1023.

Accordingly, as was set forth on the record on February 25, 2014, and as more fully set forth herein, defendant's motion for an order removing I. M., DOB --/--/2006, from the Court's Temporary Visitation Access Order and declaring that plaintiff is a biological stranger and third party stranger to I. with no rights under the laws of the State of New York, is denied.

This decision shall constitute the order of the Court.[4]

ENTER

Dated: White Plains, NY
March 27 , 2015

HON. LINDA CHRISTOPHER, J.S.C.

To: Nussair P. Habboush, Esq.
Attorney for Defendant
44 Church Street
White Plains, NY 10601

Alex R. Greenberg, Esq.
Attorney for Plaintiff

4 On March 23, 2015, subsequent to the Court having issued its Decision and Order in connection with Motion Sequence Number -- on March 19, 2015, the parties and counsel appeared before the Court. At this time, the Court learned that plaintiff had amended his complaint which originally set forth a cause of action for divorce, to one setting forth a cause of action to declare the nullity of a void marriage. Plaintiff now believes that defendant was never divorced from her prior husband of many years ago. She has yet to answer the amended complaint.

The Court has reviewed its Decision and Order and finds that this new information does not change the determination of the motion. The Court's purpose for issuing this Amended Decision and Order is to clarify that these new facts do not change the underlying basis of the decision. The Decision and Order was predicated upon judicial estoppel.

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 24

---X

L. G.,

Plaintiff, Index No. 310479/10

-against-

DECISION AND ORDER
Motion Sequences 4 and 5

M. G.,

Hon. Ellen Gesmer

Defendant.

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In the portion of Motion Sequence 4 now before the court,[1] plaintiff L. G. (Mother) seeks sanctions, pursuant to 22 NYCRR §130-1.1, against Mallow, Konstam, Mazur, Bocketti & Nisonoff, P.C. (the Konstam Firm) (which represented defendant M. G. [Father] and his parents, H. and O. G. [respectively, the Paternal Grandfather, the Paternal Grandmother and, collectively, the Paternal Grandparents]), for engaging in frivolous conduct by repeatedly making misrepresentations and knowingly false statements and claims to the court; and an order directing the Konstam Firm to pay sanctions in the amount of $10,000 to the Mother. In the remaining portion of Motion Sequence 5, the Mother seeks sanctions pursuant to 22 §NYCRR 130-1.1 against the Konstam Firm, and Abe Konstam, Esq. and Madeline Nisonoff, Esq. individually (with the Konstam Firm, the Attorneys), for engaging in frivolous conduct, and asks that the court direct them to pay sanctions to the Mother in the form of reimbursement for the reasonable counsel fees and expenses she incurred as a result of their conduct in the amount of $928,292.35,[2] in connection with: 1) the Bronx Family Court custody and access schedule proceeding, *L. G. v M. G.,* Docket Number V- xxxx/09 (the Mother's Bronx Action); 2) the Bronx Family Court access schedule proceeding, *M. G. v L. G.,* Docket Number V-xxxx/10 (the Father's Bronx Action); 3) the Special Proceeding filed by the Father, titled *M. G. v L. G. and the Beth Din of America,* Index Number xxxx/10 (the Special Proceeding); and 4) this divorce action (the Divorce Action), and specifically: a) the financial issues, settled by Stipulation of Settlement dated March 4, 2012, and so ordered by the Court on March 5, 2013 (the Financial Stipulation); b) the access schedule issues, tried over six days in December 2012 and January 2013 (the Access Trial); and c) the post-trial application for counsel fees.

In this court's decision and order dated December 23, 2013 concerning the Access Trial and Motion Sequences 2, 3, 4 and 5 (the 2013 Decision), the court declined to address the Mother's applications for sanctions against the Attorneys, since counsel could not properly defend themselves while representing the Father. Accordingly, the court scheduled a hearing to provide the Konstam Firm, Konstam and Nisonoff an opportunity to litigate these issues.

The court held a hearing on October 20, 2014 (the Motion Hearing). The Mother called as witnesses Abe Konstam and Madeline Nisonoff. The Attorneys called Madeline Nisonoff. The parties then submitted extensive memoranda.[3]

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[1] The remaining portions of Motions Sequences 4 and 5, and the cross-motion to Motion Sequence 4, were decided in this court's decision and order dated December 13, 2013.

[2] In her brief in support of this motion, the Mother states that the remedy she seeks is an order directing the Konstam Firm to reimburse her for her reasonable counsel fees incurred in the amount of $524,926.11, and that the court impose sanctions against the Konstam Firm, and Konstam and Nisonoff individually, each in the amount of $10,000, payable to the Lawyers' Fund for Client Protection, for engaging in frivolous litigation in this matter. However, that is not the relief sought in her motions, and accordingly, the court will not consider it.

[3] The court will disregard the first exhibit attached to the Attorneys' brief since that document had not been introduced into evidence at the Motion Hearing. The court will also disregard the many statements in the Attorneys' brief not supported by any of the testimony or exhibits at the Motion Hearing. For example, the brief states that the Father "truly believed that he had not signed the arbitration agreement." However, while there is evidence that he had said that to the

FACTS

Based on the testimony and evidence at the Motion Hearing, the court makes the following findings.

Credibility

Abe Konstam was not credible. He was evasive and uncooperative, even when identifying the bills from his own law firm.

Madeline Nisonoff was not credible. Many of her statements were contradicted by her own exhibits. For example, although she swore that she had conversations with the Father between the first half of the Access Trial in December 2012 and the second half in 2013, there are no entries on her billing records that reflect those conversations. Similarly, although she swore that she met with the Father in October 2011 to discuss withdrawing the Special Proceeding, there are no entries for that meeting on her bills either. Therefore, either her records are incomplete or the conversations she testified to did not occur.

Facts Concerning the Proceedings between the Parties

The background facts are set out in detail in this court's prior orders, including the 2013 Decision, and will only be repeated as relevant to the instant motions.

The parties were married on January 2, 2005. They have one child I. G., born in April 2007. On October 5, 2008, the Father suffered a brain aneurism at the parties' residence located in Riverdale, New York, and was taken by ambulance to Columbia Presbyterian Hospital. The Father was in a coma for several weeks, and underwent four surgeries at Columbia Presbyterian in the next month. He then lived in a series of rehabilitation facilities.

The Father retained the Konstam Firm on December 17, 2009 by signing a retainer agreement with the Konstam Firm. Although he had suffered an aneurism less than a year earlier, and continued to reside in a rehabilitation facility, he appeared at every court proceeding, submitted numerous sworn statements to the court, and testified both at his deposition and at the Access Trial. There has never been an application for an appointment of a guardian or a *guardian ad litem* for the Father since this matter has been before this court.[4]

After the Father retained the Konstam Firm, a member of the Konstam Firm certified each document signed by the Father, including affidavits and net worth statements. A member of the Konstam Firm also notarized and/or acknowledged the Father's signature on many documents, including stipulations and affidavits.

Attorneys once, there is certainly no evidence that he "truly believed" it.

[4] As this court found in its decision and order dated August 18, 2010 in the Special Proceeding, **Error! Main Document Only.Error! Main Document Only.**on or about February 2, 2010, Special Referee Guarino of the Bronx Family Court on its own motion, appointed Pierre Janvier, Esq. to meet with the Father and report back to the Family Court as to whether or not the Father required a guardian ad litem. On April 23, 2010, the parties' counsel advised this court that Family Court had determined that the Father did not require a guardian ad litem.

Misrepresentations and Knowingly False Statements and Claims to the Court

During the summer of 2009, the Konstam Firm did not advise the Mother where the Father was living.

The Konstam Firm failed to disclose to the Mother that the Father was willing to travel to go to a family wedding at a time when he claimed he was not well enough to travel to Riverdale to see his daughter.

On August 22, 2011, the Maternal Grandmother emailed Nisonoff advising her that they wished to cancel the visit on August 22,[5] and stating that they "do not wish to divulge the real reason that the visit cannot take place."

The Bronx Family Court Proceedings

The Mother commenced a proceeding for custody in the Bronx Family Court on October 6, 2009 (the Mother's Bronx Action). The Konstam Firm was substituted in as the Father's counsel on January 19, 2010.

In an email dated January 4, 2010, the Paternal Grandfather stated to Nisonoff, "... delay this hearing as long as you can." However, there is no evidence that the Attorneys in fact did so.

The Konstam Firm appeared for the Father in the Mother's Bronx Action on February 2 and 17, 2010 and April 21, 2010. At the last appearance, the Father withdrew his objection to the Mother's petition and the court awarded custody to the Mother.

The Father then began a proceeding seeking access in the Bronx Family Court (the Father's Bronx Action).

In an email dated August 8, 2010, the Paternal Grandfather advised Nisonoff that he was concerned that the Father might state to the Referee that he had no objection to the Mother remaining in the room during his visits with I. G.

On November 26, 2010, the Paternal Grandfather emailed Nisonoff stating that he suggested they put all visits on hold until "everything is resolved," and directing her to "go after [the Mother] with a vengeance."

By Order dated January 27, 2011, the Father's Bronx Action was consolidated into the divorce action.

The Special Proceeding

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[5] The email was ambiguous as to whether it was the Father or the Paternal Grandparents who wished to cancel the visit.

On March 16, 2010, the Konstam Firm brought an Article 75 proceeding on behalf of the Father, seeking to vacate the Notice of Arbitration sent pursuant to the Arbitration Agreement between the parties dated November 9, 2004 (the Arbitration Agreement) on the grounds, *inter alia,* that the Father had not signed the Arbitration Agreement, was not legally competent to participate in any hearing required by it and was not physically able to participate in such a hearing. Nisonoff signed an affirmation dated March 11, 2010 in support of the Special Proceeding, which stated, inter alia, that

- the Father "denies signing" the Agreement.
- "the signature on the [Agreement] is not that of [the Father];"
- "the signature that allegedly was made by the [Father] is a forgery."

In his affidavit in opposition to motion sequence 5, signed on July 1, 2013, the Father for the first time submits a sworn statement that he told Ms. Nisonoff in 2010 that he had not signed the Agreement.

On April 3, 2010, the Father told the Mother on the telephone that he did not believe that she had forged his signature on the Agreement. Nisonoff did not so advise the court. In an affirmation dated April 7, 2010 submitted in in the Special Proceeding, Nisonoff stated that she had met with the Father "on two separate occasions, each time for several hours," and that she based litigation decisions on "very specific conversation[s]" with him.

In this court's decision dated August 23, 2010, the court rejected the claim that the Father lacked mental competence to execute the Agreement, noting that the Bronx Family Court had already determined that the Father did not require a guardian ad litem.

At his deposition on October 11, 2011, the Father acknowledged that the signature on the Agreement was his.

On October 23, 2011, the Paternal Grandfather sent an email to Konstam, stating that he had told Ms. Nisonoff "MANY MANY times that we were not going to trial on [the Special Proceeding]. I just do not see what the urgency is to alert the court at this particular time." On October 24, Nisonoff sent an email to the Paternal Grandparents stating that it was best for them to withdraw their application. On October 24, the Paternal Grandfather sent an email to Konstam, asking that he get the trial in the Special Proceeding postponed "till after the financial trial." On October 25, 2011, Konstam forwarded the Paternal Grandfather's email to Nisonoff, to both her office and personal email. On October 27, 2011, Nisonoff faxed a letter to the court stating that her client would withdraw the Special Proceeding.

On November 7, 2011, on the date the trial was scheduled to begin, the Father and Nisonoff signed a stipulation which provided that the Father withdrew his petition and agreed not to dispute the validity of his signature on the Agreement

The Divorce Action

Financial Issues

Nisonoff sent an email to the Father's doctor asking that he "write a letter stating it would be too stressful for [the Father] to be deposed." There is no evidence that this request was based on any medical evidence.

On February 4, 2012, Nisonoff advised the Paternal Grandfather to delete one expense from the Father's Net Worth Statement because including it would not be "wise." On February 12, 2012, the Paternal Grandfather advised Nisonoff to disclose one invoice from the Father's care facility but not another one.

On March 4, 2012, the parties entered into a stipulation settling all of the financial issues, and the court allocuted the stipulation on the record on March 5, 2012.

Custody and Access issues

On August 22, 2011, the Konstam Firm followed the direction of the Paternal Grandparents to conceal from the Mother's attorneys the reason for the cancellation of the Father's visit with I. G.

Dr. Kuchuk, the court appointed forensic, issued her report on March 15, 2012.

On May 14, 2012, the Paternal Grandfather sent an email to Konstam stating that there was no reason to attend a pretrial conference "since we are not going to trial."

The Access Trial was scheduled to begin in March 2012. It was adjourned first to June, then to October and ultimately to December.

On November 20, 2012, the Konstam Firm sent a bill for services rendered to the Father for the period from December 4, 2011 through November 20, 2012.

On November 21, 2012, the Paternal Grandfather stated in an email to Nisonoff and Konstam, "I therefore don't see the point in advising them in advance of the trial, that Mordechai has graduated [from the rehabilitation facility] and will be coming home. Let them be caught off guard, and find out at the trial. I also want to strongly impress upon you that Mordechai does NOT get tired the way he used to. He is up and about all day." As requested, the Konstam Firm concealed from the Mother and her attorneys that the Father would be leaving the facility shortly.

On December 5, 2012, the Paternal Grandfather asked that the Konstam Firm add to the Father's affidavit that he owed them for their payment of his legal bills.

The Access Trial began on December 10, 2012 and ended on January 9, 2013.

On December 17, 2012, the Paternal Grandmother sent an email to Nisonofff stating, "When notifying the courts or [the Mother's attorney], Please do not let them know how much Mordechai is

against seeing I. G. at all. Please keep that to yourself." Nisonoff responded, seven minutes later, "Okay, got it. Making the calls now." Konstam, Nisonoff and the Konstam Firm did not advise either the Mother, her counsel or the court of this, and proceeded to trial seeking visitation on the Father's behalf.[6]

On December 24, 2012, the Paternal Grandfather sent an email to Nisonoff and Konstam stating that they would not "go thru with the trial...." The Konstam Firm did not advise the Mother, her counsel, or the court of this.

On January 7, 2013, the Konstam Firm sent a bill for services rendered to the Father. It next sent a bill on June 6, 2013.

On January 17, 2013, the Paternal Grandparents each signed a retainer agreement with the Konstam Firm. They had not had retainer agreements with the Konstam Firm prior to that date.

The Mother's witnesses during the Access Trial were the Mother, the Father, the Paternal Grandparents and Michelle Renchner, the therapist for the Mother and I. G. The court accepted into evidence, with the consent of both parties, the report of Dr. Kuchuk, and both parties cross-examined her. The only witness that the Father put on during the Access Trial was the Paternal Grandmother, who testified very briefly. He presented no testimony to rebut or contradict the testimony of Dr. Kuchuk. The Father did not testify on his own behalf.

The Subpoenas

On or about June 1, 2012, the Mother's attorneys served Subpoenas on the Paternal Grandparents (the Subpoenas) seeking the production of specific documentation relative to the custody issues in the underlying matrimonial matter, by sending them to the Konstam Firm. The Konstam Firm refused to accept them on behalf of the Paternal Grandparents but accepted service only for the Father. On August 23, 2012, the Mother's attorneys had the Subpoenas personally served on the Paternal Grandparents. In response, on or about November 28, 2012, the Paternal Grandparents produced only one of the documents requested. On January 8, 2013, the Konstam Firm, on behalf of the Paternal Grandparents, made an oral application to quash the August 2012 Subpoenas. This Court denied counsel's request because it was not made "promptly," in clear violation" of CPLR §2301, and it was not made at or before the pre-trial conference, in violation of the Rules for Part 24. This Court then ordered the Paternal Grandparents to produce the documents listed in the Subpoenas on the following morning, January 9, 2013.

On January 9, the court asked the Paternal Grandmother if she had brought the documents. Nisonoff responded that she had not produced the "writings, and letters, and correspondence between [the Paternal Grandmother] and our firm, and the firm of Andrew Wigler." In response to a question from the court, she stated that she had not done so because she disagreed with the denial of her oral motion to quash on the previous day.

On January 22, 2013, the Mother's attorneys filed Motion Sequence 4 against the Paternal Grandparents and the Konstam Firm. The Konstam Firm accepted service on the Paternal Grandparents

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[6] Eventually, his lack of interest in visiting his daughter became apparent, since he did not visit her from at least November 2012 through at least the beginning of July 2013.

only as to those portions of the Order to Show Cause seeking contempt against them. This Court provided the Paternal Grandparents with one week to comply with the Subpoenas and cure their default. The Paternal Grandparents only produced a portion of the requested documents but failed to produce a significant amount of the documents requested.

On February 21, 2013, Nisonoff submitted an affirmation in opposition to Motion Sequence 4 in which she stated, "The truth is, and as I will show this Court, the Plaintiff has received all the financial information requested in the Subpoenas to the extent it is in [the Paternal Grandparents'] possession," and "[the Paternal Grandparents] have turned over the financial records to the Plaintiff's attorneys." Neither of these statements was fully accurate when made.

On March 8, 2013, the court entered a further order directing the Paternal Grandparents to produce the documents by March 15, 2013. As of March 29, 2013, the Paternal Grandparents had still not produced certain documents. Of the documents not produced as of that date, the following documents were in the care and control of the Konstam Firm: 1) the Konstam Firm bills, since November 20, 2012; 2) additional proof of payment for legal fees, such as checks and/or receipts; 3) the Konstam Firm's responses to correspondence from the Paternal Grandparents; 4) correspondence with the Konstam Firm after November 28, 2012; 5) email exchanges with the Konstam Firm; 5) various missing or incomplete emails and email chains; 6) attachments to various emails with the Konstam Firm; and 7) a CD sent by the Paternal Grandfather to Konstam on May 31, 2012, including a recording made secretly by the Paternal Grandparents of their interview with Dr. Kuchuk.

On April 3 and 8, 2013, the Paternal Grandparents produced some but not all of the additional documents.

On April 5, 2013, the parties stipulated that all documents produced by the Paternal Grandparents and the Konstam Firm in responses to the Subpoenas would be deemed admitted into evidence in the Access Trial *nunc pro tunc.*

In the 2013 Decision, the court found, *inter alia*, that:

"The Mother was prejudiced by [the Paternal Grandparents'] failure to produce items in conformity with the Subpoenas either in a timely manner or at all because it hindered her ability to show that, in fact, the Paternal Grandparents had instructed the Husband's attorneys, whose fees they were paying, to take actions, or not take actions, that delayed the [Access Trial], caused the Mother to incur unnecessary counsel fees fighting these tactics, and, most importantly, were contrary to [the parties' daughter's] best interests because they had a negative impact on her relationship with her Father."

The Paternal Grandparents sent emails to the Konstam Firm to conceal pertinent information relative to the parties' matrimonial litigation, and the Konstam Firm followed the Paternal Grandparents' instructions.

There was no evidence introduced at the Motion Hearing to rebut these findings.

The Post-trial Application for Counsel Fees

The Wife incurred legal fees for the following purposes:

Issue	**Fees Incurred**
1) Special Proceeding, after October 11, 2011	$25,412.50.
2) Conduct of Access Trial, after Dec 18, 2012	$78,812
2) Post-Access Trial memorandum	$75,935
4) Addendum to post-Access Trial memorandum, necessitated by the Paternal Grandparents' failure to comply with the Subpoenas	$28,135.35
5) Motion sequence four (seeking contempt against the Paternal Grandparents for violating the Subpoenas and the January Order)	$28,675
6) Motion sequence five (for counsel fees and/or fees as sanctions)	$18,510.82
7) Motion Hearing	$62,000
TOTAL	**$317,480.67**

ANALYSIS

According to 22 NYCRR 130-1.1(c), a Court shall consider conduct frivolous if:

(1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law;

(2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or

(3) it asserts material factual statements that are false.

The Court "may award any party . . . in a civil proceeding[] . . . costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorneys' fees, resulting from frivolous conduct" (*Id.*). The Court "may make such award of costs . . . against either an attorney, or a party to the litigation or both" (22 NYCRR §130-1.1(b). When the award is

"against the attorney," the Court has the power to award costs against a law firm or attorney, individually (*Id.*).

In this case, this Court made specific findings regarding the frivolous conduct of the Father, the Paternal Grandparents, and the Konstam Firm in the 2013 Decision.

The Konstam Firm failed to present any evidence to mitigate this court's previous Findings contained in the 2013 Decision. In fact, the testimony elicited and evidence presented at the Motion Hearing further supports this court's previous findings against the Konstam Firm, Abe Konstam, and Madeleine Nisonoff.

Bronx Family Court Proceedings

Although there is some evidence that the Paternal Grandparents asked the Konstam Firm to engage in questionable behavior during the Bronx Proceedings, there is no evidence that the Konstam Firm did so.

Special Proceeding

The Mother argues that the Konstam Firm had no good faith basis for either of their contentions in the Special Proceeding: that the Father was not competent and that he had not signed the Agreement. However, in his affidavit in opposition to this motion, signed on July 1, 2013, the Father swears that he told Ms. Nisonoff in 2010 that he had not signed the Agreement. That evidence has not been rebutted. Moreover, at that time, the Family Court had appointed a court examiner to determine if the Father was competent. Accordingly, the Konstam Firm had a good faith basis for commencing the Special Proceeding.

However, on October 11, 2011, at his deposition, the Father identified his signature on the Agreement. He then notified the Konstam Firm that he did not want to proceed with the Arbitration Proceeding. Nonetheless, the Konstam Firm did not actually withdraw its claim until the hearing was scheduled to begin on November 7, 2011. Their failure to do so is sanctionable. As a result of their conduct, the Mother incurred fees totaling $25,412.50 during that period to prepare for trial. Accordingly, the court assesses sanctions against them individually and collectively in the amount of $25,412.50.

Divorce Action

Financial issues

Although some of the actions taken by the Attorneys in connection with the financial issues are questionable, there is no evidence that their conduct caused any actual damage to the Mother, and accordingly, the court declines to grant sanctions against them.

The Custody Issues

The Konstam firm was clearly at fault for:

1. Failing to notify the Mother's attorneys, on December 17, 2012, that the Father no longer wanted to see I. G. at all, and, on December 24, 2012, that the Father no longer wanted to proceed with the Access Trial;
2. On January 8, 2013, making a totally frivolous motion to quash the subpoena on the Paternal Grandparents;
3. Directing the Paternal Grandparents not to comply with the court's order to produce documents called for by the Subpoenas, both before and after the unsuccessful motion to quash; and
4. Misrepresenting to the court the extent of the Paternal Grandparents' compliance with the subpoenas.

The Attorneys present no justification for having failed to notify opposing counsel and the court that the Father no longer wanted to have access with I. G., and to continue the Access Trial. In fact, they repeatedly contended until the very end of the testimony and in their brief that the Father wanted access with I. G. Had the Attorneys not done so, the Mother would not have incurred the costs, after December 17, of continuing to prepare for trial, participating in the trial and writing a post-trial memorandum.

The Attorneys argue at length in their papers that they cannot be sanctioned for making the motion to quash because the court was wrong in denying that motion. The court rejects this argument for several reasons.

First, that ruling is the law of the case. The Father and the Paternal Grandparents cross-moved, in Motion Sequence 4, to reargue the court's denial of their oral motion to quash, and the court denied it, in the 2013 Decision. The only remedy as to that ruling is an appeal.

Second, the Attorneys waived any claim as to the motion to quash by stipulating that the documents produced by the Paternal Grandparents pursuant to the subpoenas would be deemed admitted into evidence in the Access Trial *nunc pro tunc*.

Third, even if the court were to consider the arguments as to the correctness of the ruling, the court would still reject the Attorneys' arguments, since the Attorneys do not address the tardiness of the motion to quash, which was the sole basis for the court's decision.[7]

Fourth, even if the motion to quash had not been barred as untimely, the court would have denied it in any event. The Attorneys argued that the subpoenas improperly sought documents barred by the attorney-client privilege since the Father's claimed inability to act on his own behalf required that the Paternal Grandparents communicate with the Attorneys on his behalf and otherwise act as his agents. However, this argument is contradicted by the Father's consistent position throughout this litigation that he was competent to act on his own behalf. He personally signed the Retainer Agreement with the Konstam Firm, as well as all pleadings, his Statement of Net Worth, his Affidavits and the settlement agreements. He personally appeared and testified, both at his deposition and at the Access Trial. The Konstam Firm addressed its bills to him. His competence was confirmed by the report of the Court Examiner appointed by the Family Court to the effect that the Father did not require appointment of a guardian ad litem, by his medical records and by his own assessment. Moreover, even if there had been a genuine basis to believe that the Father needed someone to act on his behalf, he, his parents, or any person concerned with the Father's welfare could have commenced an Article 81 guardianship proceeding (MHL §81.06). In the absence of a specific award of authority to act on the Father's behalf, the Paternal Grandparents were not empowered to do so. Therefore, had the motion to quash been timely made, the court would have denied it, and rejected the Attorneys' arguments that the subpoenas were void because they sought documents protected by the attorney-client privilege.

Once the court ruled on the motion to quash, the Attorneys continued to direct the Paternal Grandparents not to comply with it, falsely believing that their own view of the law justified them in doing so. This is incorrect.

Finally, the Attorneys acted improperly in continuing to obfuscate the extent of the compliance by the Paternal Grandparents with the Subpoenas. For example, Nisonoff made inaccurate statements in her affirmation on Motion Sequence 4 concerning the extent of the compliance by the Paternal Grandparents with the Subpoenas. Moreover, she continues to stand by those statements, since she attached that affirmation to her post-hearing memorandum and specifically directed the court's attention to it.

As a result of the Attorneys' frivolous conduct with respect to the Subpoenas, the Mother incurred substantial additional legal fees.

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[7] The Konstam Firm's objection to the subpoena based on the failure to tender mileage fees was waived.

On the other hand, the court disagrees with the Mother that the Konstam Firm is at fault for failing to advise the Paternal Grandparents to pay Dr. Kuchuk's fees. Although the Paternal Grandparents paid all of the Father's legal fees, that did not render them responsible for paying for Dr. Kuchuk's services pursuant to this court's order, which directed the Father to do so.

Accordingly, the court will award sanctions against the Attorneys representing the attorneys' fees incurred by the Wife in the Access Trial after December 17, 2012, and in making and proceeding with Motion Sequences 4 and 5.

Misrepresentations to the Court

The Mother argues that the misrepresentations by the Attorneys provide a separate basis for an award of sanctions against them. However, I find that the misrepresentations identified by the Mother as having been made by the Attorneys were either discussed above, or the Mother has failed to show that she was damaged by them. Similarly, although the Konstam Firm acted improperly in not billing the Father in the manner required by the matrimonial rules (22 NYCRR §1400.3), the Wife has not shown that she was damaged thereby.

Counsel Fees

Domestic Relations Law §237 provides that, in an action for a divorce, the court may award counsel fees "to enable that spouse to carry on or defend the action or proceeding as, in the court's discretion, justice requires, having regard to the circumstances of the case and the respective parties." Indigence is not a prerequisite to an award of counsel fees pursuant to Domestic Relation Law §237 (*DeCabrera v Cabrera-Rosete*, 70 NY2d 879 [1987]). In considering an application for an award of counsel fees, the court shall consider the "equities and circumstances" of the case before it (*Basile v Basile*, 122 AD2d 759 [2d Dept 1986]), including the financial circumstances of the parties, the relative merits of the positions taken at trial, and any dilatory tactics the court finds that a party undertook during the litigation (*Warner v Houghton*, 43 AD3d 376 [1st Dept 2007]). The court finds no basis for directing that the Attorneys pay the Mother her fees in litigating this motion.

Therefore, the Attorneys shall pay $317,480.67 to the Mother.

Accordingly, it is hereby

ORDERED that, pursuant to 22 NYCRR §130-1.1, the court sanctions the Konstam Firm, Konstam and Nisonoff for their conduct, and, as a consequence thereof, directs them to pay the Mother $317,480.67, representing the attorneys' fees incurred by her as a result of their misconduct; and it is further

ORDERED that the Attorneys shall pay the sanction by September 30, 2015; and it is further

ORDERED that a copy of this decision shall be sent to the Departmental Disciplinary Committee.

Dated: August 21, 2015 ENTER:

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Hon. Ellen Gesmer, JSC