New York Law Journal

ANALYSIS

Family Court 2024 Roundup: Part I

In Part I of her two-part article, Cynthia Feathers of the Albany County Public Defender's Office discusses selected Appellate Division decisions rendered last year in Family Court cases. This part covers decisions about attorneys for children, bias, counsel for parents, defaults, and dissents. Part II will discuss neglect, stays, summary judgment and UCCJEA decisions as well as unusual cases with surprising outcomes.

January 15, 2025 at 08:43 AM

By Cynthia Feathers

Bronx County Family Court at 900 Sheridan Ave. Photo: Rick Kopstein

In 2024, the Appellate Division rendered many interesting decisions in Family Court cases. Below is a summary of decisions covering five topics, with special attention to procedural issues.

Attorney for the Child

Two decisions deal with the role of the attorney for the child ("AFC") where the client is an appellant. In *Matter of Muriel v. Muriel*, 228 AD3d 1345 (4th Dept. 2024), the older child was permitted to unilaterally pursue an appeal challenging Family Court's refusal to award the mother unsupervised visitation.

The mother took an appeal but was denied the assignment of counsel and was unable to timely perfect her appeal. However, she submitted a

letter expressing her disagreement with the challenged order and supporting the position taken by the AFC. The reviewing court could entertain the appeal since doing so would not force the mother to litigate a petition she had since abandoned.

Matter of Dionis F. v. Daniela Z., 229 AD3d 624 (2d Dept. 2024), concerns the parents' competing custody petitions, which were resolved via a stipulation of settlement. Over the objection of the AFC, the stipulation was so-ordered by Family Court. The child appealed; the Second Department reversed.

A child does not have full-party status and cannot veto a settlement reached by the parents and force a trial to be held after the AFC had a chance to be heard. However, Family Court should have conducted an in camera interview in light of the child's strong wishes that the father not have parental access (*see also Matter of C.M. v. Z.N.*, 230 AD3d 1409 [3d Dept. 2024] [discussing purpose of *Lincoln* hearings]).

PRACTICE NOTE: Regarding *Lincoln* hearings, the Guidelines for Attorneys for Children in the Fourth Department provide helpful guidance. The manual, available online, also offers a detailed discussion of the role of AFCs upon appeal and cites the above *Muriel* decision. On other topics, the NYSBA Committee on Children and the Law, Standards for Attorneys Representing Children (2015), are a valuable resource.

Some custody decisions stress the right to parental access, even over resistance of the children. A case in point is *Matter of Morales v. Diaz*, —AD3d—, 2024 NY Slip Op 06610 (2d Dept. 2024). Family Court should not have denied the mother's petition to expand her parental access. Absent extraordinary circumstances, a noncustodial parent has a right to reasonable parental privileges. This mother's inability to obtain regular parenting time pursuant to the prior order constituted a change in circumstances.

Visits had not occurred, even though there was no proof of potential harm. The father purportedly encouraged the children to speak to the

mother, but they refused. Without a modification, the mother's access would be improperly conditioned on the desires of the children. Family Court should have directed that the father produce the children for in-person therapeutic and/or supervised parental visits (*see also Matter of Michael B. v. Patricia S.*, —AD3d—, 2024 NY Slip Op 06005 [1st Dept. 2024] [order was impermissible delegation of authority and caused father to have no visitation]).

Bias

A few of the many decisions finding bias are noted here. In *Matter of Anthony J. (Siobvan M.)*, 224 AD3d 1319 (4th Dept. 2024), the unpreserved issue of bias was reached in the interest of justice. During a break in testimony regarding the mother's alleged permanent neglect of her child, the mother said that she had changed her mind and would not voluntarily surrender the child. Even though the only evidence presented at that point was the direct testimony of a caseworker, Family Court said, "Then I'm going to do it." The trial court made good on its promise and terminated the mother's parental rights.

A new hearing before a different judge was ordered (*see also Matter of Onondaga County v. Taylor*, 229 AD3d 1381 [4th Dept. 2024] [sua sponte, court turned appearance for report into hearing, called assigned counsel "cheeky" for objecting, and implied that respondent would face jail if he did not answer questions; new hearing before different judge ordered]).

Reversal can also occur because the court's findings do not align with the proof. *Matter of Joanna PP. v. Ohad PP.*, 230 AD3d 1445 (3d Dept. 2024), concludes that Family Court's take on the proof was skewed. The resolution of the custody modification proceeding appeared to be influenced by the judge's frustration at the father's annoying behavior. The trial court had given short shrift to unfavorable evidence about the mother and favorable testimony about the father.

During the pendency of the appeal, the Family Court judge recused himself. In light of the evolving situation—including new petitions

containing serious allegations—the appellate court remitted for further proceedings (*see Matter of Michael B.*, 80 NY2d 299, 317-318 [1992]; *cf. Matter of Ayanna O. [Amanda M.]*, —AD3d—,2024 NY Slip Op 06642 [3d Dept. 2024] [appellate court declined to consider post-oral argument allegations pursuant to *Michael B.* and found record sufficient for review]).
PRACTICE NOTE: For a discussion on how AFCs or other counsel have successfully presented information about new developments upon appeal, pursuant to *Matter of Michael B.*, 80 NY2d at 317-318, *see Vital Child Custody Rule Expanded*, NYLJ, Oct. 25, 2024, at 4, col 4.

Counsel for Parents

Several decisions find that the right to counsel or to effective assistance was denied. In *Matter of Sa'Nai F. B. M. A. (Chaniece T.)*, —AD3d—, 2024 NY Slip Op 05440 (2d Dept. 2024), during a child protective proceeding, the mother had three attorneys assigned to represent her or act as legal advisor. Ultimately, over her objection, the mother was required to proceed pro se if unable to retain counsel, and she did then involuntarily represent herself. The denial of counsel was error. The mother had not engaged in egregious conduct so as to forfeit her right to assigned counsel. Thus, reversal was required, without regard to the merits of the mother's position.

Another instructive decision is *Matter of Richard TT. (Kara VV.)*, 223 AD3d 1070 (3d Dept. 2024), *appeal dismissed* 41 NY3d 989 (2024). In a Family Ct Act article 10 proceeding, the mother was deprived of counsel when proper withdrawal procedures were not followed. Once assigned, counsel may withdraw only upon reasonable notice to the client—even where the client fails to appear or there is an alleged breakdown in attorney-client communication (*see* CPLR 321 [b] [2]).

Apparently, this attorney failed to inform the mother of the application to withdraw, and Family Court made no inquiry into notice or good cause

for the requested withdrawal. A new fact-finding hearing was ordered. PRACTICE NOTE: For ethical guidance on withdrawing as counsel, *see* Rules of Prof Conduct (22 NYCRR 1200.0), rule 1.16 (c), (d), (e).

Lapses by counsel were explored in *Matter of McCloskey v. Unger*, 231 AD3d 1031 (2d Dept. 2024). In a hearing on a petition regarding the willful violation of a child support order, the father's defense was that he could not work due to a medical condition and had to rely on public assistance. Yet his attorney failed to procure medical records, financial disclosure proof, and public assistance documents. Also, counsel did not call any witnesses to testify about the father's neuropathy nor subpoena his treating physician. The father was entitled to a new hearing. The *McCloskey* decision also states that the appeal from so much of the order as committed the father to jail for six months was dismissed as academic. In other words, no stay of enforcement pending appeal was obtained.

PRACTICE NOTE: In some cases, it is incumbent on trial counsel to make the stay motion, given the urgency of the situation and a delay until entry of an assigned counsel panelist and their initial assessment of the appeal.

As to appellate counsel's duty, *Matter of Alexi P. (Ruben P.)*, 230 AD3d 792 (2d Dept. 2024), deserves attention. In an appeal regarding termination of parental rights based on abandonment, counsel submitted an "*Anders* brief" (*Anders v. California*, 386 US 738 [1967]). However, the record contained testimony by the father about his inability to visit the child due to his homelessness and COVID—indicating that a nonfrivolous issue could be argued. New appellate counsel was assigned.

PRACTICE NOTE: For a discussion of *Anders* briefs, including in Family Court appeals, *see* Appellate Standards and Best Practices of New York State Office of Indigent Legal Services (Revised 2023), Standard 23.

Defaults

In a custody modification proceeding, Family Court erred in denying the father's motion to vacate a default order, the appellate court held in *Matter of Savanna II. v. Joshua II.*, 226 AD3d 1125 (3d Dept. 2024). The father established a reasonable excuse, where he explained that he missed a court conference because his car would not start; he had appeared at previous conferences; and the mother was on notice that he intended to oppose her motion. There was also a meritorious defense to the petition: before suspending the father's overnight visits, Family Court had not taken sworn testimony as to the mother's petition.

Where the client does not appear, but counsel participates, a direct appeal may be available. In *Matter of Winter II. (Kerriann II.)*, 227 AD3d 1142 (3d Dept. 2024), *lv denied* 42 NY3d 903 (2024), the petitioner agency understandably asserted that the mother was in default on the neglect petition. The reviewing court disagreed, even though the mother had missed pretrial appearances and the fact-finding hearing. Counsel's participation on the mother's behalf during the hearing was dispositive. The appeal was not dismissed pursuant to CPLR 5511.

An interesting observation about defaults is presented in *Matter of T.J.J.P. (Deryck T.J.)*, 224 AD3d 552 (1st Dept. 2024). Upon the father's failure to appear at hearings, Family Court properly found that he permanently neglected the child. Given his default, the father could not challenge the order terminating his parental rights upon direct appeal. His attorney's failure to participate in the fact-finding hearing did not constitute ineffective assistance of counsel, though. The attorney's apparently strategic decision to not participate preserved the father's option of moving to open his default.

Dissents

Many 2024 appeals inspired illuminating dissents. A dissent in *Matter of Jeter v. Poole* , —NY3d—, 2024 NY Slip Op 05868 (2024)—a Family Court-adjacent case—explores the impact of an important statutory reform. Effective Jan. 1, 2022, where abuse or neglect charges are

dismissed for lack of proof in Family Court, respondents are entitled to have their "indicated" designation changed to "unfounded" on the Statewide Central Register of Child Abuse and Maltreatment.
The instant appeal was pending on the law's effective date; and a cardinal rule of appeals provides that changes in law apply to cases pending on appeal and can be raised for the first time on appeal, even in the court of last resort. The majority erred in characterizing the result sought by the appellants as the retroactive operation of the amendment, the dissent opines.

Matter of Carol Q. v. Charlie R., 230 AD3d 948 (3d Dept. 2024), contains a compelling opinion in which two justices concurred in part and dissented in part. At length, the justices address the trial court's unbalanced interpretation of proof, abuse of judicial notice, and improper role as advocate, and opine that a new hearing was needed (*see also Matter of Michelle L. v. Steven M.*, 227 AD3d 1159 [3d Dept. 2024] [delving into topic of judge as advocate]).

Matter of Mekayla S. (Melanie H.), 229 AD3d 1040 (4th Dept. 2024), offers a penetrating discussion regarding authentication requirements. A dissenting justice concludes that videos critical to the petitioner's case should not have been admitted into evidence, because an insufficient legal foundation established that such evidence accurately represented the subject matter depicted. Without the videos, there was no evidence to sustain the abuse petitions, the dissenter observes.

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ANALYSIS

Family Court 2024 Roundup: Part II

In Part 2 of her two-part series, Cynthia Feathers of the Albany County Public Defender's Office discusses neglect, stays, summary judgment and UCCJEA decisions as well as some unusual cases with surprising outcomes.

January 17, 2025 at 07:45 AM

By Cynthia Feathers

Bronx County Family Court at 900 Sheridan Ave. Photo: Rick Kopstein

This is Part II of a discussion of selected Appellate Division decisions rendered last year in Family Court cases. Part I covered decisions about attorneys for children, bias, counsel for parents, defaults, and dissents.

Neglect

Findings of neglect were reversed in many cases. As stated in *Matter of Elina M. (Leonard M.)*, —AD3d—, 2024 NY Slip Op 06574 (2d Dept. 2024), a single incident of excessive corporal punishment may support a finding of neglect.

Further, nowadays any physical force against children as a disciplinary measure is frowned upon. In this case, though, the sole misconduct consisted of the father grabbing the child's arm and shoulder and leaving marks.

The petitioner failed to establish that the incident rose to the level of neglect or that the father intended to hurt the child or exhibited a pattern of severe physical punishment. Moreover, Family Court improperly relied on accusations of the father's alleged alcohol misuse, where the statements were uncorroborated, and the agency failed to take the opportunity offered by the court to move to conform the pleadings to the proof (*see also Matter of G.B. [Gary B.]*, 227 AD3d 581 [1st Dept. 2024] [no proof that father lost self-control during repeated bouts of excessive drinking]).

Practice Note: Regarding amendments of pleadings, *see* Family Ct Act §1051 (b) and CPLR 3025 (c). Under both provisions, amendments can occur upon motion of a party or sua sponte (*see e.g. Matter of I.E. v J.I.* — AD3d—, 2024 NY Slip Op 06653 [1st Dept. 2024] [in family offense proceeding, on its own initiative, Family Court properly conformed pleadings to proof, given absence of surprise or prejudice]).

In *Matter of Kaira K. (Karam S.)*, 226 AD3d 900 (2d Dept. 2024), the record did not support a finding of educational neglect. Most of the child's absences were the result of busing issues and technology problems during Covid. Some occurred when the mother did not have physical custody. Further, the child's attendance improved, and she successfully completed the third grade (*see also Matter of Justice H.M. [Julia S.]*, 225 AD3d 1298 [4th Dept. 2024] [child had not attained age 6 by December 1 of year when educational neglect was alleged to have occurred; his school attendance was not mandated by Education Law]).

A powerful 2024 decision addresses a vital procedural right of accused parents. In *Matter of Emmanuel C.F. (Patrice M.D.F.)*, 230 AD3d 997 (1st Dept. 2024), the court emphasizes that Family Ct Act § 1028 sets forth specific mandatory time constraints. Given the potential and persistent harms of family separation, the mother was entitled to prompt judicial review of the child's removal, "measured in hours and days, not weeks and months." The piecemeal review provided in this case, over a

period of four months, was unacceptable. The appellate court directed that Family Court must complete the hearing expeditiously with no further adjournments, except for good cause shown.

Stays

Stays of enforcement pending appeal can be a valuable litigation tool. In *Matter of Mark AA. v Susan BB.*, 231 AD3d 1347 (3d Dept. 2024), the father challenged an order agreeing with the mother's argument that the court should decline jurisdiction of the custody proceedings pursuant to the Uniform Child Custody Jurisdiction and Enforcement Act ("UCCJEA").

The appellate court issued an order providing that, pending determination of the appeal, the prior Albany County Family Court custody order would continue in full force and effect, as modified by a Massachusetts court's temporary order (*see* 2024 NY Slip Op 69946[U]). The stay order further provided an expedited briefing schedule. The authority cited was Family Ct Act § 1114 (b), not the CPLR.

Practice Note: Under Family Ct Act §1118, the CPLR applies to Family Court appeals—"where appropriate." Relevant practice commentaries and case law indicate that, when the Family Court Act covers the relevant procedure, invoking the CPLR is rarely appropriate.

Pursuant to its inherent power, Family Court may grant a stay pending appeal, as indicated last year in *Matter of Brandon J. v Leola K.*, 229 AD3d 918 (3d Dept. 2024) (Family Court suspended order for genetic marker test) (*see also Giraldo v Giraldo*, 85 AD2d 164, 174 [1st Dept. 1982], *appeal dismissed* 56 NY2d 804 [1982] [Family Court could have issued temporary stay while appellant sought permanent stay from Appellate Division]).

Stays can prevent disruption in relocation cases. For example, in *Matter of Wright v Burke*, 226 AD3d 694 (2d Dept. 2024), the appellate court granted the mother's motion to stay enforcement, pending appeal,

of so much of the order as awarded her sole custody of the child on the condition that she relocate with the child to New York (*see also Matter of Emily F. v Victor P.*, 84 Misc 3d 357 [Sup Ct, Bronx County 2024] [Appellate Division stayed enforcement of order in relocation case]).

A stay pending appeal can also have implications as to mootness, as explained by *Matter of Zaya A. (Amy B.)*, 227 AD3d 1133 (3d Dept. 2024). That case involved a child protective agency's application to vaccinate a removed child over the parents' opposition. The child had already received the vaccine, the case was moot, and the mootness exception did not apply (*see Matter of Hearst v Clyne*, 50 NY2d 707, 714-715 (1980) (moot issues may be reviewed where novel issues presented are likely to recur but evade review). The issue in *Zaya A.* was not likely to evade review since the execution of an order for vaccination of a child could be stayed to preserve the appellant's opportunity to seek appellate review.

Practice Note: For a discussion of the mootness doctrine, *see Mootness and Ethics: Meeting the Client's Objectives*, NYLJ, Dec. 31, 2024, p 4, col 4.

Summary Judgment

Summary judgment is seldom used in Family Court practice, in sharp contrast to other realms such as personal injury litigation. In one 2024 case, *Matter of Palumbo v Palumbo*, 227 AD3d 721 (2d Dept. 2024), Family Court granted the mother's motion for summary judgment on her custody petition. Generally, custody decisions should be made after a full evidentiary hearing. However, in this case, the mother demonstrated prima facie that it was in the children's best interests to award her custody.

The terms of the father's probation prohibited him from having any contact with the children as a result of his conviction of the crime of sexual abuse in the second degree, committed against the children's half-sister. In opposition, the father failed to raise a triable issue of fact.

In two 2024 decisions, judgment as a matter of law was denied in termination of parental rights cases. In *Matter of Juliet W. (Amy W.)*, — AD3d—, 2024 NY Slip Op 05690 (4th Dept. 2024), Family Court was convinced by the petitioner agency's contention that the mother was collaterally estopped from relitigating the issue of whether she was "presently and for the foreseeable future unable, by reason of mental illness or intellectual disability, to provide proper and adequate care for the child."

The agency relied on a 2018 determination concerning other children. But that order did not find a permanent impairment and was based on stale evaluations. Thus, the mother had not yet had a fair opportunity to litigate the issue presented (*see also Matter of Kiarah V.R. (Virgina V.)*, 225 AD3d 774 (2d Dept. 2024) (decades-old neglect findings did not support summary judgment on derivative neglect petitions).

In another termination of parental rights case, *Matter of Cherie D.R. (Keith M.R.)*, 230 AD3d 1076 (1st Dept. 2024), Family Court properly denied the father's motion for summary judgment dismissing the petition grounded in abandonment. He raised a valid defense by submitting an affidavit and evidence demonstrating that the child had been wrongfully abducted by the mother and he had been unable to locate the child despite persistent efforts. However, a question of fact remained.

UCCJEA

In 2024, there were many UCCJEA decisions. *Matter of Kevin P. v Ieisha T.*, 229 AD3d 703 (2d Dept. 2024), involves a mother and child who lived in New Jersey for more than six months prior to the filing of the custody petition. Thus, New York was not the subject child's "home state" pursuant to the UCCEA, and the lower court was correct in concluding that it lacked subject matter jurisdiction and dismissing the father's custody petition.

Family Court failed to address the UCCJEA in other cases or to hold a hearing, consider testimony, or provide adequate reasoning (*see e.g. Matter of Adams v John*, 227 AD3d 1395 [4th Dept. 2024] [court erred in considering merits of petition without first resolving whether it had subject matter jurisdiction under UCCJEA]; *Matter of Olivos v Quiroz*, 226 AD3d 1028 [2d Dept. 2024] [court should not have dismissed father's petition without hearing to determine if it had jurisdiction under UCCJEA]; *Matter of Mark AA. v Susan BB.*, 231 AD3d 1347 [3d Dept. 2024] [court had conference with judge in sister state court but did not invite parties to offer testimony regarding relative convenience of forums nor offer adequate reasoning for declining jurisdiction]).

Unusual Cases

Some 2024 cases had surprising outcomes. A case in point is *Matter of Norea CC. (Anna BB.)*, 228 AD3d 1087 (3d Dept. 2024). Rensselaer County Family Court rejected a proper transfer order from Schenectady County. That was inconsistent with constitutional and statutory transfer and venue provisions. There was no basis for maintaining the proceeding in the transferor county, where neither a parent nor the subject child lived. Both parents lived in the transferee county. Further, the legal residence and domicile of the newborn child—who had been removed from the parents—was that of her parents.

Another aspect of *Norea CC.* is puzzling. The appellate decision states that an appeal as of right did not lie, because the transfer order was not an order of disposition. However, *Norea CC.* was a neglect proceeding, and under Family Ct Act § 1112 (a), in cases involving abuse or neglect, appeals from both intermediate and final orders may be taken as of right. *Any* Family Ct Act article 10 order may be appealed as of right, according to Sobie's Practice Commentaries.

Two cases that surprisingly withheld or granted the relief sought are noted here. *Matter of M.H. v C.S.T.*, 226 AD3d 539 (1st Dept. 2024), involves a respondent who turned on a gas stove without lighting the

burner and told the petitioner that the stove would blow up in her face when she went to use it. Family Court found that the respondent had created a substantial risk of serious injury and had committed the family offense of reckless endangerment in the second degree.

Yet the trial court issued only a limited, six-month order of protection that allowed the respondent to reside at the apartment of the vulnerable petitioner—his fearful, fragile, 80-year-old grandmother. Noting record proof of bizarre, offensive, and frightening conduct, the reviewing court issued a two-year stay-away order.

Finally, in *Matter of Franklin v Quinones*, 225 AD3d 759 (2d Dept. 2024), *lv denied* 42 NY3d 903 (2024), the reviewing court provided fairly rare relief in reversing an order denying the father's application to suspend his child support obligation. The relevant stringent test was met by the mother's extreme actions, constituting deliberate frustration or active interference with the visitation rights of the noncustodial parent.

The father's petition alleged that the mother coached the child to make false allegations against him. However, she did not demonstrate that any sexual abuse had occurred. Further, the mother alienated the child from the father, encouraged their estrangement, deliberately frustrated the father's visitation, and failed to assist the child in restoring a relationship with the father (*see also Matter of Morgan v Morgan*, 213 AD3d 669 [2d Dept. 2023] [suspension of support justified], *lv denied* 39 NY3d 1175 [2023]; *cf. Burns v Grandjean*, 210 AD3d 1467, 1473 [4th Dept. 2022] [suspension not warranted]).

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