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Matrimonial MATTERS

Family court cases of interest from 2008

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As is common, a number of family law cases made their way to the New York Appellate Division in the past year:

Custody

Three parties sought custody of a young child — each of the child's parents and the paternal grandmother. Family court heard all three petitions at one hearing, in which the only testimony was from the parties themselves. The father was granted sole custody and provided every other weekend visitation with the mother. The grandmother's petition was dismissed as moot. The mother appealed.

The appellate court found the record insufficient to determine whether the decision was in the best interests of the child. The trial court had found that the father could provide a more stable home life based on his work schedule and the grandmother's support.

The appellate court pointed out that since all three of the parties worked full time, without a home study or other evidence the family court lacked sufficient basis to make that determination.

The appellate court also noted that “[i]n the absence of forensic evaluation of the mother, [the] family court should not have based its determination of custody upon the father's and grandmother's bare allegation that the mother suffers from unresolved emotional trauma.”

The Third Department further admonished that, especially given the dearth of evidence in the matter, “the failure to appoint a Law Guardian here was an abuse of discretion.”

Not surprisingly, the family court's decision was reversed and remitted for further proceedings. *Amato v. Amato*, 51 A.D.3d 1123 (Third Dept. 2008).

In *Harry P. V. Cindy W.*, the Fourth Department reiterated the pleading burden in a petition to modify a custody order. 48 A.D.3d 1100 (Fourth Dept. 2008).

The court held that “[t]he petition was insufficient on its face because it failed to allege good cause for modification of the prior order,” noting that, “[i]ndeed, the father's attorney acknowledged ...

that it failed to contain the necessary allegations of a change in circumstances to warrant a hearing.”

The family court's dismissal without a hearing was determined to be proper and the decision was affirmed.

Attorneys for the Children, fka Law Guardians

Although the First Department affirmed the family court's dismissal of a petition to modify a custody order based on the petition's *prima facie* insufficiency, the appellate court took the opportunity to admonish the family court regarding the Law Guardian: “The questioning of the Law Guardian by the court is something that should not be repeated. With the parties present, the court asked the Law Guardian, on the record, to discuss the position of the 10-year-old child regarding how well the current custody arrangement was working. Although the court was correct to disallow the ‘cross-examination’ of the Law Guardian by [the] petitioner's counsel, the court should not consider the hearsay opinion of a child in determining the legal sufficiency of a pleading in the first place. Most importantly, such colloquy makes the Law Guardian an unsworn witness, a position in which no attorney should be placed.”

Quoting 22 NYCRR 7.2[b], the court stressed: “The Attorney for the Child is subject to the ethical requirements applicable to all lawyers, including but not limited to ... becoming a witness in the litigation.” *Naomi C. v. Russell A.*, 48 A.D.3d 203 (Third Dept. 2008).

In *Powers v. Wilson*, the Attorney for the Children moved for approval and award of fees for her representation of the parties' children. 56 A.D.3d 639 (Second Dept. 2008).

The supreme court approved and granted the fees without holding a hearing, and the defendant appealed the award, among other things. The appellate court affirmed, stating that “[w]here, as here, a parent neither objected to the court's decision to resolve the motion for an award of any attorney's fee on the papers submitted, nor requested an evidentiary hearing on the issue, that party has waived his or her right to a hearing on the matter.”

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