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COURT OF APPEALS

CRIMINAL LAW, JUDGES.

THE JUDGE CLOSED THIS MURDER TRIAL TO THE PUBLIC CITING "INTIMIDATION" BY SPECTATORS AND THE POSTING OF A PHOTO OF THE TRIAL ON INSTAGRAM; THE SPARSE RECORD DID NOT SUPPORT CLOSING THE COURTROOM, NEW TRIAL ORDERED.

The Court of Appeals, reversing defendant's conviction and ordering a new trial, determined the record did not support holding the murder trial in a courtroom closed to the public. The judge reacted to spectators deemed "intimidating" and the posting on Instagram of a photo taken in the courtroom with a caption supporting the defendant: "[T]he People moved to close the courtroom, citing the fact that photographs had been taken in the courtroom and posted on Instagram with the caption 'Free Dick Wolf'—which the prosecutor asserted was a reference to one of defendant's street names. After an off-the-record discussion with counsel, the court noted its concern with the photographs, and added that '[p]eople in the courtroom have been very intimidating. . . . They intimidated a court reporter already. They stare people down. They're staring up here. I am closing this courtroom based on the fact that now there are pictures that were taken in this courtroom. And I know that pictures can be taken very [surreptitiously] with a cellphone. You can look like you're looking at your cellphone when you're really taking pictures. But clearly pictures were taken in this courtroom by someone who had to have been sitting in this courtroom and pictures were taken outside the court. I'm closing the courtroom' * * * Although the prevention of intimidation by spectators during trial may very well be an 'overriding interest' that can support courtroom closure ... , it is incumbent on the trial court to ensure that the record adequately justifies its concerns and demonstrates that the identified interest would be jeopardized absent a closure. Where closure is warranted, it must be tailored to address the overriding interest. Here, the court ordered the broadest possible closure, completely excluding all members of the public for the remainder of trial. On this sparse record the closure was disproportionate in relation to the circumstances described." ***People v. Reid*, 2023 N.Y. Slip Op. 02755, CtApp 5-23-23**

CRIMINAL LAW, JUDGES.

THE JUDGE'S POLICY OF NOT LETTING MEMBERS OF THE PUBLIC INTO THE COURTROOM DURING TESTIMONY HAD THE UNINTENDED EFFECT OF EXCLUDING MEMBERS OF THE PUBLIC FROM PORTIONS OF THE TRIAL; NEW TRIAL ORDERED.

The Court of Appeals, reversing the appellate division, determined the procedure imposed by the judge effectively prevented members of the murder victim's family from attending parts of the trial. Although the judge did not mean to exclude members of the public from the trial, the judge's policy of not letting members of the public into the courtroom during testimony was improperly implemented and had the unintended result of excluding members of the public. The Court of Appeals, over a two-judge concurrence, ordered a new trial: "The trial judge is in charge of the courtroom and is ultimately responsible for ensuring that any limitation on a defendant's right to a public trial conforms with constitutional dictates. At defendant's trial, the judge delegated to court officers the implementation of the judge's general policy of prohibiting the public from entering or exiting the courtroom while a witness testifies. We agree with the Appellate Division that members of the public were excluded from the courtroom at a time when they should have had access under the terms of the extant policy. But, contrary to the Appellate Division's conclusion, that error directly resulted from the acts of court officials enforcing the trial judge's order. Therefore, the court violated defendant's right to a public trial." ***People v. Muhammad*, 2023 N.Y. Slip Op. 02756, CtApp 5-23-23**

EMPLOYMENT LAW, MUNICIPAL LAW, CONTRACT LAW.

"EXEMPT EMPLOYEES" UNDER THE CIVIL SERVICE LAW ARE TERMINABLE AT WILL; A COLLECTIVE BARGAINING AGREEMENT WHICH PURPORTS TO MAKE AN EXEMPT EMPLOYEE TERMINABLE FOR CAUSE IS UNENFORCEABLE.

The Court of Appeals, reversing the appellate division, in a full-fledged opinion by Judge Garcia, determined a so-called "exempt employee (here the secretary to the town planning board) whose qualifications cannot be tested by a Civil Service examination is terminable at will. The collective bargaining agreement (CBA) defined the bargaining unit to include the secretary and permitted the town to terminate only for "just cause." When the secretary was fired the union filed a grievance and sought arbitration. The Court of Appeals held the secretary. as an "exempt employee" was terminable at will and arbitration was therefore not available: "Certain civil service positions are classified as 'exempt' when the position is of a confidential nature and requires personal qualities that cannot practicably be tested by an examination. Exempt class employees are therefore terminable at will. In this case, the parties entered into a collective bargaining agreement that purports to provide for-cause termination protection to certain exempt class employees. We hold the agreement unenforceable to the extent it grants such protections,

and therefore this dispute over an exempt class employee's termination is not arbitrable." ***Matter of Teamsters Local 445 v. Town of Monroe*, 2023 N.Y. Slip Op. 02754, CtApp 5-23-23**

PERSONAL INJURY, LANDLORD-TENANT, CRIMINAL LAW.

IN THESE TWO CASES, INTRUDERS ENTERED AN APARTMENT BUILDING THROUGH EXTERIOR DOORS WHICH, ALLEGEDLY, WERE UNLOCKED AND MURDERED VICTIMS WHO WERE SPECIFICALLY TARGETED; THE FACT THAT THE VICTIMS WERE TARGETED WAS NOT AN "INTERVENING ACT" WHICH RELIEVED THE LANDLORD OF LIABILITY AS A MATTER OF LAW.

The Court of Appeals, affirming the Second Department and reversing the First Department, in a full-fledged opinion by Judge Wilson, determined the fact that the murder victims were targeted did not relieve the landlord, here the NYC Housing Authority (NYCHA), of liability for the alleged failure to provide exterior doors with functioning locks: "[W]hen the issue of proximate cause involves an intervening act, 'liability turns on whether the intervening act is a normal or foreseeable consequence of the situation created by the defendant's negligence' ... . It is '[o]nly where 'the intervening act is extraordinary under the circumstances, not foreseeable in the normal course of events, or independent of or far removed from the defendant's conduct,' [that it] may possibly 'break[ ] the causal nexus' ... . But '[a]n intervening act may not serve as a superseding cause, and relieve an actor of responsibility, where the risk of the intervening act occurring is the very same risk which renders the actor negligent' ... . Here, the risk created by the nonfunctioning door locks—that intruders would gain access to the building and harm residents—is exactly the 'risk that came to fruition' ... . It was not the trial court's role, on summary judgment, to assess the fact-bound question of whether the intruders ... would have persevered in their attacks had the doors been securely locked. This is not to say that the sophistication and planning of an attack is irrelevant to the factfinder's determination of proximate cause, or even that it could never rise to such a degree that it would sever the proximate causal link as a matter of law ... . But neither [scenario here] approaches that level." ***Scurry v. New York City Hous. Auth.*, 2023 N.Y. Slip Op. 02752, CtApp 5-23-23**

REAL PROPERTY TAX LAW (RPTL), MUNICIPAL LAW, CONSTITUTIONAL LAW.

THE CITY OF OGDENSBURG PROPERLY PASSED A LOCAL LAW REPEALING A PRIOR LOCAL LAW WHICH OPTED OUT OF THE RPTL ARTICLE 11 PROVISIONS FOR DELINQUENT REAL ESTATE TAX COLLECTION; THE COUNTY'S ARGUMENT THAT THE LOCAL LAW UNLAWFULLY SHIFTED THE BURDEN OF TAX COLLECTION TO THE COUNTY AND SCHOOL DISTRICT WAS REJECTED.

The Court of Appeals, in a full-fledged opinion by Judge Cannataro, determined the Local Law which repealed a prior Local Law in which the City of Ogdensburg opted out of the application of RPTL Article 11 (regarding the collection of delinquent real estate taxes) was not unconstitutional. The county argued repeal of the local law unlawfully shifted the burden of delinquent tax collection to the county and the school district. That argument was rejected: "Inasmuch as the County has no powers with respect to taxation that are not 'unambiguously delegated' to it by the legislature or the Constitution ... and the legislature has chosen to limit a county's ability to enter into RPTL 1150 (1) agreements by making such agreement permissive rather than mandatory, it cannot be said that the City impaired the County's power by doing as the legislature permits it to do under RPTL article 11. Therefore, we conclude that Local Law No. 2 does not violate the statutory and constitutional protections at issue, but effectuates a power the legislature granted to cities wishing to revoke their initial opt-out from article 11." ***Matter of St. Lawrence County v. City of Ogdensburg*, 2023 N.Y. Slip Op. 02757, CtApp 5-23-23**

RETIREMENT AND SOCIAL SECURITY LAW, MUNICIPAL LAW.

TIER 3 NYC POLICE OFFICERS CANNOT COUNT YEARS OF NON-POLICE SERVICE TOWARD THE 22 YEARS OF POLICE SERVICE REQUIRED FOR RETIREMENT ELIGIBILITY.

The Court of Appeals, in a full-fledged opinion by Judge Singas, reversing the appellate division, determined tier 3 police officers may not count prior "non-police" service in computing the 22 years of service required for eligibility for retirement benefits: "[T]ier 3 officers are eligible for retirement after 22 years of service without regard to their age ... . The issue before us is whether a tier 3 police officer's prior non-police service 'qualifies to be counted as credited service pursuant to [Retirement and Social Security Law § 513]' ... . [W]e conclude that the legislature intended tier 3 officers to receive the same service credit as their tier 2 counterparts, but restricted to the credit available prior to July 1, 1976. Before July 1, 1976, the Administrative Code provided that a tier 2 officer would not be eligible for retirement until he or she 'served in the police force for' the then-minimum period of 20 or 25 years ... . This language plainly demonstrates that, prior to July 1, 1976, tier 2 officers could count only prior police service toward their retirement eligibility. Accordingly, tier 3 officers may receive retirement credit only for prior police service." ***Matter of Lynch v. City of New York*, 2023 N.Y. Slip Op. 02753, CtApp 5-23-23**

FIRST DEPARTMENT

CRIMINAL LAW, EVIDENCE.

THE TRAFFIC STOP WAS VALID, BUT THE POLICE OFFICERS SAW NOTHING TO INDICATE A WEAPON WAS IN THE CAR; THE SEARCH OF THE CAR AND SEIZURE OF A WEAPON FROM AN OPEN PURSE IN THE BACK SEAT WAS ILLEGAL.

The First Department, reversing defendant's conviction and dismissing the indictment, determined the police properly stopped the car in which defendant was a passenger but did not have sufficient information to justify a search of the vehicle for a weapon. A weapon was seized

from an open purse in the back seat: "The police have authority to order occupants out of a vehicle in the event of a traffic violation ... . Absent probable cause, the police are allowed to conduct a limited intrusion into the vehicle only if the totality of the information available supports a reasonable conclusion that there is a substantial likelihood of a weapon within the vehicle that poses an actual and specific threat to the officers' safety ... . [T]he Court of Appeals has described this exception to the probable cause requirement as 'narrow' ... . Furtive movements 'suggesting that the defendant was reaching for something that might be a weapon' combined with some other suggestive factor have been determined to meet this standard ... . * * * No such actual and specific danger was shown to exist in this case. ... Defendant hesitated only briefly before rolling the window down and complying with the officer's demands to show his hands and to step out of the vehicle. Taking a few 'moments' to comply with an officer's orders does not rise to the level of furtive or suspicious activity so as to support a finding of an actual and specific danger to officer safety ... He was frisked outside of the vehicle and found not to possess any weapons. Defendant remained in full view of the officers, his demeanor described as 'relaxed'; he made eye contact and did not otherwise appear suspicious." ***People v. Scott*, 2023 N.Y. Slip Op. 02769, First Dept 5-23-23**

CRIMINAL LAW, EVIDENCE.

THE FACT THAT THE PEOPLE WERE HELPING THE COMPLAINANT PROCURE A U VISA WHICH WOULD ALLOW THE COMPLAINANT TO STAY IN THE US AND APPLY FOR PERMANENT RESIDENCE WAS BRADY MATERIAL WHICH SHOULD HAVE BEEN PROVIDED TO THE DEFENSE; U VISAS ARE AVAILABLE TO ALIENS WHO SUFFER ABUSE FROM CRIMINAL ACTIVITY; CONVICTIONS REVERSED AND INDICTMENTS DISMISSED.

The First Department, in a full-fledged opinion by Justice Moulton, determined defendants' convictions should be reversed and the indictments dismissed because the People failed to reveal they were helping the complainant procure a U visa which would allow the complainant to remain in the United States and apply for permanent residence. A U visa is available to an alien who has suffered abuse as a victim of criminal activity. The defendants have already served their sentences and have been deported: "A U visa is available to an alien who 'has suffered substantial physical or mental abuse as a result of having been a victim of criminal activity[,] . . . possesses information concerning criminal activity . . . [and] . . . has been helpful, is being helpful, or is likely to be helpful' to a Federal, State, or local law enforcement official, prosecutor, judge, or other authority prosecuting criminal activity ... . * * * To obtain a U visa from the United States Citizenship and Immigration Services, an applicant must first acquire a certification from a Federal, State, or local law enforcement official, prosecutor, judge, or other Federal, State, or local authority investigating criminal activity (see 8 USC § 1184 [p][1]). The certification must confirm that the applicant for a U visa "has been helpful, is being helpful, or is likely to be helpful' in the investigation or prosecution of criminal activity ... . Without a certification, the applicant cannot obtain a U visa. Law enforcement is not mandated to issue the certification ... . The U visa is a valuable benefit. Under Section 245(m) of the Act, after three years of continuous presence in the United States (in which the recipient also receives work authorization), the recipient may apply for lawful permanent residence in the United States. * * * ... [W]e cannot know what a jury would have done with further, material, impeachment arising from the U visa evidence. It might have found the U visa evidence fatally undermined [the complainant's] credibility. We find that there is reasonable probability that had the jury considered the U visa evidence, it would have raised enough reasonable doubt to produce a different outcome." ***People v. Flores*, 2023 N.Y. Slip Op. 02768, First Dept 5-23-23**

CRIMINAL LAW, JUDGES.

WHERE A JURY NOTE DOES NOT UNAMBIGUOUSLY DESCRIBE A REQUESTED EXHIBIT, THE NOTE MUST BE READ OR SHOWN TO THE PARTIES AND THE PARTIES MUST BE ALLOWED INPUT RE: THE PROPER RESPONSE; HERE THE JUDGE DID NOT FOLLOW THAT PROCEDURE AND THE CONVICTIONS WERE REVERSED.

The First Department, reversing defendant's convictions and ordering a new trial, determined the judge did not follow proper procedure re: notes received from the jury during deliberations: "The court did not follow the procedures set forth in *People v O'Rama* (78 NY2d 270[1991]) with regard to several jury notes. The record does not reflect that the court read or showed four of the jury's notes to the parties or afforded them an opportunity to provide input regarding the proper response to the notes. Indeed, the record contains no indication that these four notes, each of which sought trial exhibits, were responded to at all. While '[n]otes that only require the ministerial act of sending exhibits into the jury room do not implicate the requirements of *O'Rama*' and CPL 310.30 ... , notes that do not unambiguously describe the requested exhibits warrant input from counsel and are subject to *O'Rama*'s requirement of meaningful notice. Here, at least two of the notes that the court did not address fall into this latter category. Because of this mode of proceedings error, a new trial is called for." ***People v. Baptiste*, 2023 N.Y. Slip Op. 02835, First Dept 5-25-23**

FAMILY LAW, CIVIL PROCEDURE, EVIDENCE.

THE PROOF OF DOMESTIC VIOLENCE AT THE FORTHCOMING CUSTODY TRIAL SHOULD NOT HAVE BEEN LIMITED TO INCIDENTS OCCURRING AFTER THE HAGUE CONVENTION PROCEEDINGS IN CYPRUS.

The First Department, reversing (modifying) Family Court, determined the proof of domestic violence at the upcoming custody trial should not have been limited to incidents occurring after the Hague Convention proceedings in Cyprus: "[T]hat aspect of the order that limits the proof of domestic violence that the mother may try to introduce at the forthcoming custody trial to incidents that have occurred since conclusion of the Hague Convention proceedings, is vacated. The court correctly recognized '[a] decision under the Convention is not a determination on the merits of any custody issue, but leaves custodial decisions to the courts of the country of habitual residence' ... . However, it then effectively vested the Hague Convention proceedings with preclusive effect as to claims of domestic violence, by ruling that, at the impending custody hearing, the mother could only seek to introduce evidence of domestic violence that has occurred since those proceedings' conclusion.

There should have been no such temporal limitation imposed on the domestic violence evidence the mother may seek to introduce." ***Gould v. Kontogiorge*, 2023 N.Y. Slip Op. 02824, First Dept 5-25-23**

SECURITIES, CONTRACT LAW.

THE "NO ACTION" PROVISION IN THE CONTRACT PRECLUDED PLAINTIFFS FROM BRINGING A JUDICIAL BREACH OF CONTRACT ACTION; THE AVAILABLE CONTRACTUAL REMEDIES WERE DEEMED EXCLUSIVE.

The First Department, reversing the appellate division, in a full-fledged opinion by Justice Oing, over a two-justice dissent, determined the complaint seeking a judicial determination whether the contingent resource payment (CRP) agreement was breached when Exxon purchased InterOil Corporation was properly dismissed. Exxon successfully argued that plaintiffs' only recourse was contractual under the terms of the CRP. The opinion is far too detailed to fairly summarize here: "[The CRP] § 8.05's penultimate sentence not only provides that plaintiffs cannot bring a class action to challenge any aspect of the CRP agreement, but it also bars them from bringing any action or proceeding altogether, '[n]otwithstanding anything to the contrary in this Agreement . . . no individual Holder or other group of Holders will be entitled to exercise such rights.' Such 'rights,' written in the plural as opposed to in the singular, refer to those set out in the beginning of the sentence — namely, 'institut[ing] any action or proceeding at law or in equity or in bankruptcy or otherwise upon or under or with respect to this Agreement.' " ***Mulacek v. ExxonMobil Corp.*, 2023 N.Y. Slip Op. 02829, First Dept 5-25-23**

SECOND DEPARTMENT

CIVIL PROCEDURE, FORECLOSURE, JUDGES.

A MOTION FOR JUDGMENT AS A MATTER OF LAW MUST BE DENIED IF IT IS BROUGHT BEFORE THE CLOSE OF THE OPPOSING PARTY'S CASE, EVEN IF THE MOTION HAS MERIT.

The Second Department, reversing Supreme Court, determined the defendant's motion pursuant to CPLR 4401 for judgment as a matter of law in this foreclosure action was premature because it was made before the close of plaintiff's case: "During the trial, the defendant objected to the admission of a copy of the underlying note. The Supreme Court declined to admit the note into evidence, and the defendant moved pursuant to CPLR 4401 for judgment as a matter of law dismissing the complaint insofar as asserted against it, arguing that the plaintiff was unable to establish a prima facie case. ... [T]he court granted the defendant's motion, dismissed the complaint insofar as asserted against him, and directed the County Clerk to cancel and discharge the notice of pendency. ... 'A motion for judgment as a matter of law is to be made at the close of an opposing party's case or at any time on the basis of admissions (see CPLR 4401), and the grant of such a motion prior to the close of the opposing party's case generally will be reversed as premature even if the ultimate success of the opposing party in the action is improbable' ... . Here, the defendant's motion for judgment as a matter of law dismissing the complaint insofar as asserted against him was made before the close of the plaintiff's case, and was not based upon an admission by the plaintiff. Accordingly, the defendant's motion should have been denied as premature ...". ***Bank of N.Y. Mellon v. Waheed*, 2023 N.Y. Slip Op. 02774, Second Dept 5-24-23**

COURT OF CLAIMS, CIVIL PROCEDURE, NEGLIGENCE.

IN THIS CHILD VICTIMS ACT PROCEEDING, THE CLAIM SUFFICIENTLY ALLEGED THE TIME WHEN THE ALLEGED SEXUAL ASSAULT TOOK PLACE; LEGAL CRITERIA EXPLAINED.

The Second Department, reversing the Court of Claims, determined the claim sufficiently stated when the alleged sexual assault occurred in this Child Victims Act action: " 'Court of Claims Act § 11(b) requires a claim to specify (1) the nature of the claim; (2) the time when it arose; (3) the place where it arose; (4) the items of damage or injuries claimed to have been sustained; and (5) the total sum claimed' ... . A failure to comply with the requirements set forth in section 11(b) is a jurisdictional defect that requires dismissal of the claim ... . '[A] sufficiently detailed description of the particulars of the claim' is necessary because "[t]he purpose of the section 11(b) pleading requirements is . . . to enable the State to investigate and promptly ascertain the existence and extent of its liability' ... . 'Because suits against the State are allowed only by the State's waiver of sovereign immunity and in derogation of the common law, statutory requirements conditioning suit must be strictly construed' … . However, ' "[a]bsolute exactness is not required," ' so long as the particulars of the claim are detailed in a manner sufficient to permit investigation ... . * * * The Court of Claims erred in directing dismissal of so much of the claim as relates to the alleged sexual assault perpetrated by Hector. The claimant alleged, inter alia, that she was admitted to RPC in 1969 when she was 10 years old, and that Hector assaulted her in the auditorium in the first year of her admission. Contrary to the State's argument, the claimant was not required to allege the exact dates on which the sexual abuse occurred ...". ***Wimbush-Burkett v. State of New York*, 2023 N.Y. Slip Op. 02804, Second Dept 5-24-23**

CRIMINAL LAW, SEX OFFENDER REGISTRATION ACT (SORA).

EVEN THOUGH THE NUMBER OF POINTS WAS REDUCED BY THE CHANGE IN THE FACTUAL BASIS FOR THE RISK ASSESSMENT FROM "ARMED WITH A DANGEROUS INSTRUMENT" (RECOMMENDED BY THE BOARD) TO "INFLICTED PERSONAL INJURY," DEFENDANT WAS ENTITLED TO 10 DAYS NOTICE OF THE CHANGE.

The Second Department, reversing Supreme Court in this SORA risk assessment proceeding, determined defendant was not given the required 10-day notice that the People would seek points under a risk factor that differed from the recommendation submitted by the board.

Here the board recommended a 30-point assessment under risk factor 1 for "armed with a dangerous instrument" but the court assessed 15 points for "inflicted personal injury." The defendant was entitled to notice of that change, even though the number of points was reduced: "Correction Law § 168-n(3) provides that, '[i]f the district attorney seeks a determination that differs from the recommendation submitted by the board, at least ten days prior to the determination proceeding the district attorney shall provide to the court and the sex offender a statement setting forth the determinations sought by the district attorney together with the reasons for seeking such determinations' ... , this Court held that the phrase 'recommendation submitted by the board' is not limited to just the total points assessed or the recommended sex offender level designation, but 'includes the factual predicate for the recommendation' ... . Here, the factual predicate for the Board's recommendation for the assessment of points under risk factor 1 was the defendant having been 'armed with a dangerous instrument,' not that he 'inflicted physical injury.' In order to assess points under risk factor 1 based upon infliction of physical injury, the People were required by Correction Law § 168-n(3) to give the defendant the requisite 10-day notice, which they failed to do ...". ***People v. Green*, 2023 N.Y. Slip Op. 02799, Second Dept 5-24-23**

FAMILY LAW, CIVIL PROCEDURE.

FAMILY COURT PROPERLY DETERMINED NEW YORK WAS NOT THE APPROPRIATE FORUM IN THIS CUSTODY DISPUTE, BUT THE NEW YORK PROCEEDINGS SHOULD HAVE BEEN STAYED, NOT DISMISSED.

The Second Department, reversing (modifying) Family Court, determined Family Court properly decided New York was not the appropriate forum for this custody dispute between father in New York and mother and child in Texas, but Family Court should have stayed, not dismissed, the New York proceedings: "Based on the record before us, we agree with the Family Court that Texas is the more appropriate and convenient forum. The child has not resided in New York since May of 2020. The child also has had no significant connection to New York since 2020, and the substantial, relevant evidence pertaining to the child's care, protection, education, and personal relationships is in Texas, not New York. Accordingly, the statutory factors weigh in favor of the court's determination to decline to exercise jurisdiction. However, Domestic Relations Law § 76-f(3) specifies that '[i]f a court of this state determines that it is an inconvenient forum and that a court of another state is a more appropriate forum, it shall stay the proceedings upon condition that a child custody proceeding be promptly commenced in another designated state.' Accordingly, the Family Court erred in granting that branch of the motion which was to dismiss the petition ...". ***Matter of Waters v. Yacopino*, 2023 N.Y. Slip Op. 02792, Second Dept 5-24-23**

FAMILY LAW, EVIDENCE.

THE RECORD DID NOT SUPPORT THE FINDING THAT FATHER, DUE TO UNTREATED MENTAL ILLNESS, NEGLECTED ONE CHILD AND DERIVATIVELY NEGLECTED THE OTHER CHILDREN; THE CRITERIA FOR A NEGLECT FINDING IN THIS CONTEXT ARE LAID OUT IN DETAIL.

The Second Department, reversing Family Court, determined the finding that father, due to untreated mental illness, neglected one child, Fyre, and derivatively neglected the other children was not supported by the record: "[T]he record fails to support a finding of derivative neglect as to the subject children based on the purported neglect of Fyre. In that regard, the petitioner failed to establish that the father suffered from an untreated mental illness that placed Fyre at imminent risk of harm ... . Inasmuch as the evidence failed to support a finding that Fyre was endangered by the father's untreated mental illness, it failed to support a finding of derivative neglect as to the subject children (see Family Ct Act § 1046[a][i] ...)." ***Matter of Sonja R. (Victor R.)*, 2023 N.Y. Slip Op. 02787, Second Dept 5-24-23**

FAMILY LAW, EVIDENCE.

MOTHER'S PETITION ALLEGED FACTS SUFFICIENT TO WARRANT A MODIFICATION-OF-CUSTODY HEARING; LEGAL CRITERIA EXPLAINED.

The Second Department, reversing Family Court, determined mother's petition alleged facts sufficient to warrant a hearing on whether the custody arrangement should be modified: "[M]other's petition contained allegations that were sufficiently specific to warrant a hearing, including the allegations that the parties' ability to cooperate with each other with respect to the children had deteriorated and that the parties were no longer capable of communicating with each other in a civil and cooperative manner ... .. Those allegations were not before the Family Court on a prior occasion, and were not merely conclusory or nonspecific allegations ... . Because facts material to the best interest analysis, and the circumstances surrounding such facts, remain in dispute, a hearing is required ...". ***Matter of Liang v. O'Brien*, 2023 N.Y. Slip Op. 02789, Second Dept 5-24-23**

THIRD DEPARTMENT

FAMILY LAW, EVIDENCE.

THE PROOF FATHER NEGLECTED THE CHILD WAS PRIMARILY BASED UPON HIS INCARCERATION, WHICH WAS NOT SUFFICIENT.

The Third Department, reversing Family Court, over a concurrence, determined the proof respondent father neglected the child was insufficient. The neglect finding appeared to be primarily based upon father's incarceration: "We note that a determination of whether respondent neglected the child was complicated by the fact that no DNA analysis was performed to establish paternity until late 2020, over a year after

the child's birth. * * * At the fact-finding hearing, ... most of the proof upon which petitioner relied was ... hearsay. Although no objections were raised, the caseworker testified to the mother's statements regarding paternity and to respondent's mother's statements. In the end, petitioner's proof failed to establish how respondent's plan to have his mother care for the child fell below the 'minimum degree of care' or how it impaired the child or placed him in imminent danger of becoming impaired ... . Petitioner's proof seemed to be predicated solely on respondent's incarceration, which cannot alone form the basis for a neglect finding ... . Due to the accumulation of errors by petitioner, and the insufficiency of its proof, we find that petitioner failed to establish that respondent neglected the subject child ...". ***Matter of Elijah AA. (Alexander AA.)*, 2023 N.Y. Slip Op. 02812, Third Dept 5-25-23**

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