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Summarizing recent significant New York appellate cases

In 2022, the Legislature amended Domestic Relations Law § 111 to require consent for adoption by any nonmarital parent who has executed an unrevoked acknowledgement of parentage or filed an unrevoked notice of intent to claim parentage of a child. It did so to fix an unjust situation where parents were having their parental rights terminated for not providing support to the agency, even if they were trying to be involved in the child's life while they were in foster care. But what happens when a court determines that the consent of a parent is not necessary under the prior version of the statute, but the dispositional order isn't issued until after the 2022 amendment's effective date? To resolve that issue, the First Department recently held that the remedial amendment should apply retroactively. Let's take a look at that opinion and what else has been happening in New York's appellate courts over the past week.

FIRST DEPARTMENT

CIVIL PROCEDURE, CLASS ACTIONS

McMillian v Out-Look Safety LLC, 2025 NY Slip Op 04963 (1st Dept Sept. 11, 2025)

Issue: **Did the definition of the class constitute an impermissible "fail safe" class under Federal Rules of Civil Procedure Rule 23(b)?**

Facts: "This putative class action asserts that members of the class provided services as non-union construction site 'flaggers,' as defined by the New York City Comptroller, and were entitled to be paid at the prevailing wage for public works projects in New York City from April 16, 2018 through January 28, 2024." Instead, the plaintiffs alleged, "defendants had a uniform practice of paying members of the class at a considerably lower rate by classifying them as 'crossing guards' or 'traffic control.'" Supreme Court granted class certification under CPLR 901(a).

Holding: The Appellate Division, First Department affirmed, holding that sufficiently established the requirements of numerosity, commonality, typicality, and that the class action was a superior form for the litigation. The Court rejected defendants' argument that Supreme Court's definition of the class—"[a]ll persons employed by Out-Look Safety LLC at any time since April 16, 2018 through January 28, 2024, who worked as non-union construction flaggers on Restani, Safeway, Triumph, and/or Hawkeye projects requiring the payment of prevailing wages in New York City"—constituted an impermissible "fail safe" class under FRCP Rule 23(b). The Court explained, "[a] 'fail safe' class exists when the class itself is defined in a way that precludes membership unless the liability of the defendant is established. A 'fail safe' class is impermissible because it prevents an adverse judgment being entered against plaintiffs."

The Court held that "Supreme Court was not required to apply the standards utilized by the federal courts in FRCP Rule 23(b), given the recognition that CPLR 901(a) should be more broadly construed. Additionally, a finding of a 'fail-safe' class does not necessarily result in a bar to certification of the class, as courts have discretion to construe the complaint or redefine the class to bring it within the scope of Rule 23." Here, the Court reasoned, Supreme Court amended the class definition to remove the language that would have required a finding of liability, and defendants failed to propose a different definition. Thus, Supreme Court's definition did not result in an impermissible "fail safe" class.

FAMILY LAW

Matter of C.C. v D.C., 2025 NY Slip Op 05017 (1st Dept Sept. 18, 2025)

Issue: **Does Domestic Relations Law § 111, which was amended to require consent for adoption by any nonmarital parent who has executed an unrevoked acknowledgement of parentage or filed an unrevoked notice of intent to claim parentage of a child, apply retroactively to a parent who was only entitled to notice under the prior version of the statute?**

Facts: Following findings of neglect against the child's parents, the New York City Administration for Children's Services filed petitions to terminate the parents' parental rights. At the time of the fact finding hearing, "Domestic Relations Law § 111(1)(d) provided that a father's consent to the adoption of a child would be required: 'only if such father shall have maintained substantial and continuous or repeated contact with the child as manifested by: (i) The payment by the father toward the support of the child of a fair and reasonable sum, according to the father's means, and either (ii) the father's visiting the child at least monthly when physically and financially able to do so . . . or . . . (iii) The father's regular communication with the child or with the person or agency having care or custody of the child . . .'"

The father here argued that "he should be considered a parent whose consent was required for the child's adoption" because "he had lived with the child for approximately a year and a half and during that time had provided 'everything' to her" before she entered foster care,

and visited her regularly after she entered foster care, as well as provided clothes, food, and gifts to the child," but did not pay the agency for her support because he was never told to. "Family Court noted that the statute and the case law are unforgivingly severe in that non-payment of support precluded respondent from being designated a consent father," and thus the child could be freed for adoption without his consent. Accordingly, following a dispositional hearing in November and December 2019, the Court "determined that it was in the child's best interest to be freed for adoption and committed her to the care and custody of the agency." The agency then moved to reopen the disposition to seek to terminate the parental rights of the mother's husband as well. More than three years later, "[o]n May 31, 2023, Family Court issued its decision and order on disposition, concluding, among other things, that it was in the best interest of the child that custody and guardianship be committed to the agency for the purposes of adoption or any other long term permanency goal as appropriate . . . Family Court terminated parental rights, finding that the parents failed to address the issues that brought the child into foster care and provided no plan for the return of the child to their care and had absented themselves from the agency for many months."

The father appealed, arguing that Family Court failed to apply a 2022 remedial amendment to Domestic Relations Law § 111, which "went into effect three years after Family Court's July 2019 determination that respondent father was solely entitled to notice that the agency was seeking to terminate parental rights to free the child for adoption but before the May 2023 dispositional order was issued," and would have required his consent prior to freeing the child for adoption.

Holding: The Appellate Division, First Department agreed that the 2022 amendment should have applied retroactively to require the father's consent prior to the adoption, and thus reversed the Family Court dispositional order. The Court explained that the 2022 amendment "now requires consent for adoption by any nonmarital parent who has executed an unrevoked acknowledgement of parentage or filed an unrevoked notice of intent to claim parentage of a child. The amendment did away with the necessity for some parents with children in foster care to establish that in addition to having visited or regularly communicated with the child that they made payments to the foster care agency caring for the child. The legislature acknowledged that this requirement resulted in noncompliant or unknowing parents permanently losing their parental rights by being relegated to receiving only notice of the termination proceedings." The amendment sought to fix that issue, and was therefore remedial in nature. "The purpose of remedial statutes is to correct imperfections in prior law by giving relief to an aggrieved party, to the extent that they do not impair vested rights or bestow additional rights. As the express purpose of the amendment at issue was to correct how the law applied to nonmarital parents and was 'effective immediately,' we find that it should be given retroactive effect."

THIRD DEPARTMENT

CRIMINAL LAW, CRIMINAL PROCEEDINGS IN FAMILY COURT

People v Aaron VV., 2025 NY Slip Op 05018 (3d Dept Sept. 18, 2025)

Issue: **Under what circumstances may the People prevent the removal of criminal proceedings against a 17-year-old defendant to Family Court under Criminal Procedure Law § 722.23(1)(d)?**

Facts: Defendant, a 17-year-old, was charged with felony criminal possession of a weapon in the second degree and burglary in the second degree after he entered a relative's home and stole loaded firearms and cash. "Defendant was thereafter arraigned by an accessible magistrate in Troy City Court . . . and, the following day, was brought before County Court . . . for a violent felony hearing as required by CPL 722.23 (2) (c). During that hearing, the People conceded that they would be unable to meet the requirements of that subdivision, which would have prevented removal of the matter to Family Court. Consequently, the People moved to prevent removal pursuant to CPL 722.23 (1) (d) on the basis that the facts of the offense in combination with defendant's juvenile history established extraordinary circumstances to retain the matter in County Court. The court granted the motion and the matter proceeded in County Court." Defendant thereafter pleaded guilty to a reduced charge, was denied youthful offender status, and was sentenced to a term of incarceration "to be carried out at an Office of Children and Family Services detention facility."

Holding: The Appellate Division, Third Department held that although defendant waived his right to appeal, he did not waive his argument that the trial court erred in granting "the People's motion to prevent removal of the matter to Family Court" because that was a challenge to the court's jurisdiction. In particular, "CPL 722.10, which created the Youth Part of superior court, specifies that 'the Youth Part shall have exclusive jurisdiction in all proceedings in relation to juvenile offenders and adolescent offenders, except as provided in CPL articles 722 or 725.' Therefore, the removal provisions set forth in CPL 722.22 and, applicable here, 722.23 divest Youth Part of jurisdiction and transfer jurisdiction to Family Court in those proceedings which meet specified criteria. Accordingly, the waiver of the right to appeal does not impact defendant's argument inasmuch as it presents a challenge to whether County Court lacked jurisdiction over this proceeding and, as the court made clear in its oral colloquy, defendant did not waive his right to challenge the jurisdiction of the court."

On the merits, the Court noted, "following the arraignment of a defendant charged with a crime committed when he or she was . . . 17 years of age, . . . the court shall order the removal of the action to the family court in accordance with the applicable provisions of CPL article 725 unless, within 30 calendar days of such arraignment, the People move to prevent removal of the action. If the People elect not to move, the court shall . . . order transfer of the action against an adolescent offender to the family court. However, if the People so move, the motion must be in writing and contain allegations of sworn fact based upon personal knowledge of the affiant setting forth

that extraordinary circumstances exist that should prevent the transfer of the action to family court. As the presumption is with removal, the court is required to remove the matter to Family Court if the People fail to establish extraordinary circumstances."

Looking to the legislative history concerning what was intended to qualify as "extraordinary circumstances," the Court held that the Legislature intended "to create a sweeping presumption in favor of removing these cases to Family Court and that the People's burden is exceedingly high on a motion to prevent removal. In sum, we agree with the Second Department's conclusion that the Legislature intended for adolescent offenders to be prosecuted in criminal court only in the most exceptional cases," such as "where the defendant has committed a series of serious crimes . . . over the course of many days, where the defendant acted in a cruel and heinous manner or where the defendant was a ringleader who threatened and coerced reluctant youths to participate in the crimes." That was not the case here, and so the Court vacated defendant's conviction to allow the matter to proceed in Family Court.

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