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Summarizing recent significant New York appellate cases

The Second Department recently took the opportunity to ask the Legislature to reconsider the statutory scheme that deprives Family Court of jurisdiction to hold a hearing to determine the best interests of a child proposed for adoption where the adoption agency revokes its consent to adoption. The current statute, the court noted, could cause significant instability for children, including postponing unnecessarily "much-needed" permanent homes. Let's take a look at that opinion and what else has been going on in the New York appellate courts over the last week.

FIRST DEPARTMENT

CONTRACT LAW, LITIGATION FUNDING, USURY

***Denemark v New Ch. Capital, Inc.*, 2026 NY Slip Op 04553 (1st Dept July 23, 2026)**

Issue: **Was a litigation funding agreement truly an investment contingent on plaintiff's successful recovery in his divorce action, or was the transaction, in reality, a loan to which the usury laws apply?**

Facts: The parties entered into a "Purchase and Sale Agreement" in which the "defendant agreed to advance approximately $200,000 to plaintiff to fund the legal costs of plaintiff's pending divorce action. In return, plaintiff agreed to assign to defendant his right to receive any proceeds from the divorce claim up to the amount owed to defendant under the PSA . . . The funds advanced to plaintiff accrued interest at a rate of 1.58% per month or 18.96% per year, with a six-month minimum . . . The PSA clarified that 'THIS IS NOT A LOAN' and was expressly contingent on plaintiff's 'successful' recovery on the Claim. It proclaimed that '[i]f there is no recovery on the Claim, nothing will be owed to [defendant].' Yet, several provisions of the PSA together with the Sweetheart Guaranty, entitled defendant to recoup the money it advanced plus interest even if 'there is no recovery on the Claim,' such as in the event of plaintiff's death or reconciliation with his wife."

During the divorce litigation, the defendant filed a UCC-1 financing statement on plaintiff's property in Walkill, and refused to remove it so the property could be sold without an escrow agreement that would essentially guarantee repayment. "Accordingly, the parties executed an Escrow Agreement dated March 17, 2021, whereby defendant agreed to file a UCC-3 financing statement to terminate the lien and in turn, plaintiff agreed to hold the sale proceeds in escrow pending final disposition of the divorce action. Once the divorce proceedings concluded, the escrow agent would be permitted to release *no more* than 50% of the sale proceeds to the wife, and upon defendant's demand, would pay the balance of the sale proceeds to defendant up to the amount owed under the PSA."

After the plaintiff and his wife settled the divorce action for more than was owed under the PSA, plaintiff, without paying defendant, commenced this action to declare the PSA invalid based on usury, duress, and undue influence. Plaintiff also alleged that defendant breached the PSA by interfering in the divorce action by filing the UCC-1 financing statement against Plaintiff's property. Defendant answered and counterclaimed to recover the total amount owed under the PSA, then $408,072. The parties eventually both moved for summary judgment.

Supreme Court denied both motions, holding that questions of fact existed "as to whether the repayment provisions of the PSA were truly contingent and whether the usury laws apply to this case. Further, it found that there were issues of fact as to whether defendant inappropriately played an active role in the underlying divorce action by, among other things, filing the UCC financing statement. It also found issues of fact as to plaintiff's economic duress claim because it was based on the UCC filing and 'it is unclear if defendant was entitled to file a UCC while the possibility of payment was still contingent.'"

Holding: The Appellate Division, First Department modified, holding that "the critical issue in this case is whether the parties' PSA was an investment or in fact a loan. A fundamental component of usury is the existence of a loan, and where there is no loan, there can be no usury." The court explained that litigation funding agreements are not typically considered loans where "repayment of principal is entirely contingent on the success of the underlying lawsuit and where the litigant received the advance with no guaranteed obligation to repay, except from the proceeds, if any, recovered in the lawsuit." In contrast, the court noted, a loan may be found in light of "[t]he nature of the underlying litigation, whether the agreement provides for recourse in the event the recipient files for bankruptcy, and whether there was a personal guaranty."

Here, viewing the agreement and the facts in totality, the court held, the PSA was almost indisputably a loan, rather than an investment. The court explained that the PSA authorized defendant to file a UCC financing statement against Plaintiff to protect its lien and did not limit that filing until after Plaintiff obtained a recovery in the divorce action. "The fact that defendant was permitted under the PSA to file a UCC-1 financing statement, a device used by lenders to secure collateral, presents the hallmark of a loan." In addition, the "Escrow Agreement's mandate that no more than 50% of the proceeds from the sale of the Property be distributed to plaintiff's then wife and that the balance be paid to defendant up to the amount owed under the PSA ensured that the sale proceeds would be used to repay defendant." Defendant continually throughout the UCC filings updating the amount "presently owed" under the PSA, even though Plaintiff had not at that point secured any recovery, also suggested that the PSA was a loan, the court reasoned.

Multiple other provisions of the PSA also showed that it was loan rather than an investment, the court held. For example, one provision guaranteed repayment of the obligation if plaintiff and his wife reconciled and the divorce action was dismissed. Thus, "if the matrimonial parties reconciled and their divorce matter was discontinued, defendant would have been entitled to repayment even though there was no recovery on the Claim. This potential outcome presents yet another indicator that the transaction was a loan and not contingent on the divorce award." "Finally, considering the nature of the underlying litigation, the substantial assets involved in the divorce litigation as reflected in the record, and the matrimonial parties' rights to equitable distribution in New York, the likelihood that the principal advanced would be 'put in hazard' was low if not nonexistent. This is not to mention any influence the existence of the PSA, Sweetheart Guaranty, UCC-1 financing statement, and Escrow Agreement may have had on the outcome of the matrimonial settlement agreement as plaintiff alleges. In short, it is difficult to imagine any scenario in this case where defendant would not be entitled to repayment of the full principal amount plus accrued interest." The PSA was therefore a loan.

As a loan, the court held, it was subject to New York's usury laws, which limit the legal interest rate that may be charged to 16% per annum. "It is undisputed that under the PSA, interest accrued at 18.96% annually, which exceeds the legal limit. Contrary to defendant's argument, the terms under paragraph 27 providing that "should any court or arbitrator declare this PSA to be a loan and not a purchase and sale of an interest in the Claim, then interest upon this PSA shall be due and payable to defendant at the highest rate of interest permitted by law,' does not make the subject instrument nonusurious." As a usurious instrument, the court held it was invalid and unenforceable.

SECOND DEPARTMENT

FAMILY LAW, ADOPTION

***Matter of Aurora A. (Leigh A.--Giuseppe A.)*, 2026 NY Slip Op 04500 (2d Dept July 22, 2026)**

Issue: Does a court reviewing an adoption proceeding have jurisdiction to hold a hearing to determine the best interests of a child where an authorized agency with custody of the child has withdrawn or withheld its consent to the adoption petition?

Facts: Before the subject child was born, petitioner Leigh A. connected with the child's biological mother on a Facebook adoption support group and then traveled to Massachusetts with her then husband Giuseppe A. to meet the biological parents. Following the meeting, the "biological parents selected the proposed adoptive parents to adopt their unborn child, but could not proceed with a private adoption under Massachusetts law without the involvement of an authorized adoption agency. Therefore, the biological parents selected Alliance for Children, Inc., an adoption agency licensed to operate in New York and Massachusetts, to conduct the adoption. The agency then screened and approved the proposed adoptive parents."

After the child was born, "the biological parents each executed an extrajudicial surrender of guardianship and custody of the child to the agency pursuant to Social Services Law § 384 for the purpose of adoption by the proposed adoptive parents. The surrenders stated, among other things, that the biological parents gave the agency 'full power in its discretion to place the child for adoption and to consent to such adoption without further notice to the biological parents, in all respects and in the same manner as if they personally gave such consent at the time of adoption.' The surrenders also provided that the biological parents had chosen the proposed adoptive parents via a selection process, and that 'if for some reason this family becomes unable to adopt the child, this surrender will be of no force and effect.'" Within one week of birth, the child was placed in the care of Leigh and Guiseppe, who then petitioned to adopt the child.

A few months later, however, Guiseppe filed for divorce from Leigh based on "alleged infidelity, which resulted in a decree of separation. In September 2023, the biological parents notified the agency that they no longer wished to have the proposed adoptive parents adopt the child in light of the separation of the proposed adoptive parents." Guiseppe filed a petition to determine what should happen in light of the failure of the condition in the surrenders, and requested the court hold a hearing to determine the best interests of the children. Leigh joined the petition insofar as it requested a best interests hearing.

Although Family Court ordered a best interests hearing, before it could hold one, Guiseppe "withdrew the adoption petition insofar as asserted by him on the ground that he was no longer seeking to jointly adopt the child with [Leigh]. The proposed adoptive father's withdrawal of the joint adoption petition insofar as asserted by him was precipitated by the biological parents' decision to support adoption of the child by the proposed adoptive father alone." The adoption agency then immediately "withdrew its consent to the joint adoption of the child by the proposed adoptive parents on the ground that the proposed adoptive father 'is no longer petitioning the Court to adopt jointly with [Leigh].' The agency then moved to dismiss the adoption petition on the ground that the Family Court lacked jurisdiction to entertain the adoption petition due to the agency's withdrawal of its consent to the joint adoption. In support of the motion, the agency argued that dismissal of the adoption petition was mandated, without a best interests hearing, since the agency had lawful custody of the child and, therefore, its consent to the adoption was required pursuant to Domestic Relations Law § 111."

Family Court granted the agency's motion to dismiss, holding that because the agency—the entity with legal custody of the child—no longer consented to the adoption, it was required to dismiss the adoption petition.

Holding: The First Department affirmed, but took this opportunity to "highlight the potential conflict between the governing statutory law and the paramount concerns of the best interests of the child and achieving permanency" and "to ask the New York State Legislature to consider whether changes are needed to ensure the best interests of children placed in the custody of authorized agencies for the purpose of adoption."

The court explained that a fundamental difference exists between private placement adoptions and agency adoptions in New York. Private placement adoptions focus "on situations where biological parents, or other individuals who are in lawful custody of the child, agree to turn over custody of the child to intended adoptive parents; in contrast, the framework for authorized agency adoptions applies where it is an agency, rather than a parent, that has been granted custody of the child and the right and obligation to decide whether to consent to a proposed adoption."

For private placement adoptions, the court noted, Domestic Relations Law § 115-b allows a birth parent to revoke their consent to an adoption within 45 days of giving the consent, and after that it is deemed irrevocable. And if the birth parent revokes their consent within the 45 days, and the proposed adoptive parents oppose revocation, Family Court "must conduct a hearing to determine whether the best interests of the child will be served by returning custody of the child to the birth parents, by adoption of the child by the prospective adoptive parents, or by an alternative disposition." For agency adoptions, in contrast, Domestic Relations Law § 383-c does not provide for a best interests hearing. Rather, "Social Services Law § 383-c(6)(a) mandates that a timely revocation shall render the extra-judicial surrender a nullity, without a best interests hearing."

Moreover, where, as here, "custody of the child has been transferred to an agency for the purpose of adoption, the consent of the agency to adoption by the proposed adoptive parents is an essential condition precedent to the adoption proceeding." Courts lack jurisdiction to entertain incomplete adoption applications, and thus similarly lack jurisdiction "even to conduct a hearing to determine the best interests of the child, as doing so would mean entertaining an incomplete adoption application over which the court lacks jurisdiction," if the agency with legal custody does not consent. The proposed adoptive parents' only remedy to contest the lack of consent, therefore, is to "request a fair hearing pursuant to Social Services Law § 372-e(4), and to thereafter challenge an adverse ruling resulting therefrom by commencing a proceeding pursuant to CPLR article 78."

Here, therefore, the court held, the adoption agency's withdrawal of consent left Family Court without jurisdiction to hold a best interests hearing or even to entertain the adoption proceeding any further. The court cautioned, however, "the statutory scheme, in essence, places an authorized agency with custody of a child in the role typically performed by the Family Court in proceedings involving the custody of a child as the ultimate arbiter as to the best interests of the child . . . We take this opportunity to caution that the virtually unfettered power afforded to an authorized agency with custody of a child has the potential for problematic consequences, as evidenced by the circumstances of this proceeding.

First, the effect of the agency's withdrawal of its consent to the adoption in this proceeding would be the removal of the child from the care of the only parents she has ever known, after more than three years, since she was first placed in the care of the proposed adoptive parents at less than one week old. Notably, the agency has not articulated any concerns regarding the quality of the care provided by the proposed adoptive parents and the limited record in this case does not reveal the existence of any such concerns . . . Since the agency's withdrawal of its consent to the adoption precludes the Family Court from conducting a hearing as to the best interests of the child, the child will be subjected to significant instability and removed from the care of the only individuals she has ever known as parents, without the aid of a hearing to evaluate whether the 50/50 parenting schedule currently in effect is in the best interests of the child or whether the child's removal from the proposed adoptive parents' care will be harmful to the child.

Further, while the appellant has the option of requesting a fair hearing pursuant to Social Services Law § 372-e(4), and to thereafter challenge an adverse ruling resulting therefrom by commencing a proceeding pursuant to CPLR article 78, the child would be left in a state of limbo for a lengthy period of time while that process is conducted . . . In contrast, were the Family Court presiding over the adoption proceeding empowered with jurisdiction to conduct a best interests hearing, a determination could be made in an expeditious manner as to whether it would be in the best interests of the child to finalize the adoption or remove the child from the proposed adoptive parents' care, affording the child much-needed permanency at a young age when stability is most vital.

Thus, we propose that the Legislature consider making changes to the governing statutes to afford jurisdiction to courts to conduct a best interests hearing where, as here, an agency has withdrawn its consent to the adoption."

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