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CRIMINAL

First Department

DECISION OF THE WEEK

People v Mebuin (12/28/17) – **Misadvice on Deportation / Hearing Ordered**

The defendant, a citizen of the Republic of Cameroon, was granted asylum, became a lawful permanent resident in the U.S., and then was indicted for first-degree sexual abuse and pled guilty to a reduced charge of endangering the welfare of a child. However, he allocuted to facts establishing the elements of sexual abuse, which exposed him to a greater risk of deportation. Defense counsel did not object. In 2012, the defendant was ordered deported based on his conviction and factual allocution, but was released on bond. In a pro se motion, the defendant contended that counsel had provided him with ineffective assistance by stating that there were no deportation consequences to the plea. The defendant swore that he would not have pled guilty if properly advised, since his life would be in danger if he were deported. The reviewing court held that the motion court abused its discretion by summarily denying a hearing. The defendant had raised triable issues regarding ineffective assistance and prejudice, and he had adequately explained the absence of a defense counsel affidavit. There was little record support for the People's contention that their case was strong. Moreover, even when the likelihood of acquittal is remote, prejudice may still be established. The Center for Appellate Litigation (Robin Nichinsky, of counsel) represented the defendant.

http://nycourts.gov/reporter/3dseries/2017/2017_09276.htm

People v Lema (1/2/18) – **Sex Offender Certification / Challenge Must Be From Judgment of Conviction**

A conviction of unlawful surveillance in the second degree constitutes a sex offense, except where, upon a defendant's motion, the trial court determines that registration would be unduly harsh and inappropriate. *See* Correction Law § 168-a (2) (e). Defendant made such a motion in the SORA hearing court, which denied the application. The First Department held that the motion should have been made in the trial court, before it decided whether to certify the defendant as a sex offender. *See* Correction Law § 168-d (1) (a). The issue was not reviewable in the appeal from an order adjudicating the defendant to be a level-one sex offender.

http://nycourts.gov/reporter/3dseries/2018/2018_00005.htm

People v Rodriguez (1/2/18) – **INVALID WAIVER OF RIGHT TO COUNSEL / SENTENCE EXPOSURE NOT EXPLAINED**

In the trial court, the defendant had rebuffed attempts by the court to abandon his stated wishes to represent himself. After the defendant disrupted the proceedings and the court denied his fourth request to proceed pro se, he had to be removed from the courtroom. On appeal, he argued that his waiver of the right to counsel at suppression and *Sandoval* hearings was not valid, since the court had failed to engage in a searching inquiry to ensure that he was aware of the dangers and disadvantages of proceeding without counsel. The First Department observed that the trial court's colloquy was consistent with New York Model Colloquies, Waiver of Counsel. However, the record did not establish that the defendant was aware of the maximum sentence of 15 years, and thus his waiver of the right to counsel was invalid. Considering the overwhelming evidence of guilt, more favorable outcomes at the suppression and *Sandoval* hearings would not have led to a different result at trial, the First Department concluded. The conviction was affirmed. The Center for Appellate Litigation (Matthew Bova, of counsel) represented the appellant.

http://nycourts.gov/reporter/3dseries/2018/2018_00040.htm

Second Department

People v Rong He (12/27/17) – **DISSENT / INSUFFICIENT ATTENUATION**

An appeal from a judgment of conviction, upon a jury verdict, brought up for review the denial of a motion to suppress the defendant's statement. The trial court found that a *Payton* violation had occurred, but the defendant's subsequent custodial statement was attenuated from the illegal arrest. A dissenting justice disagreed that there was sufficient attenuation and distinguished cases where there was an intervening, precipitating event other than the passage of hours, elicitation of the statement by a non-arresting officer, or the *Mirandizing* of the defendant. Appellate Advocates (Anna Pervukhin, of counsel) represented the defendant.

http://nycourts.gov/reporter/3dseries/2017/2017_09172.htm

People v Curry (12/27/17) – **SORA / RISK ASSESSMENT INSTRUMENTS EXPLORED**

At issue on appeal was whether a sex offender's being scored as a lower risk to reoffend on a risk assessment instrument other than the RAI used by the Board of Examiners of Sex Offenders was a mitigating factor supporting a downward departure from the presumptive risk level. Standing alone, such circumstance could not be considered a mitigating factor, the reviewing court held. The alternate risk instruments were the Vermont Assessment of Sex Offender Risk-2 and the Static-99R. After reviewing the statutory scheme for sex offender registration, the room for judicial discretion, and the limitations of the alternate instruments, the Second Department concluded that the defendant had not identified specific, unique factors on such instruments that could qualify as mitigating factors. Appellate Advocates (Jenin Younes, of counsel) represented the defendant.

http://nycourts.gov/reporter/3dseries/2017/2017_09184.htm

FAMILY

First Department

Matter of Chad Nasir S. (Charity Simone S.) (1/2/18) – **MENTAL ILLNESS FINDING / NOTICE OF APPEAL DEEMED REQUEST FOR LEAVE**

A non-dispositional, fact-finding order finding that the mother was mentally ill within the meaning of Social Services Law § 384-b was not appealable as of right under Family Ct Act § 1112 (a). Because the challenged finding constituted a permanent, significant stigma that might impact the mother's status in future proceedings, on its own motion, the Appellate Division deemed the notice of appeal to be a request for leave to appeal and granted leave. However, it concluded that clear and convincing evidence supported the finding that the mother suffered from a mental illness.

http://nycourts.gov/reporter/3dseries/2018/2018_00026.htm

Sonkin v Sonkin (1/2/18) – **DIVORCE JUDGMENT / SANCTIONS AGAINST PARTY AND COUNSEL**

The First Department granted the defendant's request to impose sanctions of $5,000 against both the plaintiff and his attorney for engaging in frivolous conduct/appellate practice. *See* 22 NYCRR 130-1.1. The plaintiff sought to invalidate the parties' divorce judgment, but documentary evidence served as a complete defense to his claims. The appeal constituted the plaintiff's third unsuccessful challenge to a stipulation of settlement incorporated but not merged in the judgment of divorce. Randi Isaacs represented the respondent.

http://nycourts.gov/reporter/3dseries/2018/2018_00011.htm

Second Department

Matter of Fatima A. v Shah A. (12/27/17) – **PATERNITY / BEST INTERESTS TRUMP JUDICIAL ESTOPPEL**

The mother commenced a Family Ct Act Article 5 proceeding to declare Shah A. the father of the subject child. Her husband, Sayeed A., moved to dismiss the petition based on judicial estoppel; in prior child support proceedings, the mother had named the husband as the child's father. Nassau County Family Court granted the motion. That was error. Under the doctrine of judicial estoppel, generally, a party who assumes a certain position in a prior legal proceeding and secures a favorable judgment therein is precluded from assuming a contrary position in another action. However, in a paternity proceeding, when applying such doctrine, the child's best interests must be weighed. The matter was remitted for a best interests hearing. Mark A. Green represented the appellant.

http://nycourts.gov/reporter/3dseries/2017/2017_09122.htm

Matter of Edmunds v Fortune (12/27/17) – **CUSTODY PETITION / HEARING REQUIRED**

Kings County Family Court denied the father's modification petition seeking increased visitation and suspended his visitation pending mental health treatment. That was error, the Second Department held. Generally, where a facially sufficient petition has been filed, a full hearing is required. Family Court should not have relied on information provided at conferences, untested hearsay statements, and the conclusions of mental health providers. The matter was remitted for a hearing. Jennifer Arditi represented the appellant.

http://nycourts.gov/reporter/3dseries/2017/2017_09126.htm

Third Department

Matter of Thompson v Wood (12/28/17) – **JOINT LEGAL CUSTODY / DIVIDED COURT**

After an order on consent gave the parents joint legal custody and the mother primary physical custody,

both parties sought modification. The majority affirmed an order of Rensselaer County Family Court awarding the father sole legal custody and expanded parental access, based in part on the parties' inability to communicate and the mother's inappropriate response to the teenage daughter's sexual relationship with a boy. In dissent, two justices opined that the mother should not have been divested of her status as joint legal custodian. Standing alone, her admitted mistakes did not reflect an inability to adequately parent; the parties had been successfully communicating for years; and several relevant factors were not considered, the dissenters reasoned. They also deemed "unworkable and vague" a directive that the father "shall solicit and reasonably consider" the mother's input regarding major decisions. Tamara Cappellano represented the respondent.
http://nycourts.gov/reporter/3dseries/2017/2017_09219.htm

Matter of Kameron VV. (12/28/17) – **JUVENILE DELINQUENCY / INADEQUATE ADMISSION ALLOCUTION**
In a juvenile delinquency proceeding, Madison County Family Court's allocution did not comply with the mandates of Family Ct Act § 321.3. The court did not mention underlying facts forming the basis of the alleged crime, and the respondent was not advised of his right to present and confront witnesses or of the presentment agency's burden of proof. Moreover, the required allocution of the respondent's parent was insufficient. Because the period of probation imposed had expired, the petition was dismissed. Peter E. Smith represented the appellant.
http://nycourts.gov/reporter/3dseries/2017/2017_09215.htm

Suchow v Suchow (1/4/18) – **SEPARATION AGREEMENT / SUMMARY JUDGMENT**
After a 30-year marriage, the parties executed a separation agreement. Thereafter, the husband commenced an action seeking incorporation of the agreement in a final judgment of divorce. After the wife pro se challenged the agreement on fraud and duress grounds, the husband moved for summary judgment, and Supreme Court denied the motion. The Third Department reversed. The separation agreement contained a representation that it was not the product of fraud or duress; awarded meaningful benefits to the wife; and was the product of substantive negotiations between the parties and counsel. The wife ratified the agreement by accepting a distributive award before attacking the agreement. Her claim of fraud centered on certain tax forms prepared by the accountant husband; but an IRS field audit conducted after she filed a tax fraud claim did not reveal improprieties. A significant disparity in appraisals obtained by the parties did not demonstrate triable issues of fact regarding fraud. Finally, there were no valid allegations of duress. Leah Everhart represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_00049.htm

Matter of Charles AA. v Annie BB. (1/4/18) – **CUSTODY MODIFICATION GRANTED / PROCEDURAL WRINKLES**
The parties had joint legal custody and shared physical custody of their two children. The father filed for primary custody of the children; and the mother filed a family offense petition, but did not file a cross-petition for modification of custody. At the close of a hearing on the father's custody modification petitions, the mother asked for sole custody, which Broome County Family Court granted. The reviewing court affirmed. Family Court had failed to make an express finding of a change in circumstances, but the record supported such a finding. While the mother did not file a petition to modify custody, the father was on notice that legal and physical custody were in dispute, given his petitions and the hearing testimony. Granting sole custody to the mother was in the best interests of the children, given her far greater involvement in their lives. Consideration of the fact that the paternal grandmother was no

longer available to help care for the children was proper. The grandmother's relocation occurred after the modification petitions were filed, but Family Court could properly consider proof regarding matters occurring after the filing. There was no CPLR 3025 (c) motion to conform the pleadings to the proof. However, the father had ample opportunity to respond to such proof and was not prejudiced thereby. Samantha Koolen represented the respondent.
http://nycourts.gov/reporter/3dseries/2018/2018_00058.htm

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