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Presiding Over Justice in Family Law Cases in the Second Department

In his insightful and thorough decisions in 'Newton v. McFarlane' and 'Matter of John', Justice Scheinkman signals a new and welcome direction in family law cases: precedent that will shape the law for years to come.

By **Dolores Gebhardt** | July 29, 2019 at 12:00 PM

Since his appointment as Presiding Justice of the Appellate Division, Second Department, Hon. Alan D. Scheinkman has written several decisions dispelling the Matrimonial bar's perception that Second Department decisions in that discipline often fail to offer guidance or precedential value. Justice Scheinkman is the author of the Practice Commentaries of the Domestic Relations Law, among other treatises in Matrimonial and Family Law. Two of his recent decisions showcase how his mastery of the practice area is shaping case law in the Second Department.

Championing Children's Rights

In *Newton v. McFarlane*, 2019 N.Y. Slip Op. 04386 (June 5, 2019), the mother sought, for the third time, to modify an existing Family Court custody order so as to award her sole legal and physical custody of the now 17-year-old child. The Family Court held a hearing, over the objection of the Attorney for the Child (AFC), without first determining whether the mother had alleged a change of circumstances since the last custody order sufficient to warrant a custody transfer. After the hearing, the court held two in camera interviews with the child, who clearly stated her wish to remain with the father. The court thereafter granted the mother's petition, finding, without explanation, that it was in the child's best interest to transfer custody.

The AFC appealed on the child's behalf, alleging that the court's determinations lacked a substantial basis. The father's brief supported the child's position. The mother argued that (1) the AFC lacked standing to appeal; and (2) the child was not aggrieved by the order transferring custody because the child was not a party to the litigation. Interestingly, only the AFC argued orally.

Justice Scheinkman quickly disposed of the first argument, finding that the AFC had standing—actually, the authority—to appeal pursuant to Family Court Act §1120(b). That section provides that an AFC's appointment to represent a child continues if a party files a notice of appeal, or, significantly, if the AFC does so on the child's behalf.

Newton is a significant decision on the second issue: aggrievement. CPLR 5311 provides that "an aggrieved party … may appeal from any appealable judgment or order …." Justice Scheinkman found that a child may be aggrieved by a custody order despite the fact that he or she was not a party to the litigation. First, the child presented a hornbook definition of aggrievement: the relief she sought was denied.

Justice Scheinkman then eloquently championed children's rights:

> It seems self-evident that the child is the person most affected by a judicial determination on the fundamental issues of responsibility for, and the environment of, the child's upbringing. To rule otherwise would virtually relegate the child to the status of property, without rights separate and apart from those of the child's parents. As Chief Judge Charles D. Breitel stated in the landmark case of *Matter of Bennet v. Jeffries*: "a child is a person and not a subperson over whom the parent has an absolute possessory interest. A child has rights too, some of which are of … constitutional magnitude." *Among those rights is the child's right to have*

> *his or her best interests, and his or her position concerning those interests, given consideration by the court.* (citations omitted and emphasis added)

The very reason for appointing AFCs—to apprise the court of the child's wishes—supports the conclusion that a child is aggrieved by a custody determination that is against those wishes.

Newton does not hold that children are aggrieved in every custody case. Justice Scheinkman explained that it may be inappropriate to entertain an appeal taken by the child if the parent to whom custody would be granted does not want it, or if the parent who had custody is not opposed to transferring it to the other parent.

Having determined the two issues on appeal, Justice Scheinkman could have stopped there. Instead he continued, finding that the Family Court should not have held the custody hearing without first determining whether the mother's petition had alleged sufficient facts which, if true, constituted a change in circumstances such that it was in the child's best interest to transfer custody. If there is a sufficient showing, the custody hearing should be limited to events occurring since the last custody proceeding.

Lastly, Justice Scheinkman took the Family Court to task for failing to state its reasons for its "upending of the status quo":

> [T]he Family Court's failure to explain its decision to vastly alter the life of a child by removing her from the home of the custodial parent with whom she had resided for approximately nine years is unacceptable.

Finding the record sufficient for the court to make its own factual findings, Justice Scheinkman declined to remit the matter and found that the mother failed to establish the requisite change of circumstances, that the proposed change of custody was not in the child's best interest, and that the Family Court failed to consider the child's

expressed wish to remain with the father. The court reversed the Family Court order and dismissed the mother's petition.

On the Cutting Edge

Matter of John, 2019 N.Y. Slip Op. 05132 (June 26, 2019), presents a brilliant application of 20th century law to a 21st century situation. Joseph G., a single gay man who wanted children, had embryos created from his sperm and donor eggs. The donor relinquished all rights to the embryos. In 2013, Joseph had some of the embryos implanted in an unpaid gestational surrogate, resulting in the birth of twins, whom Joseph successfully adopted. In 2017, wanting another child, he entered into a surrogacy contract by which an unpaid friend agreed to carry the embryos to term and relinquish any claim to parental rights. The Family Court dismissed Joseph's petition to adopt the resulting child, John, on the grounds that (1) such an adoption would validate an illegal surrogacy contract; and (2) a biological parent cannot adopt his own child. The Family Court stated that it would entertain the Joseph's petition for an order of filiation—then promptly dismissed that as well. Joseph appealed *pro se*, including heartfelt and competent oral argument.

With surgical precision, Justice Scheinkman rejected both grounds, reinstated the adoption petition, and remitted the case to the Family Court—before a different judge.

New York has one of the most restrictive surrogacy statutes in the nation: All surrogacy contracts are void and unenforceable as against public policy (DRL §122). Justice Scheinkman noted, however, that the statute distinguishes between those who seek to profit from surrogacy and those who do not: Only the former are subject to civil fines and possible criminal prosecution. The potential negative outcome for those who do not contract for money is that the surrogacy contract will not be enforced if either party has a change of heart. Specifically, DRL §124(1) provides that the gestational surrogate's participation in a surrogacy contract will not be held against

her should she try to assert parental rights. Section 124(2) provides that gestational surrogates may validly terminate their parental rights—which the surrogate in *Matter of John* did.

Because New York State clearly anticipated that children would be born of surrogacy contracts, the surrogate validly relinquished her rights, and the enforceability of Joseph's surrogacy contract was never before the Family Court, there was no legal basis for dismissing the adoption petition.

Justice Scheinkman rejected the Family Court's holding that a biological parent may not adopt his own child. Noting that the "issue is relatively novel," he resolved it in the Second Department. He noted that the language of the adoption statute (DRL Article VII, §§109-117) authorizes adoptions by adult unmarried persons, such as the appellant, but does not preclude a biological parent from adopting his own child. He then discussed factual scenarios where the courts have recognized that the only means of establishing a parent-child relationship was by adopting one's biological child. He continued that the surrogate had voluntarily terminated her parental rights, and that the surrogacy contract, while unenforceable, can be used as evidence of the parties' intentions.

He found that an order of filiation "would be a shallow remedy" for Joseph because such orders fix responsibility for financial support of the child only, and do not bestow full parental rights. Moreover, an order of filiation would leave the surrogate as John's mother, with all the legal responsibility that entails, despite her valid relinquishment of her parental rights.

He concluded that the purpose of the adoption statute—to create a parent-child relationship that is in the best interest of the child—is best served by permitting the adoption of one's biological child from a consenting surrogate. Lastly, the decision

notes that it is consistent with the State Legislature's recent passage of bills that would permit such adoptions.

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Dolores Gebhardt *is a partner in the matrimonial and appellate practice departments at McCarthy Fingar in White Plains.*