COMMENTARY

Another Flawed Article by An Out-of-State Writer

The article “Is It Ethical for a Family Court Judge To Make Decisions After a Custody Trial?”, which the New York Law Journal published on Sept.…

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Commentary

By Elliott Scheinberg, Lawrence Jay Braunstein, Robert Z. Dobrish, Lee Rosenberg and Adam John Wolff | October 16, 2023 at 11:52 AM

The article “Is It Ethical for a Family Court Judge To Make Decisions After a Custody Trial?”, which the New York Law Journal published on Sept. 22, is the most recent by Toby Kleinman and her sometimes co-author Daniel Pollack, neither of whom is admitted to practice in New York state.

Unfortunately, it has become necessary for a fourth time to correct Kleinman’s severely flawed representations concerning New York law offered to readers of the Law Journal, who consider the articles reliable analyses of New York law.

Notably, after objections about several Kleinman articles, the Law Journal inserted a caveat into her bio alerting readers that her submissions should not be considered accurate representations of New York law: “This column is written for general informational purposes only and should not be construed as New York-specific legal advice.” Inaccurate information is not protected by the term “general information.”

The inferences in the most recent article, as before, lures readers of this esteemed legal periodical into the false assumption that New York law is implicated. As before, this article fails to affirmatively advise the reader that its contents relates to non-New York law.

Kleinman’s erroneous submissions have been addressed in: (1) “New York Has Numerous Protections for Children,” which was published on June 28, 2022 *and* “Setting the Record Straight as to Interlocutory Appellate Practice”, published on Jan. 17, 2020 and both by Elliott Scheinberg; and (2) “Recent Column Published in the Law Journal ‘Misleading’ on New York’s Protections for Children and Domestic Abuse Survivors,” which was published on July 19 and signed by several preeminent members of the New York matrimonial bar. These members join, again, for another time in this article to correct the misinformation.

New York Already Uses Specialized Domestic Violence Courts

Although disproven in our July 19 article, Kleinman states again that our legislature should "create special domestic violence courts similar to mental health courts." As our article noted, New York has had specialized domestic violence courts known as IDV parts—standing for integrated domestic violence—*for years*. She further demands that "such domestic violence courts similar to mental health courts, *have properly trained domestic violence personnel* hear any interim matter that comes back to court on issues of child safety." The IDV courts have such highly trained personnel, including respected jurists and other court personnel.

Children Are Not Denied Basic Rights of Justice in New York

In "What 'Safety First' for Children Should Mean," which the Law Journal published on June 22, 2022, Kleinman incorrectly asserted the absurd concept that New York denies basic constitutional protections for "the citizen child" under the Fourth, Tenth and Fourteenth Amendments. With ample references to state and federal law, Scheinberg's article "New York Has Numerous Protections for Children" showed the fallacy of the argument by itemizing the extensive protections that children are given under New York state statutory and decisional authority.

Kleinman, nevertheless, renews her "child citizen" concept without regard to New York protections afforded to children. Her abject refusal to acknowledge the ample measures that the New York legislature has, in fact, already taken, renders her proposals and suggestions inapplicable, at best.

There Is No Basis To Infer Bias and Partiality Into Judges Presiding Over Post-Judgment Litigation Between the Same Parties

Kleinman infuses a nearly irrefutable presumption of "bias," "partiality" and the inability "to remain completely neutral" into judges presiding over post-judgment litigation between the same parties. She fabricates, "a stigma of the appearance of impropriety" to fairly hear the new allegations once the judge has previously made strong negative credibility determinations against the parent who sought the protective order. Credibility determinations are not free floating in the universe of jurisprudence, rather they are grounded on: (1) *evidence* such as contradictions and admissions; and (2) *evidence* that the previously sought protective order had been incited by vindictiveness or some other ill motive in the initial proceeding, etc.

Furthermore, credibility determinations must be firmly recited in the decision and order pursuant to CPLR 4213[b]: "The decision of the court may be oral or in writing and shall state the facts it deems essential," which is not referenced in Kleinman's article. She, nevertheless, wants that judge to be "automatically recused from hearing any future custody issues where the judge has made prior credibility findings."

Kleinman says that even an appeal does not provide a salutary solution because appellate courts generally avoid altering credibility decisions made by trial judges. *Sealy v. Peart*, 215 AD3d 971 [2d Dept 2023] is a recent decision, anchored in CPLR 4213[b], that confirms that appellate courts do not rubber stamp credibility determinations without foundation, quite the opposite, they reject such determinations. *Sealy* arose from a proceeding involving cross allegations of family offenses. Following a hearing, Family Court issued mutual stay away orders. The Appellate Division, Second Department held:

> In a family offense proceeding, the petitioner has the burden of establishing, by a fair preponderance of the evidence, that the charged conduct was committed as alleged in the petition. The determination of whether a family offense was committed is a factual issue to be resolved by the hearing court, and that court's determination regarding the credibility of witnesses is entitled to great weight on appeal unless clearly unsupported by the record.
>
> Effective appellate review requires that appropriate factual findings be made by the hearing court since it is the court best able to measure the credibility of the witnesses … In granting or denying a petition for an order of protection, the Family Court must state the facts deemed essential to its determination (CPLR 4213[b] …).
>
> Here, the Family Court, which was presented with sharply conflicting accounts by the parties regarding their allegations, issued mutual orders of protection *without setting forth any findings with respect to the credibility of the parties or the facts deemed essential to its determinations (CPLR 4213[b]).* Since the record presents factual issues, including questions of credibility, and in light of the conflicting allegations made by the parties against each other, resolution thereof is best left to the court of first instance … Accordingly, the appeals are held in abeyance and the matters are remitted to the Family Court, Queens County, to set forth the findings of fact that formed the basis of its determinations (cites omitted) (emphasis provided).

Automatic Changes of Judges Versus Automatic Jury Trials in Post-Judgment Proceedings

Kleinman posits yet another difficult notion: that "child safety" and "victim safety" would not benefit from "an automatic change of judge after a judge has ruled" because "batterers often use litigation to continue to abuse. Therefore, especially where there has been domestic violence, a perpetrator may use that system to forum shop for a preferred judge to continue to control their victim through litigation."

This is inaccurate because in New York judges are randomly assigned by "the wheel," which is a random assignment system. Shopping for a preferred judge has not been possible in New York for over 30 years.

Kleinman further posits: "to assure litigants that there is no appearance of impropriety by a judge, litigation between the same parties [should] be determined by juries." Her false premise is that the presence of the same judge causes an appearance of impropriety is wholly devoid of any factual basis or empirical underpinning. Currently, only Texas provides for a jury trial option in custody cases. No other state has determined that this is a good idea. Anecdotally, but as part of the conventional

wisdom, those who practiced matrimonial law in New York when contested grounds of marital fault could be decided a jury, reported that juries were less likely than judges to find a spouse had committed wrongdoing. There is neither reason to believe nor empirical evidence to support that a jury of ordinary citizens—untrained in how to identify intimate partner violence—would find that IPV had occurred where a trained judge would not.

It Is Not Necessary To 'Continuously Demand That Judges Remain Impartial and Ensure That Appearance in the Discharge of All Their Judicial Functions'

As though there were an ongoing assumption to the contrary, Kleinman posits the heretofore unheard contention: "We must continuously demand that judges remain impartial and ensure that appearance in the discharge of all their judicial functions." This assails the integrity of every judge everywhere. It is a long settled tenet of jurisprudence that judges, like lawyers, are subject to rules of ethics with consequences for ethical violations, as may be seen in reading the Law Journal's regular publication of judicial ethics decisions.

New York Rarely Uses Guardians ad Litem in Child Custody Cases

In a previous submission, Kleinman addressed Guardians ad Litem (GAL) in custody cases. The above referenced article of July 18 noted in response that New York rarely employs GAL's as "that role is by and large filled … by 'Attorneys for Children', which is an entirely separate role and function."

Notwithstanding the fact that New York has rarely used GAL's in custody proceedings for many years, Kleinman impugns the integrity of "appoint[ed] GAL's and custody evaluators" "who are beholden to the courts" as "public defenders can represent the child." Notably, attorneys for the children are also appointed from organizations such as The Children's Law Center, et al.

Forensic Psychologists Are Governed by Strict Rules Under 22 NYCRR 623.1, et seq.

"Custody evaluators," as Kleinman calls them, are referred to as "forensic psychologists." They are highly credentialed in child and family psychology and psychiatry, in diagnostics, and are experienced therapists; many lecture and publish papers of significance. Their role is properly limited to the presentation findings by way of testimonial evidence anchored in their discipline as *aids* to the court; their findings are not dispositive. Kleinman also falsely accuses them of being beholden to the courts.

There is no alternative source for such valuable psychological assistance as there is no equivalent of a psychological "public defender." Significantly, public defenders are not competent to diagnose or to dispense psychological assistance nor could they serve as a witness—advocate. Most importantly, New York law already rigidly vets forensic mental health professionals pursuant to the strict rules of 22 NYCRR 623.1 – 623.9 for the First Department, with mirror rules in the Second Department (22 NYCRR 680.1 – 680.9):

• Section 22 NYCRR 623.1, “Access to Mental Health Professionals”;

• Sections 623.2(a), (b), address “Mental Health Professionals Certification Committee”;

• Section 623.3. Duties of Mental Health Professionals Certification Committee;

• Section 623.4, Establishment of Mental Health Professionals Panel;

• Section 623.5. Appointment of Mental Health Professionals from Panel;

• Section 623.7. Training and Education;

• Section 623.8. Periodic Evaluation of Panel Members; and

• Section 623.9. Removal.

The Third and Fourth Departments do not have comparable regulations for their forensic mental health professionals.

Conclusion

If Kleinman wishes to publish in the Law Journal, her commentary should specifically advise at the inception of each article that she writes with reference to law in jurisdictions other than New York.

The repeated need to correct Kleinman’s misinformation is unfair to readers of this publication and to those of us who understand that such misinformation in this very specialized area of law is dangerous to families and children.

Elliott Scheinberg *is a member of the New York State Bar Association Committee on Courts of Appellate Jurisdiction;* **Lawrence Jay Braunstein** *is a partner in the law firm of Braunstein & Zuckerman Esqs.;* **Robert Z. Dobrish** *is the managing partner of Dobrish Michaels, a boutique matrimonial and family law firm in in Manhattan;* **Lee Rosenberg** *is a partner at Saltzman Chetkof Rosenberg; and* **Adam John Wolff** *is a partner at Alter Wolff & Foley*.