

## CRIMINAL

### THIRD DEPARTMENT

***People v Madsen*, 1/3/19 – SEX OFFENSES / AGAINST WEIGHT AND DUPLICITOUS**

The defendant appealed from a judgment of Montgomery County Court convicting him, upon a jury verdict, of multiple counts of various sexual offenses. One conviction was against the weight of the evidence, the Third Department held. Three counts charged him with 2<sup>nd</sup> degree criminal sexual act, based on oral sexual conduct with victim 4 during summer 2010. That victim testified that he did not remember how often the defendant had oral sexual contact with him that summer but that it happened “more than once,” and he described two locations. Since the evidence did not establish the illicit conduct on more than two occasions, one of the three convictions had to be reversed. Moreover, multiple counts were duplicitous. They charged the same crimes against the same victims during the same time periods, and the victims’ testimony could not be matched to the respective counts. Further, the jurors were not instructed to relate each count to a specific act and told that they could not use any single act of sexual conduct to support a guilty verdict on more than one count. Thus, numerous convictions were reversed, with leave to the People to re-present any appropriate charges to a new grand jury. Matthew Hug represented the appellant.

[http://nycourts.gov/reporter/3dseries/2019/2019\\_00003.htm](http://nycourts.gov/reporter/3dseries/2019/2019_00003.htm)

## FAMILY

### FIRST DEPARTMENT

***Caroline D. v Travis S.*, 1/3/19 – PATERNITY / MAGISTRATE OVERSTEPPED**

The respondent appealed from an order of filiation of New York County Family Court, which adjudged him to be the father of the subject child. The First Department reversed and remanded. Although no appeal lies as of right from an order of filiation entered in a support proceeding, the appellate court deemed the notice of appeal to be a motion for permission to appeal and granted leave. The order under review—which resolved issues of contested paternity involving claims of equitable estoppel—was outside of the scope of the Support Magistrate’s statutory authority. Moreover, when the respondent appeared without his attorney, the Magistrate gave him technical instructions to convey to counsel about filing a motion to be heard by a judge, regarding a request for a DNA test. The denial of a request for an adjournment needed to file the motion was an abuse of discretion. Lewis Calderon represented the appellant.

[http://nycourts.gov/reporter/3dseries/2019/2019\\_00032.htm](http://nycourts.gov/reporter/3dseries/2019/2019_00032.htm)

## THIRD DEPARTMENT

*Jahvani Z. (Thomas V. – Mariah Z.)*, 1/3/19 – TERMINATION / STANDING QUESTION

The respondent mother appealed from Broome County Family Court orders which terminated her parental rights based on permanent neglect. During the proceedings, the child was placed with the maternal great uncle, pursuant to Family Ct Act § 1055. The Third Department affirmed the challenged orders. Initially, to the extent that the respondent appealed from the fact-finding order, that appeal had to be dismissed, since no appeal lies as of right from a non-dispositional order in a permanent neglect proceeding (unlike in a Family Ct Act Article 10 matter). *See* Family Ct § 1112 (a). Nonetheless, the appeal from the dispositional order brought up for review the fact-finding order. *See* CPLR 5501 (a) (1); Family Ct Act § 165 (a). As a threshold matter, the respondent argued that the great uncle lacked standing to commence the termination proceeding. The appellate court disagreed. Social Services Law § 384-b (3) (b) authorized a relative with custody of the child to initiate such a proceeding. Further, legislative history supported such power. Provisions cited by the respondent—regarding who may petition to terminate parental rights when the agency has failed to do so—did not override the authority granted to a relative custodian. On the merits, the record supported the challenged order.

[http://nycourts.gov/reporter/3dseries/2019/2019\\_00008.htm](http://nycourts.gov/reporter/3dseries/2019/2019_00008.htm)

## ARTICLE

**New Year's Resolution / TOP APPELLATE LAWYERS SHARE ADVICE**

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- We often come to work with assumptions about how to win. But be open to new things. Diverse perspectives help us evolve and better serve our clients.
- Every member of a legal team may have something to add, and sometimes insight comes from unexpected places. Be open to constructive criticism and new ideas.
- Think creatively. Have the confidence to take a new tack and rethink and reframe arguments.
- Don't be afraid to try new things. Test yourself. Work on cases outside your comfort zone. Learn new areas of the law and gain new skills.
- Common sense beats a footnote every time. Courts decide appeals based on common sense and broad principles, not what they said in a footnote a decade ago.
- Write in plain English, and be scrupulously honest about the record and legal authority.
- Simplify! Omit unnecessary details. Appellate judges are busy.

- The simplest argument is often the best one.
- Always be diplomatic with opposing counsel.
- At oral argument when representing appellant, listen carefully to what opposing counsel says. Reply to arguments made and questions asked, rather than making planned points.
- Answer judges' questions directly, no matter how painful. Be ready to concede when you must, with an explanation for why the concession does not matter.

**CYNTHIA FEATHERS, Esq.**

Director of Quality Enhancement  
For Appellate and Post-Conviction Representation  
NY State Office of Indigent Legal Services  
80 S. Swan St., Suite 1147  
Albany, NY 12210  
Office: (518) 473-2383  
Cell: (518) 949-6131